COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2014/CLE/gen/00303consolidated with
2015/CLE/gen/00141

BETWEEN

FELIX THOMPSON
THOMAS BOWE

Plaintiffs

AND

(1) FENTON STRACHAN

1st Defendant

(2) MINISTRY OF YOUTH SPORTS & CULTURE

2nd Defendant

(3) ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

3rd Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Gregory Armbrister for the Plaintiffs
Mrs. Darcel Smith-Williamson, Counsel of the Attorney General's Chambers for the Defendants

Hearing Dates: 25 May, 14 June 2016, 31 March 2017

Liability - Personal Injury - Consolidated Actions - Plaintiffs injured as a result of accident caused by the First Defendant acting as servant and/or agent of the Second Defendant - Vicarious Liability.

Damages - Plaintiffs' entitlement to damages - First Plaintiff had a pre-existing left hip injury in 2009 - Interim Payment Awarded - Special Damages and General Damages - Loss of earnings - Loss of future earnings - Loss of congenial employment - Medical expenses - Future medical expenses - Gratuitous care by friend for nursing care and domestic duties.

Cost - Plaintiffs submitted multiple Bills of Cost – Inflated - Cost discretionary- Reasonable Costs

The Plaintiffs suffered personal injuries as a result of a road traffic accident which occurred on 1 February 2012 on Mackey Street near Ernest Street when a truck driven by the 1st Defendant and registered to the 2nd Defendant" struck them.

HELD:

(1) That the 2nd and 3rd Defendants were vicariously liable for the actions of the 1st Defendant who was driving the 2nd Defendant's vehicle when it struck the Plaintiffs. Consequently, the Plaintiffs are entitled to damages which fall to be assessed.

(2) The 1st Plaintiff was awarded various heads of damages separately calculated to include the loss of earnings (from date of accident to date of judgment), pain, suffering and loss of amenities, loss of future earnings/loss of earning capacity, future medical expenses, loss of congenial employment, (gratuitous) nursing care, past and future which together amounted to a global sum of approximately $262, 103.00 in damages.

(3) The 2nd Plaintiff who sustained minor injuries and failed to demonstrate any loss of earnings among other heads claimed was awarded a global sum of $3,000 inclusive of both special and general damages.

(4) The court heard arguments on Costs. Costs were reduced to a reasonable sum of $30,000 for the 1st Plaintiff; and $2,500 for the 2nd Plaintiff.

JUDGMENT

Charles J:

Introduction

[1] This is an action for damages for personal injuries arising out of a road traffic accident which occurred at about 8.30 p.m. on 1 February 2012. Felix Thompson and Thomas Bowe (collectively "the Plaintiffs") were on Mackey Street near Ernest Street when a truck driven by Fenton Strachan ("the 1st Defendant") and registered to the Ministry of Youth Sports & Culture ("the 2nd Defendant") struck them both, causing injuries. The Attorney General ("the 3rd Defendant") is made a

party to this action in her capacity as the representative of the Crown pursuant to the Crown Proceedings Act.

[2] On 25 May 2016, I heard the parties on the issue of liability. It was contentious. On the same day, I found that the 1st Defendant was wholly negligent when he struck the Plaintiffs. I further found that the 2nd and 3rd Defendants were vicariously liable for the injuries suffered by the Plaintiffs. I then gave the parties some time to prepare more detailed submissions on quantum of damages which was heard on 14 June 2016. In the intervening period, Mr. Thompson (who suffered severe injuries) applied for and received an interim payment of $10,000.

Quantum of Damages

[3] The assessment of damages for injuries sustained as a result of an accident falls under two generic heads namely general and special damages.

[4] The objective of the courts in assessing compensation for a victim was stated by Lord Blackburn in **Livingstone v Rawyards Coal Company** (1880) 5 App. Cas. 25 at 30, (an appeal from the House of Lords from Scotland) as follows:

> **"I do not think there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."**

[5] The leading West Indian authority on assessment of damages is the case of **Cornilliac v St. Louis (1965) 7 W.I.R. 491**. In that case it was stated that the factors which ought to be borne in mind in assessing general damages are: (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering which had been endured; (iv) the loss of amenities suffered and (v) the extent to which, consequently the injured person's pecuniary prospects have been materially affected.

[6] In **Cornilliac**, at 494 G-H, Sir Hugh Wooding CJ cautioned that it is not the practice to quantify damages separately under each of these heads or to disclose the build-up of the global award. But, it is critical to keep these heads firmly in mind and make a conscious, even if undisclosed, quantification under each of them in order to arrive at an approximate final figure. That being said, there are instances in which a court has disclosed amounts awarded under one or several heads. In **Cornilliac**, for example, the sum that was awarded for loss of pecuniary prospects was quantified because of the extent to which the parties differed on that head.

[7] The practice is to grant a global sum for general damages for pain and suffering and loss of amenities. These are considered against the backdrop of the nature and extent of the injuries sustained and the nature and gravity of the resulting physical disability. There is usually an attempt to calculate pecuniary loss and, in addition, loss of earning capacity where applicable.

[8] A conventional sum for general damages is arrived at based on comparable awards in similar jurisdictions where the socio-economic conditions are similar such as Bermuda, Cayman Islands and the British Virgin Islands. English awards and practice are looked at as guides in particular, the UK practice text of Kemp and Kemp on Damages. This principle received judicial buttressing in the Bahamian case of **Matuszowicz v Parker** [1987] BHS J. No. 80 (1985, No. 827).

[9] Above all, the award must be fair and reasonable. In **H West & Sons Ltd v Shephard** [1964] AC 326, Lord Pearce explained that "*The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum.*"

[10] The Court is also mindful that damages are awarded to an individual and not to an average person of a certain class on an actuarial calculation. Since the defendant must take the plaintiff as he finds him and must compensate him so as

to put him in as good a position, as he was prior to the tort, there must be taken into account and assessed the contingencies and chances for better or for worse inherent in the plaintiff at the time of the tort and the contingencies affecting him as an individual.

[11] I shall now address each Plaintiff's claim for damages for personal injuries separately.

Felix Thompson

The nature and gravity of the resulting physical disability

[12] Mr. Thompson was born on 16 June 1951 and was 60 years old at the date of the accident.

[13] At the trial, Mr. Thompson called a number of witnesses but no medical doctors were called to testify on his behalf. He however relied on two medical reports signed by Dr. Caroline Burnett Garraway, Deputy Medical Chief of Staff at Princess Margaret Hospital, both dated 12 March 2012 and the medical reports of Dr. Robert Gibson dated 3 September 2012 and 2 January 2016 respectively.

[14] In summary, the reports state that Mr. Thompson was a patient of the Princess Margaret Hospital on 12 February 2012. He was struck by a truck. X-rays showed a supracondylar fracture of the left humerus and soft tissue injury to the left thigh. He was admitted to the hospital by the orthopedic service for open reduction and internal fixation of the fracture. This was done under general anesthesia on 15 February 2012. Mr. Thompson was discharged on 17 February 2012 after an uneventful hospital course.

[15] According to one of the reports of Dr. Burnett-Garraway, Mr. Thompson was reviewed in the orthopedic clinic on 1 March 2012. The wound was noted to be healed and the sutures were removed. The splint was reapplied. He was last seen on 22 March 2012 where the elbow was noted to be very stiff. The cuff and collar sling was discontinued and he was referred for physiotherapy. He was given an appointment to return in six weeks. Mr. Thompson was advised that

manipulation under general anesthesia may be considered if there was no improvement in his range of motion after physiotherapy. There is no documentation of any follow-up visits. He was finally diagnosed with supracondylar fracture of the left humerus managed surgically.

[16] Dr. Gibson saw Mr. Thompson on 21 August 2012. That was approximately six months after the accident. According to his report, Mr. Thompson sustained an injury to his left hip in 2009 and has since that time noted increasing pain in that hip.

[17] At the time of the accident, Mr. Thompson sustained a fractured left elbow which was initially casted and he subsequently underwent Open Reduction and Internal Fixation followed by further casting. He was again seen by Dr. Gibson on 20 October 2015.

[18] In the opinion of the medical experts, Mr. Thompson suffered the following injuries as a result of the accident namely:

1) Supracondylar fracture of the left humerus;

2) Associated ulnar nerve injury which is manifested by his weakness to grip and the wasting of the appropriate ulnar nerve innervated muscles of the hand and forearm;

3) Carpal tunnel syndrome;

4) Persistent stiffness of the digits of the hand;

5) Frozen left shoulder indicating damage to the intrinsic muscles of the shoulder;

6) Injury to left elbow; scarring of left elbow from surgery as well as significant painful restriction of the shoulder and elbow; reduced wrist flexion and extreme limitation of pronation and supination;

7) Reduced flexion of the thumb and lateral digits due to stiffness of the inter -phlangeal joints;

8) Aggravation of the left hip with an acceleration of symptoms which might ultimately lead to further surgical intervention in that area i.e. hip replacement.

Special Damages

[19] Special damages are quantified damages of which a plaintiff has already spent as a result of the damage and loss suffered. This type of damages must therefore be pleaded for, particularized and proved. This was the view of Lord Diplock in **Ilkew v Samuels** [1963] 2 All E.R. 879, [1963] 1 WLR 991 where he said:

> **"Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized…it is plain law…that one can recover in an action only special damage which has been pleaded, and of course, proved."**

[20] In **Michelle Russell v (1) Ethylyn Simms and (2) Darren Smith** [2008/CLE/gen/00440]**,** Sir Michael Barnett, CJ at [43] stated as follows:

> **"It is settled law that special damages must be pleaded and proven. The Court of Appeal in *Lubin v Major [No. 6 of 1990]* said:**
>
> > **43. "From the above reasoning, it is clear that what the learned Registrar is saying, correctly in our view is that a person who alleges special damage must prove the same. It is not in general sufficient for him merely to plead special damage and thereafter recite in oath the same facts, or give evidence in an affidavit without any supporting credible evidence aliunde, and sit back expecting the tribunal of fact to accept his evidence as true in its entirety, merely because the aforesaid evidence is not controverted, even though the particular damage in the sense of a loss having been incurred appears reasonably improbable and or the money value attributed to the said loss or damage appears unlikely and or unreasonable viewed in the context of the susceptibility of human beings in general to overestimate and exaggerate loss, damage, and suffering without any intention whatsoever of being deliberately dishonest…."**

[21] Unquestionably, it is for the Plaintiffs to prove their damage. It is not enough to write down particulars, and, so to speak, throw them at the court and say "I am entitled to this."

[22] Mr. Thompson claims the following as special damages (not challenged by the Defendants because there are receipts):

(a) Physiotherapy charges on 2 March 2012 at PMH	$30.00
(b) Medical Research fee at PMH on 13 April 2012	$70.00
(c) Receipt dated 30 October 2012 for medical report from Dr. Gibson	$450.00
(d) Receipt from PMH dated 18 May 2013	$10.00
(e) Loss of clothing that he was wearing at time of accident	$100.00
(f) Visit to Dr. Gibson for examination on 20 January 2016	$193.00
(g) Medical Report dated 04 January 2016	$450.00
TOTAL	**$1,303.00**

[23] Mr. Thompson also claims monies received from his sister Mrs. Dorothy Collie between 2 February, 2012 and December 2013 and continuing of $3,600. Mr. Armbrister appearing as Counsel for Mr. Thompson properly submitted that he is not proceeding with these claims.

Loss of earnings

[24] For loss of earnings, Mr. Thompson testified that he earned approximately $400.00 to $500.00 weekly from driving his taxi-cab and as a result of the accident he suffered a loss of earnings of $120,000 from 2 February 2012 to the date of judgment.

[25] To substantiate his weekly earning, Mr. Thompson produced a letter from the Bahamas Taxi Cab Union: Tab 3 of Agreed Bundle of Documents filed on 28 November 2014. In that letter, the General Secretary stated the following: "Please note that the Government rate for the loss of use is as follows:

5 passenger x 8 hours per day	$45.00 per hr.	$360.00
8 passenger x 8 hours per day	$60.00 per hr.	$480.00"

[26] Mr. Thompson's testimony is supported by the evidence of Vernon Davis who operates a taxi service from the Royal Towers on Paradise Island. He was there when Mr. Thompson arrived at work at 6.00 a.m. on 1 February 2012. He

testified that he earns between $600.00 and $700.00 weekly from driving his taxi. In addition, he testified that he is aware that Mr. Thompson has not driven his taxi cab from the Royal Towers since 1 February 2014 (sic) nor has he been gainfully employed since 1 February 2014(sic). He said that in October 2014, he enquired of Mr. Thompson as to whether he would desire to drive for him and Mr. Thompson said that he cannot for medical reasons. Mr. Davis was very emotional as he testified.

[27] I accept Mr. Thompson's evidence that he earned approximately $400.00 to $500.00 per week. However, I do not accept his evidence that he worked 52 weeks a year. I will discount 4 weeks for vacation leaving 48 weeks at $400.00 weekly making a total of $19,200 annually. From February 2012 to 31 March 2017 is approximately 5 years. I will therefore award an amount of $96,000.00 for loss of earnings.

[28] In the aggregate, for special damages, I will award the sum of $97,303.00.

General Damages

Pain, suffering and loss of amenities

[29] I turn now to general damages for pain, suffering and loss of amenities. In **Wells v Wells** [1998] 3 All ER 481 at 507, H.L., Lord Hope of Craighead observed that:

> **"The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases, as represents the court's best estimate of the plaintiff's general damages."**

[30] It is obvious that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff's necessary medical care, operations and treatment.

[31] In the present case, I have no doubt that Mr. Thompson suffered severe pain and still does as a result of the accident. Having regard to the evidence adduced. I particularly note the evidence of his girlfriend, Margaret Davis, Mr. Thompson and the medical doctors, particularly Dr. Gibson. Mr. Thompson has multiple problems involving the left upper extremity and no doubt will require further investigation and surgery to try to achieve relative improvement in the upper extremity and a reduction in his pain.

[32] It is also true for the left hip which was already injured. Dr. Gibson opined that the presence of post-accident pain increasing over time implies an aggravation of the existing pathology with an acceleration of symptoms which might ultimately lead to further surgical intervention of that area i.e. hip replacement. He was particularly concerned about the hip symptoms. He stated that if there is continuing increasing severity then there will be the need for hip replacement sooner rather than later.

[33] In terms of loss of amenities, it is settled that it is in respect of the objective loss of amenities that the damages will be determined. Hence, 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 probable effect on the health and spirits of the injured party, are all proper considerations to be taken into account. Amongst the loss of the amenities of life, there are to be considered: the injured person's inability to engage in indoor and outdoor games, his dependence, to a greater or lesser extent, on the assistance of others in his daily life, the inability to cope by looking after, caring for and rendering the accustomed services to a dependent; his sexual impotence and his inability to lead the life he wants to lead and was able to lead before the injuries. In this regard, the age of the injured person must be taken into account, since an elderly person or a very young child will not suffer the same loss as a young adult: **Gray v Mid Herts Group Hospital Management Committee,** the Times, March 30, 1974.

[34] It is unchallenged that prior to the accident Mr. Thompson worked as a Taxi Cab

driver. It is also unchallenged that he was a swimmer and he played pools. According to him, he is still unable to do DIY work at home and can no longer climb ladders or to do work with small machine tools or lift heavy objects. It is clear from the medical evidence and uncontested by the Defendants that, as a result of the accident, Mr. Thompson sustained serious injuries.

[35] Learned Counsel Mr. Armbrister suggested that the appropriate figure for pain and suffering is $216, 493.22 and $10,000 for loss of amenity. In arriving at the figure of $216,493.22, learned Counsel itemized the respective injury – see paragraph 11 of Plaintiff's skeleton arguments & authorities on Damages and Quantum - and applied the UK Judicial Studies Guidelines for the Assessment of General Damages in Personal Injury Cases, 12th Edition. The Guidelines state that the level of the award within the bracket will be affected by the following considerations namely (i) the presence and extent of pain; (ii) the degree of independence; (iii) depression and (iv) age and life expectancy.

[36] Mr. Armbrister also relied heavily on the Court of Appeal decision in **Shorn Scott (also known as Shawn Scott) v The Attorney General et al** (SCCivApp & CAIS No. 281 of 2013). In passing, I observe that this judgment is under appeal to Her Majesty's Privy Council. The issue before the Board is what is the proper approach to the assessment of general damages for pain, suffering and loss of amenities; in particular whether damages assessed by reference to the English Judicial Studies Board Guidelines should be adjusted upwards to reflect the higher cost of living in The Bahamas.

[37] In **Shorn Scott**, in considering an award for pain and suffering, the learned President Mrs. Justice Allen (as she then was) stated at [32]:

> **"Where multiple injuries are suffered by a claimant the Court should consider whether it is appropriate to add together the individual amounts which might be awarded for each injury considered separately and determine whether the award for pain, suffering and loss of amenities should be greater than the sum of the individual parts to reflect the combined effect of all the injuries on the complainant's quality of life, or alternatively, whether the award should be smaller than the sum of the**

individual parts in order to avoid an element of double counting where there is an overlap of the injuries."

[38] At paragraph 37, the learned President continued:

> **"In considering whether the learned assistant registrar erred in failing to make a separate award for the head injury, I remind myself of the following from the judgment of Pitchford LJ in *Sadler v Filipiak* [2011] EWCA Civ 1728:**
>
> > **"It is in my judgment always necessary <u>to stand back from the compilation of individual figures</u>, whether assistance has been derived from comparable cases or from the JSB guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary** [Emphasis added]**."**

[39] Against this backdrop, I have considered the submissions of both Counsel and the plethora of judicial authorities relied upon specifically the following:

[40] **Shorn Scott** was involved in an incident with members of the Royal Bahamas Police Force. As a result, he suffered multiple injuries including paraplegia, concussion, dizziness, headaches, loss of sexual sensation, the inability to control his bowel and bladder, dizziness and pain in the left ear. He was awarded 257,000.00 for his general damages for pain, suffering and loss of amenities. The Court of Appeal increased that figure to $325,000.00 because the assistant registrar failed to make a separate award in respect of the appellant's head injury, headaches, dizziness and pain in his left ear.

[41] In **Olga Forbes V Marion Smith** [2007/CLE/gen/1388], the plaintiff suffered the following injuries namely (i) cervical strain; (ii) lumbar strain; (iii) soft tissue Injury to the right Mandible (jaw) and fracture in the mesio-buccal root of the lower right second molar tooth; (iv) Injury to the right eye; (v) right carpal tunnel syndrome requiring surgery; (vi) shoulder impingement syndrome with hypertrophy bursa,

acromial spur, partial thickness rotator cuff tendon tear of supraspinatus portion and small anterior labral tear; (vii) moderate post- traumatic stress disorder. She was awarded $65,000.00 for pain, suffering and loss of amenities.

[42] In **Michelle Russell** [supra], Ms. Russell suffered serious injuries as a result of a traffic accident. The injuries included (i) fracture of the humerus; (ii) compound fracture of the right tibia; (iii) fracture of the sternum with internal hemorrhaging; (iv)fracture of the pelvis and sacrum arm broken in three places; (v) fracture of the 5th and 6th rib and (vi) depression. In essence, the fractures were to her chest, arms, legs and pelvic area. According to Dr. Barnett, "Ms. Russell was fortunate to be alive as her injuries were life threatening and being obese and diabetic means her tissues will take longer to heal. She has had surgeries in April 2005 and March 2006. She requires further surgeries all of which cannot be performed at one sitting. The further surgeries will require her to be incapacitated for probably nine months. She will have some degree of pain for the rest of her life. Sexual intercourse for her is likely to be painful and she is unlikely to be able to have children due to the injury in the pelvic region and the pain." Ms. Russell was awarded $150,000.00 for pain, suffering and loss of amenities.

[43] In **Grand Bahama Construction Co. v Kemp** [1997] BHS J. No. 7, the respondent was severely injured in a road traffic collision. He was 53 years old. The injuries which he suffered included (i) fractures of his pelvis, the right acetabulum and ilium; (ii) three broken ribs on the right side with abrasions along them and two others; (iii) internal injuries to the bladder and lungs; (iv)extensive hemorrhaging, and (v) a deep punctured wound in his right leg. He spent three days in a hospital in Freeport and was then transferred by air ambulance to a Miami Hospital where he spent ten days in an intensive care unit. His total period of hospitalization was one month during most of which time his condition was considered to be critical. He underwent surgical repair to his pelvis and hip fractures and achieved good healing as well. He was awarded $150,000 for pain, suffering and loss of amenities. On appeal, the general damages were reduced to $75,000.

[44] In **Matuszowicz v Parker** [supra], the plaintiff suffered a severe injury to his right arm. His forearm was crushed and amputated partially a little above the elbow. In his report, Dr. Sethi stated that "It [forearm] was only hanging by a little piece of skin laterally. Elbow joint was completely disarticulated. Distal one third of the humerus was crushed. Mr. Matuszowicz, who was 30 years old at the date of the accident, was awarded $80,000 for pain, suffering and loss of amenity.

[45] Like Mr. Armbrister, Learned Crown Counsel, Mrs. Williamson provided a plethora of judicial authorities which are indeed helpful but none of them is exactly on point. In my opinion, **Olga Forbes** (2007) and **Grand Bahama Construction v Kemp** (1997) bear some affinity to the present case.

[46] I am reminded that the only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords "with the general run of assessments made over the years in comparable cases: **Bird v Cocking & Sons Ltd** [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ. It is important that conventional award of damages are realistic at the date of judgment and have kept pace with the times in which we live: **Senior v Barker & Allen Ltd** [1965] 1 W.L.R. 429. There has been a gradual rise over the years of the "conventional" sum. Salmon LJ pertinently had observed in **Fletcher v Autocar and Transporters Ltd** [1968] 2 Q.B. 363 at 364 that "*the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant but would consider them to be sensible and fair in all the circumstances*." The award of damages is not meant to be a windfall but fair and reasonable compensation for the injuries suffered.

[47] Adopting the approach suggested by the Court of Appeal in **Shorn Scott** that it is always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the JSB

guideline, and make a fair and reasonable award, I am of the considered view that an award of $75,000 for pain, suffering and loss of amenities represents fair and reasonable compensation for the injuries sustained by Mr. Thompson. I have taken into consideration the sum which he claimed for loss of amenity.

Loss of future earnings/ loss of earning capacity

[48] As regards the assessment of general damages in respect of future loss of earnings, there are a number of uncertainties, which have to be brought in and these, necessarily, make the calculation of future loss of earnings so problematic because the court has to engage in the exercise of prophesying both what will happen to the plaintiff in the future and what would have happened if he had not been injured. The uncertainties include such matters as the probable length of time of the plaintiff's future incapacity, his prospects of obtaining employment and the normal hazards of life. To reach a figure for the award of a lump sum, the normal method of assessment which is used by the courts, is first to calculate, as accurately as possible, the net annual loss suffered, which is usually based on an average of the plaintiff's pre-accident "take-home" pay. This is to be used as the multiplicand.

The multiplicand

[49] This is the starting point. I have already calculated his annual yearly earnings to be $19,200: see paragraph [27] [supra].

[50] In the circumstances, I will fix a multiplicand of $19,200. I am conscious of the principles enunciated in **Cookson v Knowles** (1979) AC 556 and followed in **Alphonso v Ramnath** [1997] 56 W.I.R. 229., that for the purpose of arriving at the multiplicand, the basis should be the least amount that Mr. Thompson would have been earning if he had continued working without being injured.

The multiplier

[51] In determining the multiplier, the court has to be conscious that it is assessing general and not special damages; that it is evaluating prospects and it is a once

for all and final assessment. It must take into account the many contingencies, vicissitudes and uncertainties of life. It must remind itself that the plaintiff is receiving money now as a capital sum instead of instalments over the rest of his working life. The court must also remind itself that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident.

[52] In the present case, Mr. Thompson was 60 years old at the time of the accident having been born on 16 June 1951. He is now 65 and will soon be 66. He would have had a normal working life of 65 or 70 as he says. If 65, he is already a retired man but I will accept his evidence that cab drivers can go a bit longer although I observed that Mr. Thompson could not read without his glasses. I also take into account the many contingencies, vicissitudes and imponderables of life and that damages will be a lump sum award.

[53] Learned Counsel Mr. Armbrister suggested a multiplier of 18. No doubt, he faced an uphill task to produce an authority to demonstrate that the court can fix a multiplier of 18 for a man who has passed 65 (the retirement age for civil servants). In **Matuszowicz v Parker**, the plaintiff was 30 years old at the date of the accident. He could, in the normal course of events, have had a working span of some 35 years. Georges CJ opined that a multiplier of 18 seems appropriate in the circumstances. In my opinion, multipliers of 18 are non-existent for persons like Mr. Thompson due to his age: see Table of Multipliers for authenticated awards and unauthenticated awards at pages 136 – 139 of Kemp & Kemp Vol. I (4th Edition).

[54] In the circumstances, I would give Mr. Thompson a working life of 70 years and fix a multiplier of 4.

[55] Using the multiplier of 4 and a multiplicand of 19,200, the award under this head is $76,800.00. I will allow that award.

Future Medical Expenses

[56] Under this head, Mr. Thompson claims that an amount of $120,000 is fair and reasonable. Learned Counsel Mr. Armbrister submitted that Mr. Thompson, in his affidavit in support of this application, indicated that he takes motrin for his pain which cost $8.00 and that he requires 3 sessions a week in physical therapy for the rest of his life. Each session costs $30.00.

[57] In his witness statement and oral testimony in this court, he did not speak to any medication for the rest of his life so any claim for medication is disallowed.

[58] Further, under this head, Dr. Gibson recommended that Mr. Thompson might benefit from an MRI scan of the left shoulder as well as Electromyographic and Nerve Conduction Velocity studies of the arm to access the presence of any nerve injuries or entrapment neuropathies which may require further surgical intervention. Dr. Gibson also indicated that **if** there is continuing increasing severity then there will be the need for hip replacement sooner rather than later.

[59] Mr. Armbrister correctly submitted that it is not possible to form an accurate and verifiable estimate of the future cost of medical treatment and medication because so much depends on how Mr. Thompson progresses in the future.

[60] According to Dr. Burnett-Garraway's letter dated 14 May 2013, she stated that "*Mr. Thompson's last visit to the orthopedic clinic was on 3 May 2013. At the time repeat X-rays of the left elbow were ordered and he was advised to return in one week for review. There is no documentation of any follow-up visits after that*." Clearly, from the letter, he never returned to PMH.

[61] Mr. Thompson's last visit to a doctor was on 20 October 2015. That was when he saw Dr. Gibson who issued a report on 4 January 2016. It was a follow-up visit from 2012. Dr. Gibson concluded that Mr. Thompson was demonstrating signs of progressive disease in the left upper extremity. Investigative confirmation will consist of an MRI of the cervical spine along with EMG and NCV's of the left upper extremity and x-rays of the elbow and hip. Dr. Gibson opined that "**if** his

neuropathic condition is not identified and treated he can expect a significant disability in the left upper extremity with associated functional loss. Progression of the degenerative disease in the cervical spine can not only negatively affect the upper extremity but the lower extremity as well [emphasis added].

[62] This court did not have the benefit of hearing from Dr. Gibson since he was not called as an expert witness. Mr. Thompson was urged to produce a more up-to-date medical report and/or to call Dr. Gibson. He failed to do so.

[63] Not having had the benefit of a more up-to-date medical report and/or hearing from Dr. Gibson, the court cannot speculate as to whether Mr. Thompson may or may not require future medical treatment. In the circumstances, I will make an award of $5,000.00 for the costs associated with the MRI of the cervical spine along with EMG and NCV's of the left upper extremity and x-rays of the elbow and hip. I take judicial notice that as a retiree, Mr. Thompson may not have to pay to obtain these services at PMH.

[64] With respect to hip replacement surgery, it is not conclusive that Mr. Thompson will need hip replacement. The phrase "if there is continuing increasing severity" is hypothetical and speculative. Therefore, I will disallow the claim under this sub-head.

Loss of congenial employment

[65] At paragraph 13 of his witness statement, Mr. Thompson averred that he enjoyed driving his taxi and interacting with passengers from the four corners of the earth and he looked forward to driving repeat visitors. For this, he claimed the sum of $10,000 in damages for loss of congenial employment.

[66] Mr. Armbrister cited the case of **Hale v London Underground Ltd** [1968] 112 SJ 32 to substantiate his assertion that a plaintiff is entitled to damages under this head. In **Hale**, Otton J said "it is now well recognized that this is a separate head of damage."

[67] As I understand it, this is a relatively modern head of damage and it is a separate award from loss of earnings and pain, suffering and loss of amenity. In simple terms, it is meant to be an award to compensate plaintiffs who lost their jobs because of injuries and found that they had lost a major satisfaction in their life that they derived from their employment. An award is then made on account of the future loss of this job. The notion for the basis of this was expressed by Edmund Davies LJ in **Morris v Johnson Mathey** [1967] 112 Sol Jo 32. He stated that "*the joy of a craftsman in his craft was beyond price*."

[68] It appeared from the evidence that Mr. Thompson loved his job. He loved to take tourists around the city. In fact, at the time of the accident, he had just picked up some guests from the Royal Towers to transport them to Cable Beach. He made this stop to go and purchase a phone card when the unfortunate accident took place.

[69] Under this head of damage, I will make an award of $3,000.00.

Nursing care, past and future

[70] At paragraph 17 of his witness statement, Mr. Thompson stated as follows:

> **"Me and my girlfriend Margaret Davis live together. I received nursing care from her after my surgical procedures which continues up to the present time. I claim damages for nursing care and future nursing care."**

[71] At paragraph 5 of her witness statement, Ms. Davis stated that after the accident and operations, she bathed, fed, washed, ironed and cooked for Mr. Thompson. She stated that she still does things for him but to a limited extent.

[72] It is accepted that a court can make an award of damages in personal injury cases for services freely provided to an injured plaintiff by a relative or friend out of love and affection. Indeed, in the case of **Hunt v Severs** [1994] 2 All E.R. 385, Lord Bridge had this to say:

> **" …[A] plaintiff who establishes a claim in damages for personal injury is entitled in English law to recover as part of those damages the reasonable**

> **value of services rendered to him gratuitously by a relative or friend in the provision of nursing care or domestic assistance of the kind rendered necessary by the injuries the plaintiff rendered."**

[73] Mr. Thompson claims an amount of $20,000 but provided no evidence to demonstrate how this amount was arrived at. Ms. Davis stated that after the accident and surgeries, she basically took care of him. I will make an award of $5,000 for nursing care, past and present. As she asserted, she still does things for him but to a limited extent.

The outcome for Mr. Thompson

[74] The outcome for Mr. Thompson is as follows:

General Damages

a)	Pain, Suffering and Loss of amenities	$75,000	Interest at the rate of 6 % per annum from the date of service of the Writ of Summons with Statement of Claim: 11 March 2014 to date of trial: 14 June 2016.
b)	Loss of Future Earnings	$76,800	No interest before judgment
c)	Future Medical Expenses	$5,000	No Interest before Judgment
d)	Loss of congenial employment	$3,000	No interest before Judgment
e)	Nursing Care, past and present	$5,000	No interest before Judgment
	Total General Damages		**$164,800**

Special Damages

a)	Loss of earnings from the date of accident to date of judgment	$96,000
b)	Medical and related expenses	$ 1,303
	Total Special Damages	**$97,303**

with interest on (a) above ($96,000) at the rate of 6% from 1 February 2012 to the date of judgment.

[75] The total global sum awarded to Mr. Thompson will be $262,103.00 with interest at the rate of 6% per annum from the date of judgment to the date of payment.

[76] I make no deductions for NIB Contributions as no evidence was adduced in that regard.

Costs

[77] In accordance with case management directions, both parties submitted their respective Bill of Costs to the Court. Mr. Thompson, the successful party, seeks costs in the amount of $54,300.

[78] A convenient starting point is Order 59, rule 3(2) of the Rules of the Supreme Court ("**RSC**") which states:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[79] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[80] Order 59, rule 2(2) of the RSC similarly reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"

[81] The discretionary power to award costs must always be exercised judicially and not whimsically or capriciously. The Judge is required to exercise his discretion in accordance with established principles and in relation to the facts of the case and

on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd**.[1986] 2 All ER 529 at pages 536-537.

Reasonable costs

[82] In deciding what would be reasonable the court must take into account all the circumstances, including but not limited to:

a) any order that has already been made;

b) the care, speed and economy with which the case was prepared;

c) the conduct of the parties before as well as during the proceedings;

d) the degree of responsibility accepted by the legal practitioner;

e) the importance of the matter to the parties;

f) the novelty, weight and complexity of the case; and

g) the time reasonably spent on the case.

[83] Having considered these factors and bearing in mind that this is a run-of-the-mill action a reasonable figure is $30,000. The Order will be Costs to Mr. Thompson in the sum of $30,000. In arriving at this figure, I took into account the Summonses which were heard and determined by Evans J.

Thomas Bowe

The nature and gravity of the resulting physical disability

[84] Mr. Bowe alleged that having been struck by the truck, he suffered shock, physical injury and damage.

Special Damages

[85] It is settled law that special damages must be pleaded, particularized and proved. In his statement of claim filed on 30 January 2015, Mr. Bowe averred that he claimed special damages. In his witness statement, he stated that he was standing on the road when he was struck by the Defendants' truck causing him

shock, physical injury and damage to his foot. At the trial, he testified that as a result of the accident, he suffered loss of income for three (3) days at $900.00 per day.

[86] The old adage of 'he who asserts must prove' has not been withered away in personal injuries cases. Mr. Bowe submitted no documentary evidence. I will make no award under this head.

General Damages

[87] Mr. Bowe averred that as a result of the accident, he suffered shock, physical injury and damage. That is the extent of his pleadings. He submitted a report from PMH to substantiate the minor injuries which he suffered. According to the report of James Johnson, Medical Chief of Staff, Mr. Bowe complained of (i) anterior chest wall pain; (ii) right knee pain and (iii) left ankle pain. Clinical and radiological evaluation confirmed a diagnosis of soft tissue or musculoskeletal injury in the areas mentioned. There was no evidence of fractures. He was given analgesics upon discharge.

[88] A reasonable sum to compensate him for his pain and suffering is $3,000. Mr. Bowe claims costs of $14,180.00. Costs must be reasonable. In the circumstances, I will make an order of Costs to Mr. Bowe in the sum of $2,500.

[89] Last but not least, I am grateful to Mr. Armbrister and Mrs. Smith-Williamson for their industry and immeasurable assistance to the court.

Dated 10th day of April A.D., 2017

Indra H. Charles

JUSTICE