COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2008/CLE/gen/01877

BETWEEN

DELONE SYMONETTE

Plaintiff

AND

CHARLES TURNQUEST

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Ms. Marylee Braynen-Symonette for the Plaintiff**

Mr. Raynard Rigby for the Defendant

28 November 2018, 5 December 2018 and 1 April 2019

JUDGMENT

WINDER J.

This is the assessment of damages arising out of a road traffic accident, which occurred on the 27th March 2007 between the Plaintiff, a motorcyclist and the defendant, a driver of a Chevy Truck. The accident took place in the vicinity of Bernard Road and Grant Street on the Island of New Providence.

1. The claim was commenced by specially endorsed Writ of Summons which was filed on the 26th November, 2008. The Statement of Claim (Amended) provides at paragraph 2, details of the injuries and damages, as follows:

    2. By reason of the matters aforesaid, the Plaintiff sustained severe injuries and has suffered loss and damage.

    PARTICULARS OF INJURIES

    At the time of the accident the Plaintiff was a healthy 36 year old young man, employed at Bahamas Fast Ferries Limited as a 2nd Engineer.
    As a result of the accident the Plaintiff sustained multiple trauma, fracture to the right femur, fracture to the right ulna, fracture to the left tibula, open laceration of the right knee, muscle abrasion to the right hand, scaphoid fracture to right wrist and ulna and multiple soft tissue injuries.
    The Plaintiff was hospitalised for some four (4) weeks where he underwent three (3) surgeries.
    The first surgery was an open reduction, internal fixation of the right ulna, irrigation and debridement and suturing of the right knee and intramedullary railing of the right femur.
    The second surgery performed on 29th March 2007, involved an intramedullary nailing of the left femur. The Plaintiff underwent a further surgery for an open reduction and internal fixation of the scaphoid in his right hand.
    Upon his discharge from the hospital the Plaintiff was unable to ambulate independently and required the use of a wheel chair, a commode, and urinal. He further required the assistance of a caretaker around the clock for some four months subsequent to the accident.
    The Plaintiff was unable to walk for some 7 months after the accident and was not fit to work for more than one (1) year. As a result of his inability to work the Plaintiff was terminated from his job.
    The Plaintiff now lives with screws in all of his limbs and is unable to walk any distance without experiencing excruciating pain.
    Prior to the accident the Plaintiff was a healthy young man, whose future has been adversely altered by the injuries, sustained in the accident. The Plaintiff is now unemployed and unable to enjoy his pre-accident hobbies of basketball and football. The Plaintiff continues to experience severe pain in his lower and upper extremities and he is severely handicapped on the job market.

PARTICULARS OF SPECIAL DAMAGES

1.	Cost of motor cycle	$5,000.00
2.	Medical expenses	
	a. Doctor's Hospital	$56,863.90
	b. Dr. Barrette McCartney	$2,721.00
	c. Dr. Delton Farquharson	$5,770.00
	d. Dr. Valentine Grimes	$10,079.00
	e. Lewis Orthopedics	$650.00
	f. Nursing Care	$3,500.00
3.	In home care (20 wks @ $175 per wk)	$3,500.00
4.	Loss of Earnings (25/3/07 to 26/11/08)	$46,030.64
5.	Smith v Manchester Award	
6.	Past Loss of Bonus (2007)	$600.00
7.	Mobile phone (Motorola Razor)	$110.00
8.	Clothing (blue jeans -60, Tommy shirt -80, Nike tennis -$110, hat -$40)	$290.00
9.	Travel (4 April 07 to Sep 07) 40 @$30	$1,200.00

2. On 29 June 2015 the Defendant filed a Defence to the claim.

3. On 11 April 2018 the Defendant admitted liability. As a result of the admission, the trial of this action was concerned only with the question of quantum of damages.

4. At the trial of the action the Plaintiff was the only witness who was called to give evidence in the Plaintiff's case. Dr David Barnett, Orthopaedist, was the only witness in the defendant's case.

5. The Plaintiff's evidence-in-chief was given in two witness statements. The witness statement of 22 November 2018 provides in part as follows:

> 2 That after the accident occurred I remained in Doctor's Hospital for a significant period where I underwent surgeries, therapy and a recover period. Once I had left the hospital I was still unable to use my legs for approximately one (1) year. Within the year period, I underwent physical therapy before being able to move from wheelchair, crutches, walker and then walking cane which was very painful.
>
> 3 There were two (2) titanium rods inserted in my legs and metal braces had been attached to the bones in my forearm. Because of the rods in my left leg and the rods in my right thigh my ankle and knee produced constant pain and inflammation. Due to the metal brace, I was left restricted from using my arm and hand.
>
> 4 I relied heavily on my family to take the time and assist me with normal functions that I would have been able to carry out without the accident. I placed the burden on my family to assist with carrying me to Doctor visits and submitting sick slips at their convenience as I was unable to do these things for myself.

5 About nine (9) months later I lost my job as 3rd Officer/Engineer because of ultimately being unable to efficiently and effectively perform my duties due to my injuries. I was unable to continue my career path as an Engineer as the accident left me handicapped. I was unable to participate in form of physical exercise which has resulted in me gaining a lot of weight.

6 As a result of losing my job, I no longer have medical insurance coverage as I was enrolled in the group insurance at Bahamas Fast Ferries, the premium for which was deducted from my salary.

7 I commenced my job at Bahamas Fast Ferries as a Deck Hand at a weekly salary of about Three Hundred ($300.00) Dollars in about three (3) years I was able to work my way up to the position of Engineer with a salary increase of One Hundred ($100.00) Dollars per week. Over the ensuing four plus years I continued to work my way up with gradual annual increases in salary of about Three Hundred ($300.00) per week.

8 During the last four (4) years of employment at Bahamas Fast Ferries I received annual bonuses of Six Hundred ($600.00) Dollars per year.

9 At the time I lost my job at Bahamas Fast Ferries I was unable to walk independently and was deemed unfit for work.

10 As soon as I was able to walk without the aid of crutches, even though I was still in considerable pain, I was forced to seek some sort of employment as my mortgage was then substantially in arrears together with my child support payments. I had no funds whatsoever to support myself or my children.

11 I started looking for any kind of work that did not involve bending or heavy lifting. The only work that I was able to find was driving a delivery truck For Island Block in or about May, 2009. I received from Island Block a salary of Three Hundred and Twenty ($320.00) Dollars per week. As the pay was insufficient to meet my expenses in or about November, 2010 the Company had a need for a night Security Guard. I asked my boss at Island Block to allow me to work as night security as I needed the extra money. My boss allowed me to work as a night security in addition to my day job as a truck driver for which I was paid Two Hundred and Forty ($240.00) Dollars per week.

12 That after Island Block went out of business in 2011, despite my diligent search I was unable to find work. In or about late 2017 Mr. Sherman Johnson agreed to hire me as a truck driver as long as jobs are available. I am paid a weekly salary of Three Hundred and Twenty ($320.00) Dollars.

13 That as a result of my injuries, I have to replace my shoes at a rate of at least three (3) times per year and I have to constantly purchase over the counter pain killer to somewhat manage the pain to my leg and hand. I further not only lost my motor bike but my cell phone, the clothing and shoes I wore at the time were also destroyed.

The Claims

6. The Plaintiff's claims may be grouped under the following heads of damages, each of which will be considered hereunder:

    a) General Damages

(i) Pain Suffering and Loss of Amenity (PSLA)
(ii) Smith v Manchester Award
(iii) Future Surgery
(iv) Loss of Future Earnings

b) Special Damages
(i) Medical Expenses & Subrogation
(ii) Past Loss of Earnings
(iii) Loss of Motorcycle
(iv) Miscellaneous Expenses
(v) Loss of Bonus

A. General Damages

Injuries sustained

7. When the Plaintiff was received at Doctor's Hospital on 27 March 2007, the day of the accident he indicated that he did not experience any loss of consciousness after the impact. His right thigh, left ankle and right wrist were deformed and painful and swollen. X-rays performed revealed:
   a) A fracture of the distal (lower) shaft of the right ulna forearm bone;
   b) A fracture of the right scaphoid, carpal wrist bone;
   c) A comminuted fracture of the upper shaft of the right femur, the thigh bone, and;
   d) A comminuted fracture of his distal shaft left tibia and fibula, of the leg.

8. Dr. Grimes who was the On-Call Orthopaedic Surgeon, at the time the Plaintiff was brought into the emergency room, diagnosed the Plaintiff's condition as follows:
   a) Fractures of the shaft of his right femur, right ulna, left tibia and left fibula.
   b) A fracture of the right scaphoid.
   c) A anterior laceration over the right knee, extended into the joint and;
   d) Multiple abrasions of his right forearm, hand and face.

9. The Plaintiff underwent several surgical procedures. The fractures of his distal ulna shaft required open reduction and internal fixation with a 6 hole plate and screws.

The right scaphoid carpal bone was stabilized with 2 pins. The right shaft of the femur and the Plaintiff's left tibia were internally stabilized with locked nails.

10. The Plaintiff spent five days in the Intensive Care Unit and on 24 April 2007, a month following the accident, was discharged. The plaintiff followed up with Dr. Grimes as an outpatient, to continue rehabilitation.

11. On the 5 July 2007 the two pins were removed from his right scaphoid and physical therapy was enhanced in his right upper limb.

12. Late July 2007 the Plaintiff transitioned from using a wheelchair to using a walker. In September 2007 the Plaintiff had progressed to either using a cane or crutches in order to assist him while walking. A radiograph report of 15th October 2007 showed the ulna had healed, and the right femur and left tibia were healing.

13. In April 2008 the Plaintiff was able to walk without any support. On 19 January 2010 Radiographs performed showed the fractures had fully healed.

14. In September 2015, Dr Grimes reported that the Plaintiff, "was most recently assessed on September 1, 2015. Some of the injuries have resolved and others have caused ongoing disability. His right upper and lower extremities are largely pain free. He continues to experience near daily pain in his left knee and leg which significantly limits his mobility as well as his ability to stand for prolonged period or walk extended distances."

15. On the 15 March 2018 the Plaintiff had a consultation with Dr. Barnett, who had reviewed his prior medical records including reports of Dr Valentine Grimes, Orthopaedic and Spine Surgeon who treated the plaintiff accident.

16. Dr Barnett found:
    (a) The plaintiff was deemed to have the "expected" degenerative osteoarthritis in his cervical spine. This degenerative pathology, he says, was originally revealed on a CAT scan performed on admission.
    (b) The plaintiff's injuries had healed with the following exceptions:

(i.) The injury to the wrist joint had increased the risk of developing post traumatic arthritis ("PTA") in the future; and

(ii.) the wrist showed loss of the last 10% of the extension.

(c) A consequence of the accident is the clawing of the plaintiff's left big toe, which although not painful, causes the plaintiff to wear through shoes at a faster than normal rate.

(d) In the case of the right knee, the plaintiff had on-going pain, swelling and stiffness in the joint.

(e) The right knee injury also presents increased risk of developing PTA.

(f) Recommends diagnostic tests in the form of x-ray and CT scan of the right knee with arthroscopic surgery.

(g) Does not expressly recommend Total Knee Replacement surgery but does advise that "if needed" it would cost around $40,000.00.

17. The Plaintiff claims that he lost his employment with Bahamas Fast Ferries (BFF) as an Engineer as a direct result of the injuries he sustained.

PSLA

18. There are several areas of injury which arise for consideration with respect to this head of loss:
(1) Fractures of the shaft of his right femur, right ulna, left tibia and left fibula;
(2) A fracture of the right scaphoid;
(3) A anterior laceration over the right knee, extended into the joint; and;
(4) Multiple abrasions of his right forearm, hand and face.

19. I have considered the arguments advanced by the parties in respect of how to deal with these multiple injuries, from a PSLA perspective. Both parties have cited the English Court of Appeal case of ***Sadler v Filipiak and another [2011] EWCA Civ 1728***. The plaintiff argues that the correct methodology would be to allocate figures as reasonable compensation for each injury. I am persuaded by the defendant, however, that the correct approach is as advanced by ***Sir John May*** in the English Court of Appeal case of ***Brown v Woodall [1995] PIQR Q36***. ***Brown v Woodall*** was referred to in ***Sadler***, where ***Etherton LJ*** stated:

"…, I respectfully agree that the learned judge's approach adding up the various figures for the awards that she thought appropriate for the various different injuries could well lead one to an award, which, compared with other awards, is in the aggregate larger than is reasonable.

In this type of case if there are a number of separate injuries, all adding up to one composite effect upon the Plaintiff, it is necessary for a learned judge, no doubt having considered the various injuries and fixed a particular figure as reasonable compensation for each, to stand back and have a look at what would be a global aggregate figure and ask if it is reasonable compensation for the totality of the injury to the plaintiff or whether it would in aggregate be larger than was reasonable?"

20. The correctness of ***Brown v Woodall [1995] PIQR Q36*** was accepted, in this jurisdiction, by ***Adderley J*** (as he then was) in the case of ***Pratt v Sands and another [2012] 1 BHS J No. 12***.

21. The ***Judicial Studies Board Guidelines on Assessment of Damages 14th ed.,*** which was proffered by both parties, gives guidance on each of the Plaintiff's injuries. I have considered the authorities advanced by the parties and find that the JSB Guidelines provide adequate indicators of the Plaintiff's injuries. I have considered the plaintiff's injuries as outlined in the medical reports of both Dr. Grimes and Dr. Barnett alongside the JSB Guidelines and have determined that the Plaintiff's injuries fall into the categories below:

    i) Arm: Less Severe Injury – "While there will have been significant disabilities, a substantial degree of recovery will have taken place or will be expected." These injuries are assessed in the range of £15,300 to £31,220 [$19,624.39 to $40,044.02].I would place the plaintiff in the mid range of this scale and award $28,000.
    ii) Wrist: "Less severe injuries where these still result in some permanent disability as, for example, a degree of persisting pain and stiffness. These injuries are assessed in the range of £10,040 to £19,530 [$12,877.71 to $25,049.96]. I would place the plaintiff at the upper end of this scale and award $20,000.
    iii) Knee: "Less severe injuries than those in (a)(ii) and above and/or injuries which result in less severe disability. There may be continuing symptoms by way of pain and discomfort and limitation of movement or instability or deformity with the risk that degenerative changes and the need for remedial surgery may occur in the long term as a result of damage to the kneecap, ligamentous or meniscal injury or muscle wasting". These injuries are assessed in the range of £20,880 to £34,660 [$26,781.52 to $44,456.30]. I would place the plaintiff at the top of this scale and assess $40,000.
    iv) Leg: (iii) Serious – "Serious compound or comminuted fractures or injuries to joints or ligaments resulting in instability, prolonged treatment, a lengthy period of non-weight-bearing, the near certainty that arthritis will ensue;

extensive scarring. To justify an award within this bracket a combination of such features will generally be necessary". These injuries are assessed in the range of £31,250 to £43,710 [$40,082.50 to $56,064.19]. I would assess this injury to the plaintiff at $50,000.

v) Scarring: "A large number of awards for a number of noticeable laceration scars, or a single disfiguring scar, of leg(s) or arm(s) or hand(s) or back or chest". These injuries are assessed in the range of £6,240 to £18,120 [$8,003.67 to $23,241.44]. Having regard to the other awards I assess this loss to the plaintiff at $10,000.

22. The aggregate assessment of the individual injuries amount to B$148,000. Adopting the approached advanced in ***Brown v Woodall,*** with respect to assessing quantum in relation to multiple injuries, I find that this global figure is a reasonable compensation for the entirety of the Plaintiff's injuries.

23. The Plaintiff has sought to include a ***Heil v Rankin*** uplift of 10% into the PSLA award. In the Privy Council case of ***Scott v AG et al [2017] UKPC 15*** the Board declined to endorse this approach, in using the JSB Guidelines in The Bahamas, of applying an automatic uplift. In addition to the fact that the Board had set out guidance that an uplift is not automatic, just as in the *Scott* case there has been no authority set out by the plaintiff if this matter to justify an uplift of 10%. Further, having accepted the sum of $148,000 as reasonable, I am not convinced that the inclusion of a10% uplift is appropriate in this matter.

Future Surgery – Right knee

24. The parties have agreed the costs of the arthoscopic surgery that Dr. Barnett discussed in the medical report supra at $12,000. However, there is contention on the part of the Plaintiff that Total Knee Replacement will be required at the estimated cost of $40,000 if performed by the recommended surgeon as mentioned in Dr. Barnett's report supra.

25. Dr. Barnett states as follows:

> "Arthroscopic surgery of his right knee, with the possibility of a joint replacement of his right knee in the future, depending on the finding in the radiographs and or what is visualised at the arthroscopic surgery."

26. In respect of the likelihood of Total Knee Replacement surgery, Dr Barnett stated, "[I]t is really like less than 10% really. So the way we look at that really the likelihood

is less likely than likely." In *Eldon Johnson v Devaughn Brown and Pinder's Customs Brokerage* SCCivApp No.107 of 2015 the Court of Appeal rejected the trial judge's decision to award for the cost of future surgery on the ground that the appellant's risk was medically assessed at only 10%.

27. I accept Dr. Barnett's evidence that the likelihood of the total knee replacement is less than 10% in which case the need for future surgery is too remote. I will give no recovery, with respect to future surgery, save for the agreed cost of the arthroscopic surgery at $12,000.00.

Smith v Manchester

28. The Plaintiff seeks a *Smith v Manchester* Award. This award is derived from the case of ***Smith v Manchester Corporation (1974) 1 WLR 132*** in which the plaintiff developed a frozen shoulder resulting from an accident at work due to her employer's negligence. The Plaintiff continued to be employed by the company so she had no loss of earnings. However, the Court of Appeal increased her damages award to include £1,000 for future loss of earning capacity. The court opined that it had done so with the view that if the Plaintiff should she become unemployed, would find it more difficult to obtain employment than an able-bodied person.

29. Smith v Manchester award would be compensation for diminution in earning capacity. It takes into account whether the Plaintiff may be unemployed for a long period or whether he may be forced to accept a less attractive job than he would have prior to his injuries. As ***Allen P.*** noted in ***Cadet's Car Rentals and another v. Pinder - [2016] 2 BHS J. No. 82,*** "[f]rom the authorities of ***Smith v Manchester, Moeliker v A Reyrolle & Co. Ltd*** [1977] 1 WLR 132, and the 2015 case of **Billett v Ministry of Defence** [2015] EWCA Civ. 773, it is clear that a Smith v Manchester award is warranted where there is no present or foreseeable financial loss, but there is loss which the claimant is likely to suffer in the future by reason of decreased difficulty in obtaining or retaining employment. It represents an award for damages which one is likely to suffer in the future by reason of increased difficulty in obtaining or retaining employment."

30. In the circumstances, whilst I am satisfied that the plaintiff is disabled in the labour market, I am of the view that this is not a case in which a **Smith v Manchester** award would be appropriate. The plaintiff is disabled; his disability affects his ability to pursue his chosen career as a boat engineer. It cannot be said that there is no present or foreseeable financial loss, but there is loss which the claimant is likely to suffer in the future by reason of decreased difficulty in obtaining or retaining employment.

Future Loss of Earnings

31. The Plaintiff submits that at the time of the accident he earned a salary of $523.07 per week as a 3rd officer/boat engineer. At the date of trial the Plaintiff was 47 years old and employed as a truck driver. He says, and I accept, that the accident caused him long term injury and disability. He could not engage in activities involving bending and heavy lifting as would be required as a boat engineer. Under cross examination he stated that his job on BFF, as an engineer, involved extreme work, he had to service the engine, service the transmission and general maintenance of the vessel. He stated that it was a very confined area down in the engine room and the places he had to get in, he didn't have the strength in his legs and arms to do the work that was necessary. He reported, and Dr Barnett confirmed (11 years after the accident), that he continued to have swelling in his foot, pain and numbness in his legs.

32. The Defendant also sought to suggest that the Plaintiff's loss of employment was not as a result of the injury by his own delinquency in not responding to his employers BFF. I dismissed that suggestion as unproven. It seems clear that the plaintiff is unable to continue in his chosen line of employment any longer, in any event, having regard to his injury. I accept that he has sustained and will continue to suffer some loss of income as he is limited to earning a living in jobs such as truck driving and security guard work. The Plaintiff has shown that he was and remains capable of working as indicated in the medical reports, albeit limited. At the time of trial the Plaintiff worked for Johnson's Trucking and earned a weekly wage of $320.

33. The Plaintiff has submitted that I consult the UK Government Actuary's Department, Actuarial Tables for use in Personal Injury and Fatal Accident Cases, ("the Ogden Tables") Ogden tables to determine an appropriate award for future loss of income. I was directed to the Privy Council case of ***Cadet's Car Rentals Limited et al v Pinder***.

34. In ***Cadet's Car Rentals Limited***, an assessment for loss of future income, the Privy Council considered the use of these tables in the Bahamian Court's. The injured party, Mr Pinder was aged 32 at the date of the accident and 34 at the date of the trial. At the trial, Sir Michael Barnett, Chief Justice, found that at the date of the accident Mr Pinder was employed as a mason earning an average of $520 per week and that he had other employment at the weekend as a handyman from which he earned about a further $250 per week. At the date of trial, he was no longer employed. The Chief Justice found that, as a result of the accident, Mr Pinder, while able to work, could no longer work as a mason. He had only a high school education. The Chief Justice rejected a submission that Mr Pinder could earn more as a fisherman than he had as a mason; he accepted the medical evidence that work as a professional fisherman was not an option. The Chief Justice made an award of $380,000 in respect of loss of future earnings. He arrived at the figure by applying a proposed multiplier of 19.1 which he considered reasonable.

35. The Court of Appeal rejected Barnett CJ's assessment and considered that the correct figure for the multiplicand should have been $19,240.00 instead of $20,000.00 and that applying the multiplier of 19.1 was wrong in principle. Using the UK Government Actuary's Department, Actuarial Tables for use in Personal Injury and Fatal Accident Cases, 7th ed (2011), ("the Ogden Tables") to derive a multiplier of 4.8461, it quashed the award of $380,000 and substituted an award for loss of future earnings of $93,238.96.

36. The Privy Council found that the calculations under the Ogden Tables were incorrect and in allowing the appeal made an award in respect of loss of future earnings of $650,043.21. At paragraph 9 of the decision of the Privy Council, their Lordships stated the following:

> 9. Neither party to the present appeal has suggested that the use of the Ogden Tables for the quantification of future loss of earnings was inappropriate in this case. Accordingly, the Board, in deciding this appeal, will seek guidance from those Tables. The Board notes, however, that the Tables are intended to reflect the particular conditions prevailing in the United Kingdom which are likely to differ considerably from those in The Bahamas. The courts of The Bahamas may, therefore, wish to consider on some future occasion whether it is appropriate to refer to the Ogden Tables for guidance or whether it may be preferable to seek the assistance of actuarial tables designed to reflect the conditions prevailing in The Bahamas. In this regard the Board draws attention to the observations of Lord Kerr in Scott v Attorney General [2017] UKPC 15 (at paras 25-29) concerning the application in The Bahamas of the United Kingdom Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases.

37. Having given the matter careful and anxious consideration, I will decline to make use the Ogden Tables. I find that it is inappropriate to do so. My concerns, as indicated by their Lordships, are based upon the simple fact that they are based upon actuarial tables and calculations, not only prepared in the United Kingdom, but based upon the United Kingdom econometrics. As their Lordship rightly noted, "the Tables are intended to reflect the particular conditions prevailing in the United Kingdom which are likely to differ considerably from those in The Bahamas". In the Court of Appeal, in ***Cadet's Car Rental***, **Allen P**. also expressed similar caution in using theses tables. At paragraph 18 and 19 she stated,

> **18** A word of caution is therefore necessary to the wholesale application of these tables as if they have the force of law in The Bahamas. For one thing, they are based on the index of the UK Government Stock, and for another, the discount rate is based on the mortality risks and other contingencies related to the population of the UK, and not to the population of The Bahamas.
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> **19** That is not to say that they are not useful guides, but, as noted, the courts of The Bahamas must be careful in the wholesale application of these tables when determining the appropriate award for future losses in personal injury cases in The Bahamas.

38. In my view, these tables would not bear an accurate reflection of future loss of income in this case and I decline to utilize them.

39. I have considered the evidence and whilst there was an occasion when the plaintiff earned income similar to that which he earned prior to his accident, as a boat engineer, it is fairer to say that his income has been reduced by approximately $200 per week. This represents the approximate difference between his income at BFF and his income as a trucker ($523.07 minus $320). This represents his salary at the time of the accident minus his proven weekly earning capacity. The period when he earned $560 per week he worked two jobs trucking in the day and at night as a security guard. Understandably, he was forced to surrender the night security job for his family life.

40. I am satisfied that his income has generally been reduced annually by $10,200 (52 x $200). The plaintiff is now 47 years of age. In my view, a lump sum of $100,000, taking into account annual income losses over the next 10 years, properly invested, ought to reasonably account for his loss of income between trial and up to his retirement age of 65.

B. Special Damages

41. Special damages must be proven in order for the Court to make such an award. In **Russell v Simms et al 2008/CLE/gen/00440** ***Barnett CJ*** stated:

> "[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, and sit back expecting the tribunal of fact to accept his evidence as true in its entirety, merely because the aforesaid evidence is controverted, even though the particular damage in the sense of a loss having been incurred appears reasonably improbably 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 honest."

42. The Plaintiff claims 9 items of special damages which I will consider below:

Medical Expenses & Subrogation

43. Items 1-6 below related to medical expenses incurred by the plaintiff as considered hereunder:

(a) Item 1. The parties have agreed Home Care and Nursing care costs at **$7,000**.

(b) Item 2. The Plaintiff claims **$650** for a wheelchair that was purchased from Lewis Orthopaedics. I make the award for the full amount claimed.

(c) Item 3. Doctors Hospital Bills amount of $56,773.90. Colina paid $50,146.35 leaving a balance of **$6,627.55** in co-payments and/or co-insurance which was settled by the Plaintiff.

(d) Item 4. Dr. Delton Farquharson's fees amount to $5,770 for medical care. The receipt in evidence indicates that Colina paid $4,108.36 leaving a balance of **$1,661.64** as the co-insurance and/or co-payment of the Plaintiff.

(e) Item 5. Dr. Valentine Grimes fees amount to $9,679 for medical care and medical reports. The receipts indicate that Colina has paid the amount of $8,844.00 for in-patient surgical procedures performed on the Plaintiff in relation to his injuries. The Plaintiff also had 2 Office visits (21 January 2010 and 19 July 2013) that amounted to **$220.00**. Additionally, $615.00 of the original amount being the cost of 2 medical reports (1 July 2008 and 8 September 2015 respectively). The cost of the medical reports must be deducted ($9,679-$615=$9,064) as these are not the subject of assessment but are recoverable as costs in the taxation process.

(f) Item 6. Dr. Barrett McCartney for anaesthesia in the amount of $2,721.00. This bill states that the insurance company settled the claim for $2238.36 leaving a balance of $482.64 as the Plaintiff's responsibility. The Plaintiff received a demand letter from Consumer Information Services representing ANRESP (through whom Dr. McCartney rendered services as an anaesthesiologist) for this payment with interest accrued of **$579.10**.

44. The Defence contends that Colina Insurance Company may have paid as much as $50,146.35 of the medical bills and as such subrogation should take place in relation to the plaintiff's claim under this head. The Defendant contends that much of the medical expenses listed above were not paid out of pocket by the plaintiff but by Colina Insurance, the carrier for the group health insurance plan for BFF. They aver that medical insurance and accident insurance are not the same creatures, in that there is no right of subrogation under an accident insurance plan and they rely on *inter alia* a statement in McGregor on Damages (18th ed.) as instructive, which states the following:

"Where a claimant's medical expense have been paid for him under a private medical insurance scheme to which he subscribes, such as that run by BUPA or PPP, the question of whether he is entitled nevertheless to claim the expenses as part of his damages is a question which does not arise because the insurances under the schemes, unlike the accident policies considered when dealing with loss of earning capacity, are regarded as indemnity insurances which entitle the insured themselves to recover their outlays directly from the tortfeasor through the medium of subrogation. Thus the injured party has no standing to claim medical expenses; he has been made whole by his insurers who in their turn step into his shoes and make the claim for the moneys expended by them."

45. The Plaintiff relies on *inter alia* ***Bradburn v G.W. Ty*** **(1874) LR 10 Ex 1** which was endorsed by the House of Lords in ***Parry v Cleaver*** **[1970] AC 1** as follows:

"Where a claimant has purchased accident insurance so that he receives a payment from the insurance company after sustaining injuries, the payment made by the insurance company is not deducted from the damages payable by the defendant whose negligence caused the injuries. This principle was established in *Bradburn v G.W. Ty* (1874) LR 10 Ex 1, on the grounds that it was not the happening of the accident which caused the benefit to the claimant but the purchasing of the insurance.

46. Whilst it is clear from the evidence provided that medical expenses were in fact incurred and were necessary, I accept the submission of the Defendant in this regard. This is not accident insurance as provided for in ***Parry v Cleaver***. In any event, I am comforted by the fact that these are not funds which the Plaintiff has actually expended himself and that the insurer was able to pursue this loss through subrogation if it wished.

Damages related to the Motorcycle

47. There is no dispute that the motorcycle was destroyed in the accident. There are however, varying accounts as to the value of plaintiff's motorcycle at the time of the accident. The Plaintiff contends that the motorcycle is a 2006 Yahama while the Defendant contends that the motorcycle was a 2003 model as is stated in the Police Road Accident Report that has been entered into evidence.

48. I believe that the police report reflected the correct model year of the motorcycle. There has been no evidence led to disprove the independent evidence in the police

report. The purpose of the law is to place the Plaintiff in essentially the same position that he would have been in had the accident not taken place due to the Defendant's negligence, this of course includes the damage to his motorcycle. I believe that the motorcycle was in fact purchased for the sum of $5,000.00 as stated by the plaintiff. I will value this loss at $3,500 at the time of the accident, taking into account any relevant depreciation.

Miscellaneous Expenses

49. I have categorised items 7-9 of the Writ of Summons as miscellaneous expenses.

1.	Mobile phone (Motorola Razor)	$110
2.	Clothing (blue jeans -60, Tommy shirt -80, Nike tennis -110, hat -40)	$290
3.	Travel 4th April 07 to Sep 07) 40 @$30	$1,200

The parties have agreed these costs in the claimed amount of $1,600.

Past Loss of Earnings

50. The function of damages is make the victim of a tort whole, essentially placing him in the position he would have been in pre-accident. The admission of liability by the Defendant does not cause the Plaintiff to be absolved of his duty to mitigate his potential loss.

51. The plaintiff relies on the English High Court case of ***Irani v Duchon [2018] EWHC 2314 (QB)*** in support of his claim that the causative effect of his termination by BFF was his injuries. Irani suffered serious injury after being involved in a road traffic accident whilst riding his motorcycle. Liability was accepted and Irani's employer was deemed to have perpetrated a sham redundancy on him. The trial judge found that the injuries sustained were a "material consideration" for the redundancy.

52. ***Irani*** does not appear to be on all fours with the instant case, having regard to the evidence. Firstly, I did not find that the plaintiff's job at BFF made redundant but that he was terminated as indicated by the letter from BFF, captioned "Voluntary Abandonment of Employment". Secondly, I did not find that the termination was a

sham but that the plaintiff did not submit the relevant sick certificates following the accident and that BFF lawfully terminate the employment on the basis of abandonment. This termination was well after the period the plaintiff had become ambulatory. Whilst he may have been ambulatory he continued to have medical challenges. On the evidence, he would have been unable to have perform his functions at BFF and still in considerable pain unable to carry out duties which included bending and heavy lifting heavy items.

53. Dr. Grimes' prognosis in his medical report dated 1 July 2008 was that the plaintiff would incapable of working for approximately one year following the accident." I accept therefore that the period of March 2007 to March 2008 the Plaintiff was declared unfit for work. The employment letter dated 26 April 2007 from BFF states the Plaintiff's weekly salary was $523.07=$27,199.64 per annum. As such I make an award that he should receive his gross annual salary from BFF for that time.

54. Whilst the Plaintiff could no longer work for BFF or as a boat engineer, there was no evidence led that showed that the Plaintiff was unfit for other types of work from April 2008 to April 2009. The Plaintiff went on to secure work at Island Block Company in May of 2009 as a truck driver where he earned a salary of $320.00 per week. He earned this amount until late 2010. In late 2010 he also took on additional work with IBC as a security guard and earned an additional $240 per week until May 2011 when the company went out of business. The Plaintiff's combined salary at this juncture was in fact $560, this was more than he earned while in the employ of BFF.

55. Mitigation as it relates to this claim is also in dispute between the parties. The Defendant relies heavily upon a letter dated 14 November 2018 which notified the Plaintiff that they would plead that there was a failure to mitigate his loss of earnings on his part. They say that this letter is adequate notice and rely on *Geest v Lansiqot* [2002] UKPC 48 affirmed in by the Bahamas Court of Appeal in *Baptiste v Peet* [2016] 2 BHS J. No.28. The plaintiff argues that the pleading of mitigation of loss of earnings should have been done in the pleadings and only where there are no pleadings should notice have been given via a letter. They also argue that the 14 days between the letter and the Hearing was not sufficient time to allow them to

defend the plea adequately. The Plaintiff's also rely on the case of *Baptiste* to prove this point. They further argue that the Plaintiff acted reasonably in the circumstances.

56. I find that the letter notifying the Plaintiff of the Defendant's intention to plead the Plaintiff's failure to mitigate was reasonable and given with sufficient notice. Had the plaintiff required additional time the request could have been made, and considered. In *The Solholt*, [1983] 1 Lloyd's Rep. 605 CA, Sir John Donaldson MR in delivering the judgment of the Court said the following:

> "A plaintiff is under no duty to mitigate his loss, despite habitual use by lawyers of the phrase 'duty to mitigate'. He is free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly caused by the defendant's breach of duty."

57. This principle applies equally to non-pecuniary losses as reflected in the current matter. The question of mitigation of damage by the plaintiff is one of fact and not of law. The medical report of 1 July 2008 by Dr. Grimes indicates that the Plaintiff was unfit for work for 1 year after the accident, however no evidence has been led that the Plaintiff actively sought work following this period. The Plaintiff's evidence is that he did not work again until May 2009 when he was employed with IBC. I find therefore that the Defendant ought not to be held responsible for the Plaintiff's job loss and failure to mitigate after the loss of his employment with BFF. I will reduce his income loss for the period by 40% for his failure to mitigate.

58. As such I award the Plaintiff the listed amounts for the following periods of time:
    (1) March 2007 to March 2008 the plaintiff was deemed unable to work. I make the award for **$27,199.64.**
    (2) April 2008 to April 2009 at a 40% reduction for failure to mitigate his losses by seeking employment during this time. I make an award for **$16,319.78.**
    (3) May 2009 to May 2010 at BFF weekly salary $523.07-$320 (IBC weekly salary=$203.07x56=**$11,371.92**
    (4) June 2010 to May 2011 it is accepted that the Plaintiff earned more than his BFF salary and as such I make no award for this period.

(5) June 2011 to September 2017. During this period the Plaintiff's evidence was that he was doing trucking jobs and bodywork for a neighbour who ran an auto-body shop. He stated that he earned at best $200 per week during this period. BFF weekly salary $523.07-$320.00 (average proven earning potential) =$203.07x6years 4 months = **$67,757.69**

(6) October 2017 there is a letter of the 16th April 2018 confirming the Plaintiff's employment with Johnson's Trucking at $320 per week as the date of trial 28th November 2018. The amount of the award is **$12,319.58.**

59. The total loss from the accident in March 2007 to trial in November 2018 is awarded in the amount of **$134,968.61.**

Loss of Bonus

60. The Plaintiff claims the loss of an annual $600 Salary Bonus from the date of the accident. Neither the Plaintiff's written or oral evidence supported the claim for a fixed annual bonus entitlement. The claim is refused.

Summary of Award

61. I summarize the awards to the Plaintiff below:

i.	PSLA	$148,000
ii.	Future Surgery	$ 12,000
iii.	Loss of Future Earnings	$100,000
iv.	Special Damages	
	Home Care & Nursing	$ 7,000
	Wheelchair	$ 650
	Doctors Hospital	$ 6,627.55
	Dr Farquharson	$ 1,661.64
	Dr Grimes	$ 220
	Dr McCartney	$ 579.10
	Motorcycle	$ 3,500
	Agreed Miscellaneous expenses	$ 1,600
	Past Loss of Earnings	$134,968.61
Total Award		$416,806.90

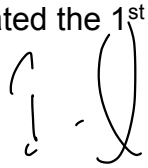
Conclusion

62. Judgment is awarded to the Plaintiff in the sum of $416,806.90.

63. The Plaintiff has not prosecuted this matter with alacrity, it having commenced since 2008. I accept that in the year or so leading to trial there was delay due to efforts to settle the dispute. These discussions could hardly justify a 10 year path to trial. In the circumstances I award interest at the rate of 2.5% per annum from the date of the Statement of Claim to the date of judgment. Interest to accrue thereafter at the statutory rate.

64. Unless the parties wish to argue for some other order, I will award costs to the Plaintiff to be taxed if not agreed.

Dated the 1st day of May 2020



Ian R. Winder

Justice