

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**

2
3 **Cause No: G336/2006**
4

5 **BETWEEN:**

6 **THOMAS FARRELL**

7
8 **FIRST PLAINTIFF**

9
10 **CATHERINE FARRELL**

11
12 **SECOND PLAINTIFF**

13
14 **AND:**

15 **CHARLES BODDEN**

16
17 **DEFENDANT**

18
19
20 **Appearances:**

21 **Ms. Denise Owen and Mr. Kyle Broadhurst**
22 **of Broadhurst LLC on behalf of the**
23 **Plaintiffs**

24 **Sir Richard Cheltenham Q.C. instructed by**
25 **Mr. Waide DaCosta on behalf of the**
26 **Defendant**
27

28 **Before:**

The Hon. Mr. Justice Charles Quin

29 **Heard:**

27th July to 3rd August 2012

30 **Defendant's submissions:**

19th November 2012

31 **Plaintiffs' submissions:**

17th January 2013

32 **Counsel's agreed transcripts:**

17th January 2013

33 **Judgment on Liability:**

31st May 2013

34 **Draft Judgment on Quantum:**

21st June 2013

35 **First Plaintiff's Addendum Submissions:**

30th July 2013

36 **Defendant's Supplemental Submissions:**

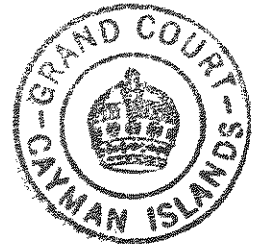
13th August 2013

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38 **JUDGMENT ON QUANTUM**
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THE FACTS

1. At about 11:45 p.m. on the evening of Tuesday the 30th December 2003, Charles Bodden, the Defendant, was driving from West Bay to George Town along the West Bay Road at the time when two visitors to the Cayman Islands, Thomas Farrell (“First Plaintiff”) and Catherine Farrell (“Second Plaintiff”), the First and Second Plaintiffs, were crossing the West Bay Road underneath the Hyatt overhead pedestrian bridge (the “Hyatt OPB”). The two Plaintiffs crossed the northbound portion of the road which runs from George Town to West Bay, and moved further across into the middle of the road, which is the lane for vehicles turning off the road, and, in moving from that point into the southbound portion of the road which runs from West Bay into George Town, they were struck by the Defendant’s vehicle – a red Honda Civic, registration 80 555. Both Plaintiffs were seriously injured and taken to George Town Hospital. After the collision the Defendant drove his vehicle to the left side of the road and parked by Decker’s Restaurant/a nearby Restaurant.

2. Following on from my Judgment on Liability dated the 31st May 2013, in which I found the Defendant liable, but with a thirty percent deduction for the Plaintiffs’ contributory negligence. I now examine the question of Quantum.

QUANTUM

3. On the 15th August 2006 the Plaintiffs filed their Statement of Claim and on the 26th July 2012 the Plaintiffs filed their Amended Statement of Claim in which they plead that, by reason of the Defendant’s negligence and or breach of duty, the Plaintiffs have suffered injury, loss and damage. I now set out the most relevant particulars of injuries, loss and damage claimed by the Plaintiffs.

1 *THE FIRST PLAINTIFF'S INJURIES, LOSS & DAMAGE*

2 4. The First Plaintiff claims that he suffered very serious injuries as a result of the
3 accident and continues to suffer as a result of the injuries sustained. The injuries
4 include:

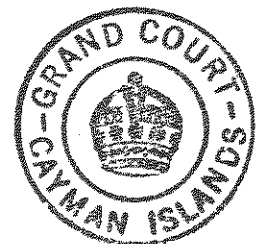
5 a. A Closed Head Injury:

6 i. This is described as a closed head injury with severe post- concussion
7 syndrome, resulting in mood disorder, memory impairment, attention
8 and cognitive deficits.

9 ii. The First Plaintiff claims that, since the accident, he has had to work
10 very hard to be able to continue to perform on a satisfactory basis in his
11 employment. He also states that he suffers from depression and
12 becomes easily fatigued. He states that he suffers from exhaustion,
13 sleep disorder, reduced libido, and all these factors have interfered
14 significantly with his personal life and have reduced his work capacity.
15 He states that these disabilities are likely to be permanent.

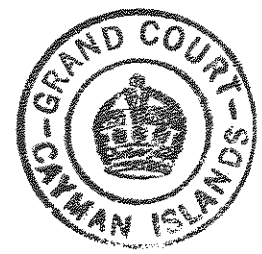
16 b. Injuries:

17 i. In the Amended Statement of Claim, the First Plaintiff also claimed
18 damages for personal injuries loss and damage as a result of:



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- i. Eight distinct spinal fractures;
- ii. Shattered left shin and hip;
- iii. Multiple right-sided rib fractures and punctured lung;
- iv. Frozen left shoulder;
- v. Right-hand fracture;
- vi. Nasal fracture;
- vii. Scars to face and body and multiple abrasions and lacerations.



FIRST PLAINTIFF'S EVIDENCE

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2 5. The First Plaintiff's evidence as to what occurred after the accident is vague and
3 much of the early information he learned from his family and the doctors who
4 treated him.

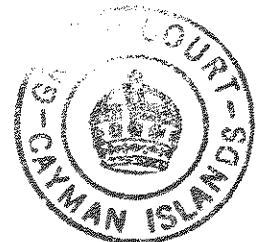
5 6. The First Plaintiff explains that the primary injuries he sustained were the closed
6 traumatic brain injury, spinal fractures, rib fractures, a punctured lung, a shattered
7 left shin and hip, nasal fracture and multiple lacerations.

8 7. The First Plaintiff was admitted to the George Town hospital and when it was
9 discovered that his injuries were so severe, he was stabilized and transferred by air
10 ambulance to the Trauma Centre at Jackson Memorial Hospital ("JMH") in Miami
11 Florida for evaluation and further treatment.

12 8. The following day the First Plaintiff was unable to answer questions but he was
13 able to follow commands. The First Plaintiff was incubated and sedated.

14 9. At JMH the First Plaintiff underwent surgery to his shin. An external fixator was
15 used with multiple pins and rods.

16 10. On the 9th January 2004 the First Plaintiff's family met with his care team and made
17 the decision to move him to New York so that he could be closer to home. The
18 Second Plaintiff's brothers, Charles and Larry Horning, accompanied the First
19 Plaintiff on his flight from JMH to Huntington Hospital ("Huntington") in Long
20 Island.



1 11. The First Plaintiff spent 11 days in Huntington where he recalls being in discomfort
2 and pain. The First Plaintiff states that his daily routine was pretty much bed rest, as
3 even going to the bathroom was a major production.

4 12. On the 23rd January 2004 the First Plaintiff was moved from Huntington to Burke
5 Rehabilitation Center ("BRC") to begin his rehabilitation programme. The First
6 Plaintiff recalls being transferred by ambulance and recalls looking back at this
7 period of time when his memory became much better. The Plaintiff recalls that the
8 ambulance ride from Huntington to BRC was uncomfortable due to the severity of
9 his injuries.

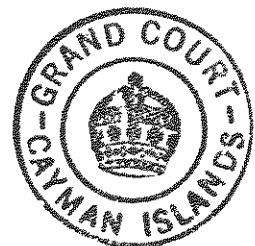
10 13. The First Plaintiff recalls that his rehabilitation was extremely painful and tiring
11 and that his sessions of physical exercise with the physiotherapist led to extreme
12 pain and exhaustion. The First Plaintiff said he found the rehabilitation process
13 exhausting and at times overwhelming.

14 14. On the 13th February 2004 the First Plaintiff returned home after having spent three
15 weeks at BRC. During his time at BRC he had lost approximately 40 lbs. He had
16 completely lost his appetite and he struggled to go through his exercises each day.

17 15. After leaving BRC the First Plaintiff continued his rehabilitation with the
18 physiotherapist, which was initially scheduled twice per day. In addition, a nurse
19 would visit to check his blood and clean his leg where the pins went through. The
20 Plaintiff experienced extreme pain and discomfort.

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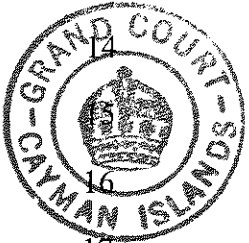
1 16. On the 1st April 2004 the external fixator was removed from his leg. The First
2 Plaintiff recalls that his son, Patrick, played a lacrosse game at Wagner University
3 on Staten Island. The First Plaintiff said this was the closest game to his home so he
4 was finally able to attend one of his son's games again. Before the accident the First
5 Plaintiff said he had attended virtually all of Patrick's lacrosse games at High
6 School and College, so it gave him a great lift to be able to see his son play lacrosse
7 at Wagner University.

8 17. From April 2004 and onwards the physiotherapist came once per day. The
9 physiotherapist taught the First Plaintiff to walk around inside the house and
10 practice going up and down the stairs with crutches. The Plaintiff made good
11 progress but became tired and weak during these sessions.

12 18. Towards the end of April 2004 the First Plaintiff had recovered to such an extent
13 that he was able to drive. He was suffering from a frozen shoulder, which made it
14 painful to put on shoes and socks and get in and out of the car. However, once the
15 First Plaintiff began driving he would take the Second Plaintiff and himself to their
16 physiotherapy sessions. These sessions took place three times per week and
17 involved a 3 to 4 mile drive from their home.

18 19. For another 12 months the First Plaintiff experienced times of severe pain and
19 humiliation.

20 20. In early June 2004 the First Plaintiff was able to return to his work as Director of
21 Business Development in the New York office of Ernst & Young. The First
22 Plaintiff said that, throughout his recovery, his employers had been quite
23 understanding, and they informed him that they would give him the time he needed
24 to recover.

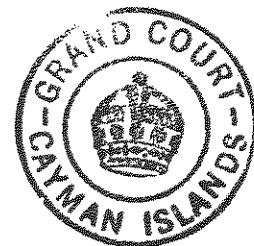


1 21. The First Plaintiff continued with his physiotherapy for several months and in 2005
2 he was still suffering from a frozen shoulder and, accordingly, in March 2005 he
3 had arthroscopic surgery on his shoulder. The First Plaintiff said that although this
4 was painful, he made steady progress following the surgery and this made it a lot
5 easier for him to be motivated and have much less difficulty during physical
6 activity. For the first time he was finally able to put on socks, shut the car door and
7 button the collar of his shirt without experiencing any pain. He had a wider range of
8 motion, although not quite as wide it was prior to the accident.

9 22. The First Plaintiff remained in his post at Ernst & Young for 2004, 2005, 2006, but,
10 in August 2007 he was informed by Ernst & Young that they would be terminating
11 his employment. The First Plaintiff's supervisor said that the company was
12 eliminating his post, but the First Plaintiff felt that it was because the firm was not
13 satisfied with his performance. However, Ernst & Young continued to pay his
14 salary of US\$182,000.00 until the 31st December 2007, whilst he looked for
15 alternative employment.

16 23. The First Plaintiff felt that whilst he was away some of the partners took over his
17 contacts and thereby took over his contact relationships and he found it difficult to
18 recover this work. The First Plaintiff also had difficulty with multitasking. The First
19 Plaintiff had difficulty keeping up the numerous demands of his job at Ernst &
20 Young, and the firm had reduced his responsibilities to working with five public
21 companies and also being responsible for the entrepreneur of the year award. The
22 First Plaintiff felt that he was unable to meet the expectations of his supervisor.

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1 24. In October 2007 the First Plaintiff secured a similar Business Development position
2 with Price Waterhouse Coopers (“PWC”), working in New York, and targeting
3 private companies in New York and Long Island. The First Plaintiff’s salary of
4 US\$150,000.00, which was less than at Ernst & Young, but included a commission
5 and bonus package.

6 25. The First Plaintiff stayed with PWC throughout late 2007, 2008, 2009 and then on
7 the 21st January 2010 PWC terminated his contract as at the 28th February 2010.
8 Unlike Ernst & Young, PWC did state that the First Plaintiff’s “*separation from*
9 *employment at PWC (was) for performance reasons.*”. The First Plaintiff was of
10 the view that it was terminated as a result of his performance not meeting
11 expectations.

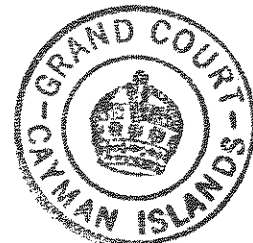
12 26. In his witness statement dated the 30th March 2010 the First Plaintiff complained of
13 having difficulty sleeping and having a lower energy level than he had prior to his
14 accident. The First Plaintiff says that he still suffers from pain and lack of
15 movement in his shoulder, which hinders his golf.

16 27. In his evidence before the Court the First Plaintiff said he experiences some aches
17 and pains in his left knee, particularly after jogging and playing golf. He says the
18 major focus of his injury is with his head. The First Plaintiff said his wife says he
19 sometimes shuffles.

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1 28. The First Plaintiff was asked about his ongoing physical issues. He said it was
2 really his memory. He said his left knee aches – particularly in colder weather. His
3 hip hurts after playing golf and he feels a little bit of restriction in his hip and his
4 left lower back. He said he occasionally had discomfort and pain in his left
5 shoulder, and he sometimes experiences difficulty turning when driving. He has
6 difficulty sleeping and this makes him tired.

7 29. The biggest difficulty the First Plaintiff experiences is with his memory. He has
8 difficulty remembering people's names and remembering a lot of different things.
9 He also feels that he is less tolerant and becomes more agitated.

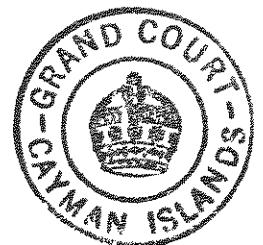
10 30. After leaving PWC he had difficulty finding another job, but he got a job with
11 Group Systems approximately 15 months after leaving PWC. He worked with
12 Group Systems for five months and then they terminated him. However, he has an
13 arrangement with Group Systems as an independent contractor, so he continues to
14 try and sell packages – particularly to the four large accounting firms and
15 consulting firms.

16 31. The First Plaintiff states that he has made extensive efforts to secure further
17 employment, but he feels that his age is now going against him.

18 32. The First Plaintiff said he had expected to work until age 62. He said that when one
19 is young, one wishes to retire earlier, but, as one gets older it becomes more
20 difficult to retire early. He said that at 62 he would qualify for social security.

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CROSS EXAMINATION OF THE FIRST PLAINTIFF

33. The First Plaintiff said that during his absence from the end of 2003 to early June 2004, other partners at Ernst & Young had taken over his business relationships and that made it more difficult for him to return to his full assignment.

34. The First Plaintiff accepted that business development is not the core of the auditing and accounting business of Ernst & Young, which made him more vulnerable to early termination.

35. However, the First Plaintiff said he was able to continue to work in a demanding and competitive environment, and stayed on at Ernst & Young for 3 ½ years after his accident and period of rehabilitation. The First Plaintiff was then able to secure a new and similar executive position with PWC. He said he then worked for 2 years and 3 months with PWC.

36. The First Plaintiff accepted that he was able to travel to see his son play lacrosse in April 2004 and he, the First Plaintiff, was able to return to keeping up with the kids and social functions, including lunches and dinners.

37. The First Plaintiff also accepted that he returned to playing golf, to using the elliptical machine for exercising and to a fairly active social life.

38. The Plaintiff said that his shoulder is now about 95% right, although still somewhat tight and sometimes sore.



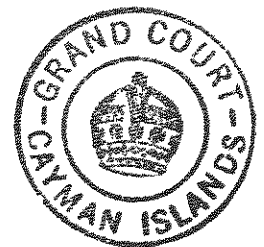
1 39. The First Plaintiff accepted that the only consequence of the injuries now is his
2 mental health status and a form of diminished self esteem – in light of the fact that
3 he is currently experiencing difficulty in getting back into the job market. The
4 Plaintiff said he thinks he can work, but he adds that he has not found “*somebody*
5 *who wants to hire and pay me yet.*”

6 40. The First Plaintiff says he still at work as he is still trying to sell software but, he
7 says, regrettably, he does not get paid unless he closes the deal.

8 41. The First Plaintiff accepted that his orthopaedic injuries are healed – except for the
9 slight limitation of movement in his right shoulder and the pain in his left knee. The
10 First Plaintiff said that his shoulder and left knee are not completely healed, and, he
11 said that his right hip is another area where he experiences some discomfort. The
12 Plaintiff accepted that the discomfort in these areas is not constant.

13 42. In addition, the First Plaintiff says that he reads newspapers and especially the
14 sports sections, and he also reads books. He said he is currently reading Bobby
15 Jones’ book “Grand Slam”. The First Plaintiff said he plays 18 holes every week.
16 He said he could play more but he does not like to play on consecutive days. He
17 accepted that he still plays “pretty well.”

18 43. The First Plaintiff said he could tend to daily chores including physical chores like
19 taking out the garbage and collecting the mail, and he has no need for any
20 assistance whilst walking. The First Plaintiff accepted that his social life is not
21 impaired.



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FIRST PLAINTIFF'S MEDICAL EVIDENCE

44. On the 14th January 2004 Dr. William Martin (“Dr. Martin”) at Huntington did consultation for a status post-multiple trauma injuries for the First Plaintiff. Dr. Martin listed the injuries as a left tibular-fibular fracture, a T9 fracture, a right haemothorax and related rib fractures and closed head injuries. Dr. Martin confirmed that the First Plaintiff was to undergo orthopaedic stabilization by Dr. Robert Moriarty (“Dr. Moriarty”) with a long term plan for rehabilitation for the head injuries.

45. On the 15th January 2004 Dr. Musarat Shareeff (“Dr Shareeff”) examined the First Plaintiff at the request of Dr. Moriarty. Dr Shareeff confirmed that the First Plaintiff had the same orthopaedic injuries as outlined by Dr. Martin.

In relation to the neurological evaluation he said the First Plaintiff was intermittently confused and dazed. He said the First Plaintiff is very forgetful and is unable to concentrate. He noted that the First Plaintiff had difficulty with concentration and registration.

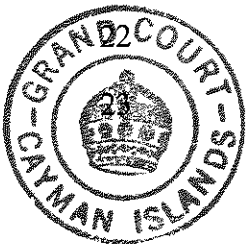
Dr. Shareeff however noted that the First Plaintiff does not suffer from any seizures and denies any headaches, nausea, vomiting or any difficulty with expression or speech.



1 46. On the 18th January 2004 Dr. Arnold Schwartz (“Dr. Schwartz”) confirmed that a
2 CAT scan was done on the dorsal spine, revealing evidence of a comminuted
3 vertebral fracture – body fracture T9, with fracture of the right T9 lamina and a left
4 transverse process T9 fracture. Dr. Schwartz also noted that there were fractures of
5 left T6, T7, and T8 transverse processes. Dr. Schwartz said that the lamina looked
6 satisfactory however there was a slight obliquity at T8-T9, secondary to the
7 fracture.

8 47. On the 18th January 2004 the radiology report from Dr. Barry Morgenstern (“Dr.
9 Morgenstern”) stated that the First Plaintiff had suffered multiple comminuted
10 fractures involving the proximal and mid tibia. Dr. Morgenstern said there was
11 fracture also noted at the proximal fibula. In addition, there were multiple right-
12 sided rib fractures. He said there was no evidence femoral or pleural effusion.

13 48. Before he was discharged from Huntington to the BRC, Dr. Moriarty, who was the
14 First Plaintiff’s consultant orthopaedic surgeon produced a comprehensive discharge
15 report on the 22nd January 2004. In his discharge/transfer report, Dr. Moriarty set
16 out the injuries the First Plaintiff sustained as a result of the accident. Dr. Moriarty
17 reported that the First Plaintiff had sustained a closed head injury. Dr. Moriarty
18 noted that over the three weeks at Huntington the First Plaintiff’s confusion had
19 lessened and that the First Plaintiff had experienced significant improvement over
20 that 3-week period relating to the recognition of persons, places and things. Dr.
21 Moriarty said the First Plaintiff had continued difficulties and consequently Dr.
Moriarty also confirmed that the First Plaintiff was to be seen by neurologists Dr.
Rudansky and Dr. Winter at Huntington – in a traumatic brain injury programme.



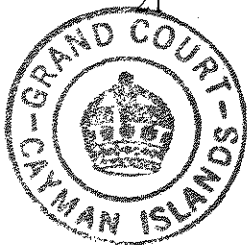
1 49. On the 2nd February 2004 Dr. Jane Bennett, a radiologist at BRC, conducted a
2 thoracic spine x-ray with frontal and lateral views. Dr. Bennett confirmed that there
3 is osteopenia, but alignment was preserved.

4 50. In relation to the First Plaintiff's orthopaedic injuries, Dr. Moriarty reported no
5 further breathing difficulties and the First Plaintiff had a negative chest x-ray giving
6 evidence of healing rib fractures. Dr. Moriarty reported that the First Plaintiff had a
7 comminuted closed fracture to his left tibia, for which he underwent a surgical
8 procedure in Miami, which included the placement of an external fixator. The First
9 Plaintiff received aggressive pain care, and his x-rays demonstrated that the
10 fractures were in a good overall position – with the pins in good positions as well.

11 51. Dr. Moriarty also reported that the First Plaintiff sustained multiple thoracic spine
12 compression fractures – the most serious of which as at level T9. Dr. Moriarty said
13 the First Plaintiff did not sustain any obvious spinal cord compromise and the First
14 Plaintiff has been treated non-operatively in a TLSO-type body brace. Dr. Moriarty
15 said surgical intervention to the back is not anticipated at this time unless he
16 develops a more pronounced kyphosis in the future.

17 52. In relation to the First Plaintiff's left shoulder, x-rays and a CT scan do not reveal
18 any evidence of any bone injury. Dr. Moriarty reported that the First Plaintiff's
19 shoulder is stiff and will require rehabilitative efforts to gain motion and strength.

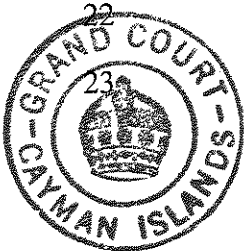
20 53. In relation to the First Plaintiff's right index fingertip injury: It has been improving
21 and the First Plaintiff had small sutures still in place that could be removed.



1 54. The First Plaintiff was admitted to the BRC where he underwent a Mini Mental
2 State Examination ("MMSE") for which he scored 20 out of 30 in relation to the
3 tests of orientation, registration, attention, calculation and language.

4 55. In addition, under the care of Dr. Barry Jordan and Dr. Olivia Caldeira, an initial
5 neuropsychological evaluation report was done on the 26th January 2004 in order to
6 establish a baseline from which to measure progress and develop treatment goals.
7 The report noted that the First Plaintiff was pleasant, friendly and cooperative and
8 rapport with the First Plaintiff was easily established. In relation to mood and
9 effect, the First Plaintiff appeared euthymic, and appears to be within normal limits.
10 The First Plaintiff's speech was within normal range – with no obvious
11 impairments. There were no perceptual disturbances. The patient's thought
12 processes were characterized as logical and coherent. The First Plaintiff's thought
13 content were characterized as content-appropriate to the situation. In relation to
14 judgment and insight, the First Plaintiff presented with decreased insight deficits.
15 The summary and conclusion were that the First Plaintiff had relative cognitive
16 weaknesses. There was a severely impaired delayed recall of verbal information and
17 mildly impaired attention.

18 56. On the 4th February 2004 the First Plaintiff attended a Group Health and Behaviour
19 Session. The report from Dr. George Cuesta ("Dr. Cuesta") found that the First
20 Plaintiff was alert, awake and attentive to the group discussion. The First Plaintiff
21 participated in the group discussion on coping and adjustment to brain injury. The
22 First Plaintiff said he was concerned about his children who were aged 21, 16 and
23 13 and their adjustment to his injury.



1 The First Plaintiff said that he felt that they were traumatized by the accident which
2 happened when they were vacationing in a county where driving is on the right
3 hand side of the road. The First Plaintiff recalled that *“as they were crossing he saw*
4 *the vehicle coming, pushed his wife out of the way and he was struck and thrown*
5 *many feet.”* The First Plaintiff said his wife was also injured, but less severely than
6 he was, and he added that he was thankful to be alive.

7 However, in his witness statement and in his evidence before the Court the First
8 Plaintiff stated that he had no recollection of the accident or of crossing the street.
9 He said it has been hard for him to understand how the accident could have
10 occurred. He said,



*“I have since learned we were walking across the street to the other side when
Kathy and I were hit by a car driven by the Defendant as we were crossing the
third [southbound] lane.”*

14 Neither counsel for the Plaintiffs nor leading counsel for the Defendant raised Dr.
15 Cuesta’s report of the 4th February 2004 with the First Plaintiff. Accordingly, he
16 was given no opportunity to explain this in Court.

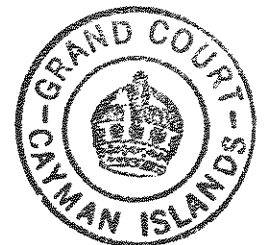
17 Shortly after the Court hearing the First Plaintiff advised his attorneys that he has
18 no recollection of having attended the session or of having seen Dr. Cuesta’s report
19 prior to the date of the hearing. The First Plaintiff is not able to dispute his
20 attendance at Dr. Cuesta’s Group Health and Behaviour Session or the content of
21 Dr. Cuesta’s report and the First Plaintiff does not attempt to do so, nevertheless,
22 the First Plaintiff avers that he is simply not able to recall attending the Group
23 Health and Behaviour Session on the 4th February 2004 with Dr. Cuesta.

1 Additionally, neither counsel for the Plaintiffs nor leading counsel for the
2 Defendant raised this reported recollection of the accident, dated the 4th February
3 2004 with any of the medical experts.

4 57. On the 11th February 2004 BRC prepared a further in-patient neuropsychological
5 report. BRC noted that the First Plaintiff had been diagnosed with post-concussion
6 syndrome. BRC conducted an MMSE and other tests. In the MMSE he scored 30
7 and his cognitive rating was normal. The report stated that rapport with the First
8 Plaintiff was easily established, and his mood was within normal limits. The effect
9 was now within normal limits. His speech was within normal range without obvious
10 impairments. There were no perceptual disturbances. The First Plaintiff's thought
11 processes were characterized by logical and coherent processes, and his thought
12 contents were appropriate to the situations.

13 The report concluded that the First Plaintiff had relative cognitive weaknesses, with
14 severely impaired recall of verbal information.

15 58. On the 12th February 2004 BRC provided a discharge summary in relation to speech
16 and language. It stated that the First Plaintiff recognised and remembered 75% -
17 90% of the time. His orientation was 20/20. His word association was 5/5.
18 Immediate recall of words was 4/4. Delayed recall of words 2/4. The report noted
19 that the First Plaintiff had made improvements in following complex conversation,
20 orientation, sustaining attention, problem solving ability, memory skills and
21 judgment and insight.



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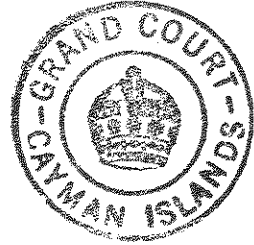
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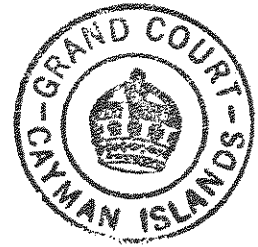
59. On the 4th March 2005 the First Plaintiff underwent his arthroscopic surgery on his left shoulder. In the report of his health history at that time the First Plaintiff confirmed that he had no problems with his vision, hearing or sense of taste and smell. In relation to the functional assessment, the First Plaintiff confirmed that he was able to discharge all these functions. In relation to the question of his daily routine of activity and exercise, the First Plaintiff said he was moderately active and listed his activities as golf, occasional running and swimming. The First Plaintiff confirmed that his sleep routine was sound and he did not need any sleep medication, and that he would generally sleep between 5 and 8 hours per day. The First Plaintiff said that the intensity of his pain to the shoulder was mild. In relation to when the pain is at its worst, in describing it as between 1 to 10 the First Plaintiff described it as 3, but, on an average, the pain would be 2 and was an aching pain which restricted movement. The nursing staff noted that there were no special considerations in relation to any cognitive limitation/development or psychological factors.



1 *DR. GOLDSTEIN*

2 60. On the 9th January 2006 the First Plaintiff was the subject of an orthopaedic
3 examination by Dr. Robert Goldstein (“Dr. Goldstein”) of the Madison Avenue
4 Orthopaedic Associates. Dr. Goldstein recorded a detailed history from the First
5 Plaintiff. In addition, Dr. Goldstein reviewed the medical records from JMH and in
6 addition reviewed the x-rays of the rib fractures, the left leg, the thoracic spine, the
7 cervical spine and the right hand. Dr. Goldstein also reviewed CT Scans of the
8 brain, the chest, the abdomen and the pelvis, and the post-operative reports of the
9 surgery to the left tibia performed by Dr. Hutsen. Dr. Goldstein reviewed the
10 medical records from Huntington and the post-operative reports from the surgery
11 performed by Dr. Fealy on the First Plaintiff’s left shoulder at the Hospital for
12 Special Ambulatory Surgery. Dr. Goldstein recorded that the First Plaintiff had
13 sustained multiple injuries including:

- 14 *i. Multiple lacerations;*
- 15 *ii. Head trauma;*
- 16 *iii. Left shoulder injury;*
- 17 *iv. Multiple rib fractures;*
- 18 *v. A punctured lung;*
- 19 *vi. Fractures of the thoracic vertebrae;*
- 20 *vii. Fractures of the left tibular and fibular.*



21 all of which were pleaded in the First Plaintiff’s Statement of Claim and in his
22 Amended Statement of Claim.
23

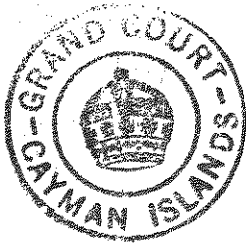
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25 61. Dr. Goldstein recorded the history of the First Plaintiff’s treatment at the
26 Huntington, the BRC, and the treatment the patient received by Dr. Moriarty, Dr.
27 Shareef and Dr. Hutson.

1 Dr. Goldstein recorded that the First Plaintiff confirmed that he works with a trainer
2 in the gym to aid him in his recovery and that he also does daily exercises at home.

3 The Plaintiff's recorded complaints in January 2006 were that he was not able to
4 think as clearly as he did prior to the accident and that his short-term memory is
5 poor. The First Plaintiff said that he tired easily, He also said that his left shoulder
6 is weak, but it has improved since surgery, although not yet regaining full range of
7 motion. The First Plaintiff said he has difficulty when trying to play golf. The First
8 Plaintiff complained that he had frequent pain in his mid thoracic spine in the area
9 of the fractures and that his left leg continued to ache. The First Plaintiff said he
10 was an avid runner but he was unable to run now due to his injuries.

11 62. Dr. Goldstein confirmed that a review of the First Plaintiff's medical records at the
12 time showed that x-rays revealed:

- 13 i. *A right second anterior rib fracture and segmental fractures of the 3rd,*
14 *4th and 5th ribs on the right.*
- 15 ii. *A comminuted fibular head and neck fracture that was impacted and*
16 *laterally displaced.*
- 17 iii. *A comminuted mid shaft tibular fracture, with approximately 1 ½ shaft,*
18 *with medial displacement of the distal fragment.*
- 19 iv. *Superior end-plate fracture of T9 with mid right lateral wedging of the*
20 *T9 vertebral body.*
- 21 v. *Tuft fracture of the distal shaft of the second distal phalanx*
- 22 vi. *X-ray of the cervical spine was negative for fractural dislocation*
- 23 vii. *CT scan of the brain and facial bones revealed nasal bone fracture and*
24 *frontal scalp haematoma;*
- 25 viii. *CT scan of the chest, abdomen and pelvis revealed T9 compression*
26 *fracture with left transverse process fractures involving the vertebral*
27 *bodies T5 through to T9 and a right lamina fracture of T8.*



1 63. Dr. Goldstein performed a physical examination on the First Plaintiff and found:

2 *i. That the First Plaintiff ambulated with a normal gait.*

3 *ii. Regarding range of motion of the cervical spine:*

4 *a) There was full flexion and extension to 45 degrees.*

5 *b) Lateral rotation was limited to 70 degrees to the right and 50*
6 *degrees to the left.*

7 *c) On the lateral bending – 40 degrees to the right and 30 degrees*

8 *iii. That examination of the left shoulder revealed healed operative*
9 *arthroscopy portals and range of movement revealed a lack of 15*
10 *degrees of abduction and 15 degrees of forward flexion.*

11 *iv. There was a full range of movement of the right shoulder, both elbows,*
12 *wrists and fingers.*

13 *v. There was a full range of motion in the lumbar spine with flexion to 90*
14 *degrees, extension 25 degrees and lateral bending 25 degrees.*

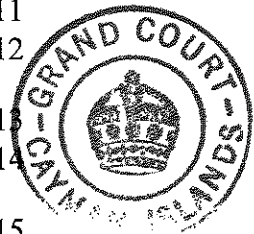
15 *vi. There was a full range of motion of both hips, knees and ankles.*

16 *vii. The left leg revealed multiple healed surgical incisions secondary to*
17 *pin placement of the external fixator.*

18

19 64. Dr. Goldstein confirmed that the First Plaintiff sustained severe permanent injuries
20 to his head, left shoulder, chest and left leg that are causally related to the motor
21 vehicle accident which occurred on the 30th December 2003. Dr. Goldstein stated
22 that the First Plaintiff's prognosis is guarded, as he has continuing complaints –
23 referable to his left shoulder and left leg. The injuries have compromised the First
24 Plaintiff's normal activities of daily living and have interfered with his ability to run
25 and participate in sports activities such as golf, which he enjoyed prior to his
26 accident.

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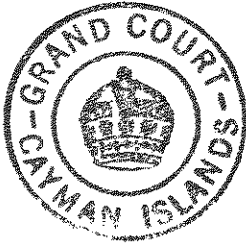


1 *DR. LOUIS C ROSE*

2 65. Dr. Rose provided a report for the First Plaintiff, dated the 13th April 2012, having
3 examined the First Plaintiff on the 19th March 2012. Dr Rose set out the same
4 medical history as Dr. Moriarty and Dr. Goldstein had in their medical reports dated
5 the 22nd January 2004 and the 9th January 2006, respectively.

6 66. Dr. Rose found:

- 7 *i. On the 19th March 2012 the First Plaintiff complained of low back*
8 *pain, stiffness, spasms and limited range of movement. The First*
9 *Plaintiff also complained of right side hip pain and stiffness, aching*
10 *pain in the left groin and numbness of the right index finger. He*
11 *complained of stiffness and swelling in his left leg with pain.*
- 12 *ii. On physical examination Dr Rose found that, upon examination of the*
13 *lumbar sacral spine revealed equal sensation to light touch and*
14 *reflexes were intact and pulses were intact.*
- 15 *iii. Dr Rose noted that the First Plaintiff walked with a shuffling-type gait*
16 *and had difficulty mounting and dismounting the examination table.*
- 17 *iv. Dr Rose noted that the First Plaintiff's right index finger revealed a*
18 *well healed traumatic wound, with decreased sensory perception to*
19 *light touch.*
- 20 *v. Examination of the left hip revealed full range of motion without pain.*
- 21 *vi. Examination of the right hip revealed no swelling, and ecchymosis*
22 *erythema. The First Plaintiff had limited range of motion: forward*
23 *flexion was 90 to 100 degrees with pain at the extremes. Internal*
24 *rotation was 20 to 30 degrees. External rotation was 30 to 45 degrees*
25 *with pain.*
- 26 *vii. Examination of the patient's left knee showed marked tenderness to*
27 *palpation about the medial joint line and at the medial and lateral*
28 *patella. The McMurray test positive with medial joint pain elicited.*
- 29 *viii. Examination of the First Plaintiff's left leg wound revealed the surgical*
30 *incision to be well healed and moderate tenderness to direct palpation.*



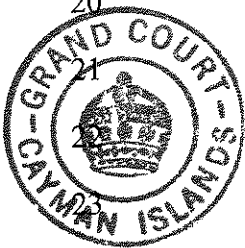
1 67. Dr Rose reviewed the previous treatments administered to the First Plaintiff. Dr
2 Rose reviewed the CT Scan report from JMH – revealing the T9 compression
3 fracture and the fractures involving vertebral bodies T5 and T9, the CT Scan of the
4 brain and face and the CT Scan of the cervical spine – all taken at the JMH on the
5 31st December 2003.

6 68. Dr. Rose reviewed the operative report dated the 4th March 2005 from Dr. Fealy in
7 relation to the First Plaintiff's left shoulder.

8 69. Dr. Rose reviewed the post-operative report from Dr. Hutson, dated the 6th January
9 2004, which included the complex mental tibia fracture. Dr Rose also reviewed Dr.
10 Moriarty's operative report from Huntington which was on the First Plaintiff's left
11 lower extremity dated the 1st April 2004.

12 70. Dr. Rose evaluated an x-ray of the First Plaintiff's lumbar spine and found that the
13 x-ray revealed loss of the lumbar lordosis at multiple levels. In addition, he did an
14 evaluation on an x-ray on the pelvis, which revealed moderate bilateral hip arthritis.
15 An evaluation of the x-ray of the left knee revealed degenerative joint disease. X-
16 rays of the left tibia revealed evidence of a healed segmental fracture and x-rays of
17 the right ribs revealed healed fractures.

18 71. Dr. Rose confirmed that the First Plaintiff had sustained permanent partial disability
19 to his lower back, right hip, right hand, and, left lower extremity. Dr Rose was of
20 the view that the Plaintiff would continue to have these symptoms on a permanent
21 basis – having difficulty with activities of daily living, including those requiring
22 long periods of standing or walking, any type of lifting, carrying, pulling or pushing
23 of even light objects. Dr Rose's view was that the First Plaintiff would have
24 continued lower back pain and right sided pain, and would require continued

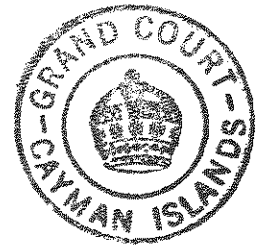


1 physiotherapy and use of anti-inflammatory and analgesic medications to treat his
2 symptoms. Dr. Rose went as far as saying that the First Plaintiff could require
3 steroid injections and possible surgical intervention in the future for discectomy and
4 fusion.

5 72. In relation to the First Plaintiff's right hip Dr. Rose said that the First Plaintiff
6 would require a total hip replacement at some time in the future, followed by 3 to 6
7 months physical therapy.

8 73. Dr. Rose was of the view that the First Plaintiff would continue to have left lower
9 extremity pain and limited function of the left ankle – causing increasing pain due
10 to the limited range of motion of the left ankle. He said decreased motion and the
11 development of post-traumatic arthritis, there would be need for fusion or total joint
12 replacement at some point in the future.

13 74. Overall, Dr. Rose said the First Plaintiff is severely disabled and would have
14 difficulty functioning in any capacity on a regular basis.



DR. ROBERT L. MICHAELS

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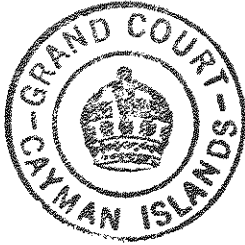
75. Dr. Michaels examined the First Plaintiff on the 15th June 2012 on behalf of the Defendant and stated that the First Plaintiff described to him that his injuries were to his left leg, his left shoulder, his left knee, ribs and left hip.

76. Both Orthopaedic Experts – Dr. Rose and Dr. Michaels – have strong academic credentials and great experience in the field of orthopaedic surgery and practice.

77. Dr Michaels reviewed the x-rays reports from the Jackson Memorial Hospital in Miami, the ICU Unit at Huntington and the care received from Dr. Moriarty and Dr. Schwartz, as well the reports from the BRC and the further reports of examinations done by Dr. Moriarty when the First Plaintiff was an out-patient.

78. Dr. Michaels states that the First Plaintiff’s complaints in June 2012 included occasional pain in his lower back and left shoulder. The patient was no longer undergoing active orthopaedic care and the First Plaintiff said he visited Dr. Moriarty “*a couple of times over the past three years.*”

79. From his examination of the First Plaintiff, Dr. Michaels reported as follows.



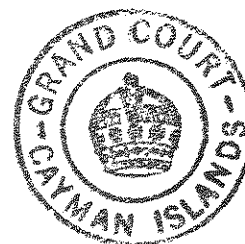
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a. Left Shoulder:

- i. *There was no tenderness, swelling, ecchymosis or erythema.*
- ii. *The range of motion of the left shoulder revealed:*
- iii. *forward elevation - 180/180;*
- iv. *external rotation - 75/90 degrees;*
- v. *internal rotation - 80/80 degrees;*
- vi. *abduction - 180/180 degrees;*
- vii. *extension – 40/40 degrees;*
- viii. *abduction – 30/30 degrees;*
- ix. *Impingement sign was negative;*
- x. *Apprehension, Drop Arm and O'Brien tests were negative.*
- xi. *There was no rotator cuff weakness*
- xii. *There was no trapezius tenderness or spasm.*

b. The Right hip:

- i. *Flexion – 100/100 degrees*
- ii. *Extension – 30/30 degrees*
- iii. *Abduction – 40/40 degrees*
- iv. *Abduction – 20/20 degrees*
- v. *Internal rotation – 40/40 degrees*
- vi. *External rotation – 50/50 degrees*
- vii. *There was no tenderness, swelling, ecchymosis or erythema.*
- viii. *The Patrick test was negative.*



c. The Left Hip:

1 i. Same results on examining the left hip.

2 d. Left knee-Leg:

3 i. Flexion – 150/150 degrees;

4 ii. Extension - 0/0 degrees

5 iii. There was no tenderness, swelling, effusion, ecchymosis or erythema;

6 iv. There was a negative anterior drawer sign, Lachman, McMurray,
7 Valgus instability, Cord atrophy, post-drawer sign, pivot shift, tight
8 lateral retinaculum patellar facet tenderness and various instabilities.

9 v. There was negative crepitus.

10 e. The range of motion of the cervical spine:

11 i. Flexion – 50/50 degrees

12 ii. Extension – 60/60 degrees

13 iii. Right and left bending – 45/45 degrees

14 iv. Right and left rotation – 80/80 degrees

15 v. No vertebral tenderness, no paravertebral spasm

16 vi. Motor strength – 5/5 in the deltoids, biceps, triceps, wrist extensors,
17 wrist flexions, finger flexions, finger extensors and intrinsics bilaterally
18 with no atrophy. Sensation was full. Reflexes in the triceps, biceps and
19 brachioradialis were present and equal bilaterally. Spurling's
20 maneuver was negative. There was no trapezial tenderness or spasm.

21 f. Range of motion of the thoracolumbar spine revealed:

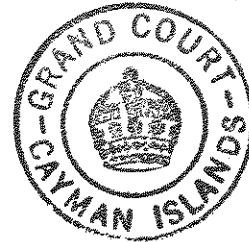
22 i. Flexion – 60+/60 degrees

23 ii. Extension, right and left lateral bending – 25/25 degrees

24 iii. Right and left lateral bending – 25/25 degrees;

25 iv. Right and left rotation – 80/80 degrees

26 v. The Claimant reports minimal subjective pain at the extremes of
27 motion. There was no vertebral tenderness and no paravertebral spasm
28 noted.



1 vi. *Straight leg raising test was negative in the sitting and supine*
2 *positions.*

3 vii. *Motor strength – 5/5 in quad, hamstrings, calf and EHL muscles*
4 *bilaterally.*

5 viii. *There was no muscle atrophy.*

6 ix. *Reflexes in the patella – (1+) and Achilles (trace) were present and*
7 *equal bilaterally.*

8 x. *Sensation – full.*

9 g. Ribs/Chest:

10 i. *No tenderness either right or left side.*

11 ii. *No defect or crepitus.*

12 iii. *Healed laceration Right flank.*

13 iv. *Healed incision on right chest at mid-axillary line between 6th and 7th*
14 *ribs.*

15 h. Gait:

16 i. *The claimant has a normal gait pattern.*

17 ii. *He does not use or need an assistive ambulatory device.*

18 iii. *There was no difficulty with getting on and off the examination table*
19 *nor with dressing or undressing.*

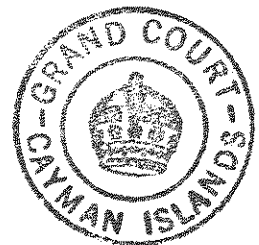
20 i. Back:

21 i. *T9 compression fracture, traverse process fracture T5 through to T9, a*
22 *T8 Lamina fracture - healed.*

23 ii. *Lumbar sprain – healed*

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26 j. Left Leg Injury

27 i. *Closed left tibia and fibular fracture – healed*



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ii. *The SP application of illizerov external fixator, and removal of external fixator*

k. Hand:

i. *Right hand index finger distal phalanx fracture with associate laceration – healed.*

l. Left Shoulder Injury:

i. *Left shoulder contusion-sprain – resolved.*

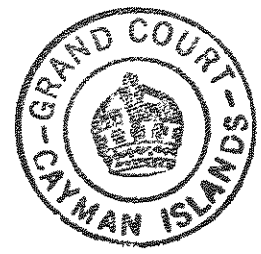
ii. *SP manipulation under anaesthesia with arthroscopic capsular release for adhesive capsulitis – resolved.*

m. Chest Injury:

i. *3rd, 4th, 5th right rib fractures – healed;*

n. Hip Injury:

i. *No evidence of right hip injury.*



1 80. Dr. Michaels' Conclusions were as follows:

2 a. *From an orthopaedic standpoint the Claimant requires no further physical*
3 *therapy, orthopaedic treatment, orthopaedic follow-up or orthopaedic surgery*
4 *for any of the examined areas.*

5 b. *There is no need for further diagnostic testing, durable medical supplies,*
6 *medical transportation or household help.*

7 c. *The injuries sustained and that symptoms reported are causally related.*

8 d. *There will be a minimal range of motion loss in the left shoulder in external*
9 *rotation of 15 degrees.*

10 e. *There is a minimal range of motion loss of 10 degrees of left knee flexion.*

11 f. *The displayed and measured ranges of motion are fully functional.*

12 g. *The Claimant's injuries are healed. The nature of his injuries to the left leg*
13 *does not result in an increased likelihood or development of arthritis, as the*
14 *fractures did not involve in the joint and did not result in deformity.*

15 h. *The Plaintiff exhibits no orthopaedic disability. The Plaintiff may work and*
16 *perform activities of daily living without restrictions relating to his orthopaedic*
17 *injuries.*

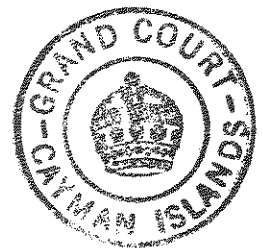
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19 81. Dr. Michaels conceded in live evidence that the First Plaintiff has made a
20 remarkable recovery from very severe injuries. Dr. Michaels also submitted that the
21 First Plaintiff received excellent medical care in the JMH, the BRC and the
22 Huntington. Dr Michaels also paid tribute to the First Plaintiff's own contribution to
23 what amounts to a remarkable recovery.

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DR. ALLAN RUBENSTEIN

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82. On the 2nd May 2012 Dr. Rubenstein conducted a medical evaluation of the First Plaintiff. In relation to his motor skills Dr. Rubenstein made the following findings:

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a. There is full range of movement of both shoulders and both knees.

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b. There was no pain on straight leg-raising bilaterally. The First Plaintiff could flex at the hips to 90 degrees.

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c. The First Plaintiff's heel and toe walking was performed satisfactorily, and his gait and tandem gait were normal.

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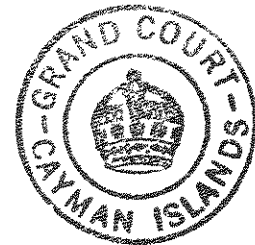
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GENERAL

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DAMAGES

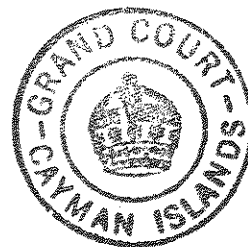
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GENERAL DAMAGES

83. The traditional guidelines in relation to quantum of damages have been found, both by the Grand Court and the Court of Appeal in the *Judicial College (JC) Guidelines*¹ – the latest of which is the 11th Edition dated the 2nd July 2012. Counsel for the Plaintiffs relies greatly on these 2012 Guidelines.

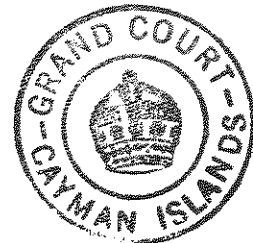
84. In *Archer v. UBS* 2009 CILR 531, the Grand Court adopted and followed the earlier JSB Guidelines. More recently, in *Wilson v. Ebanks* Cause Number G327 of 2004 the learned Chief Justice in a Judgment delivered on the 14th June 2011 stated at paragraph 31:

“The Guidelines reflect the decided cases of which there are many. The Guidelines are thus highly recommended as “a distillation” of the conventional wisdom contained in the reported cases.” – per Lord Donaldson in his Foreword to the First Edition of the Guidelines dated the 25th March 1992.

85. The learned Chief Justice also cites the 17th Edition of *McGregor on Damages* where the learned editors state at paragraph 35-227:

“The Guidelines are an “essential tool in the assessment of damages for non-pecuniary loss and personal injury claims.”

86. I adopt the learned Chief Justice’s approach in *Wilson v. Ebanks* and have utilised the latest *JC Guidelines* of July 2012.



¹ Formerly called the Judicial Studies Board (JSB) Guidelines.

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BACK INJURY AWARD – FIRST PLAINTIFF

87. T9 compression fracture, Camo Transverse process fracture – T5 – T9, and, T8 lamina fracture – healed.

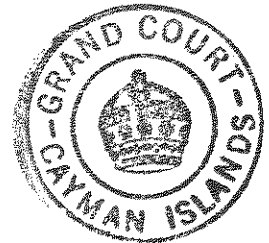
88. The First Plaintiff suffered severe injuries in the accident, but has made a remarkable recovery and he returned to work after 6 months. The First Plaintiff can look after himself and do all he needs to do to take good care of himself by way of washing, dressing, feeding and all the normal day to day functions. In addition the First Plaintiff is able exercise three times per week on an elliptical machine. The Plaintiff plays golf to a high standard with a single handicap.

89. I find that this injury falls within the “Minor” category found in Chapter 7(B)(c)(i) and (ii) which states at (i):

“(i) Where a full recovery or a recovery to nuisance level takes place without surgery within about two to five years.....” and

(ii) Where a full recovery takes place without surgery within a period of several months and two years.”

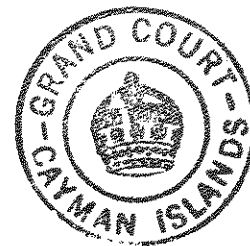
90. However, taking into account the severity of the original injury, and the degree of pain experienced by the First Plaintiff, he made a recovery, without surgery, within a period 2 years and several months and consequently I award **\$15,000.00** in this regard.



LEFT LEG INJURY AWARD – FIRST PLAINTIFF

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91. The First Plaintiff sustained a closed left tibia and fibula fracture which required the application of an illizerov external fixator, which was removed in April 2004.
92. I would categorise this as a serious injury, which required extensive treatment until mid 2004. This was a complicated fracture, but, again, the First Plaintiff has made a remarkable recovery. I do accept that the First Plaintiff suffered severe pain and discomfort for the early months of 2004, and it is fortunate that he is now able to carry on life without any significant restriction in movement as he can play golf to a single figure handicap, exercise and is basically mobile.
93. I agree with counsel for the Plaintiffs that this injury falls within the “Serious” category found in Chapter 7(L)(b)(iii) of the JC Guidelines and accordingly, I award the sum of **US\$65,000.00**.



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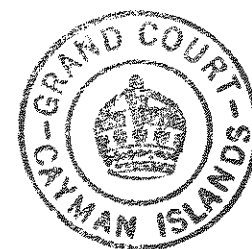
HAND INJURY AWARD – FIRST PLAINTIFF

94. There is a sharp conflict of evidence between the Plaintiffs’ expert, Dr. Rose, and the Defendant’s expert, Dr. Michaels.

95. Dr. Rose says the First Plaintiff has significant lack of sensation, which heightens the potential for future injury and impacts negatively on the ability to perform daily activities. Dr. Rose said the digital nerves of the First Plaintiff’s index fingertip were injured. Dr. Rose said the First Plaintiff sustained a laceration which required stitches to be closed.

96. This differs from with Dr. Michaels’ view that there is a tuft fracture and a shaft fracture of the distal phalanx of the finger and that the First Plaintiff has not said that this is an ongoing problem. Dr. Michaels views the First Plaintiff as having sustained decreased sensation round the pulp of the finger.

97. I agree with the Plaintiffs’ counsel that this injury falls within Chapter 7(I)(I) of the JC Guidelines which states this level is appropriate where a fracture has mended quickly, but grip has remained impaired. Accordingly, I award the sum of **US\$12,000.00.**



1 *LEFT SHOULDER INJURY AWARD – FIRST PLAINTIFF*

2 98. The First Plaintiff sustained a post-traumatic frozen left shoulder. He underwent a
3 manipulation under anaesthesia, with arthroscopic capsular release and subacromial
4 decompression with Dr. Fealy at Huntington on the 4th March 2005. He underwent
5 post-operative physical therapy and did well. The report from the outpatient
6 rehabilitation physical therapy unit reported slow progress but full recovery.

7 99. I would describe this injury as moderate. It is a frozen shoulder with limitation of
8 movement and discomfort, with symptoms persisting for about two years.

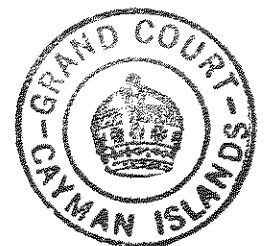
9 100. Once again I agree with the Plaintiffs' counsel that this injury falls within Chapter
10 7(C)(c) of the "Moderate" category indicating "frozen shoulder with limitation of
11 movement and discomfort with symptoms persisting for about two years.
12 Accordingly, I award **US\$15,000.00**.

13 *CHEST INJURY AWARD – FIRST PLAINTIFF*

14 101. The First Plaintiff sustained eight fractured ribs with pneumothorax.

15 102. I accept that these were injuries which led to a collapsed lung from which a full and
16 uncomplicated recovery has been made.

17 103. Again I agree with Plaintiffs' counsel that this injury falls within Chapter 6(A)(f)
18 of the JC Guidelines for chest injuries and award the sum of **US\$6,000.00**.

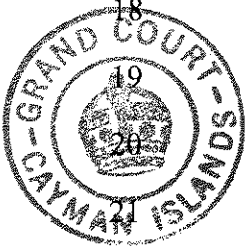


1 *RIGHT HIP INJURY AWARD – FIRST PLAINTIFF*

2 104. Again there is a conflict between the evidence of Dr. Rose and Dr. Michaels. Dr.
3 Rose found limited range of movement, with pain at the extremes of movement.
4 The x-rays revealed moderate bilateral hip arthritis. Dr. Rose linked an exacerbation
5 of this arthritis in the right hip to the First Plaintiff's altered gait and all this resulted
6 from the impact during the accident. Whilst Dr. Rose accepts that there is some
7 arthritis in both hips he explains that the arthritis in the right hip had been
8 exacerbated because of the limitation in use of his left leg after the accident. Dr.
9 Rose said the First Plaintiff walks with a limp, which comes from a combination of
10 the injury to his left leg and the injury to his right hip.

11 105. Dr. Michaels states that, from all the medical reports from the three hospitals –
12 JMH and BRC – and from the reports of Dr. Moriarty's continual treatment, there is
13 no complaint of any limp or antalgic gait. Dr. Michaels had a frank discussion with
14 the First Plaintiff and did a physical examination – including a gait analysis, from
15 which Dr. Michaels reports a normal gait pattern. Dr. Michaels said the First
16 Plaintiff did not have any difficulty getting on and off the examination table. When
17 Dr. Michaels observed the First Plaintiff walking down the hallway and into the
18 room, he saw both legs swing symmetrically, that is, the heel came down first and
19 the toe followed, and he saw a free-flowing gait. Dr. Michaels did not see any
20 evidence of a shuffling gait nor did Dr. Michaels feel that a shuffling gait would
21 play into the type of trauma undergone by the First Plaintiff.

22 On the 9th January 2006 Dr. Goldstein found that the First Plaintiff ambulated with
23 a normal gait. On the 2nd May 2012 Dr. Rubenstein reported that the First Plaintiff's
24 gait and tandem gait were normal.

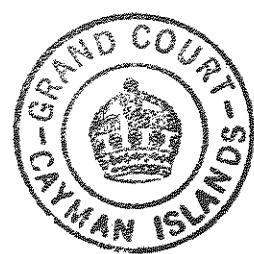


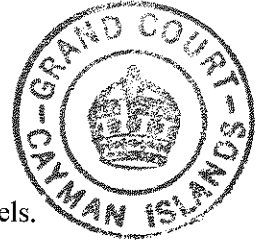
1 106. Dr. Michaels said the First Plaintiff had complained of some pain in the lower back
2 or buttock. Dr. Michaels said that, from his examination of the First Plaintiff and
3 from his review of the medical records, there was no indication that there was any
4 injury to the right hip whatsoever. Dr. Michaels said that, to take a jump from an x-
5 ray with some arthritic changes over to recommending a hip replacement, is far too
6 vast a leap and he would not be comfortable making that decision.

7 107. From my review of the evidence there is no record of the First Plaintiff sustaining a
8 right hip injury or of the First Plaintiff complaining about a right hip injury. The
9 First Plaintiff's complaints were that he got occasional lower back pain and pain in
10 the left shoulder. Dr. Moriarty who was the First Plaintiff's orthopaedic surgeon,
11 and who was seeing the First Plaintiff up to the late 2000s, a couple of times per
12 year, did not record any injury to the hip, nor that he walked with any limp or
13 shuffling gait. In addition, although the First Plaintiff pleaded in his Statement of
14 Claim and his Amended Statement of Claim that he reserves his right to expand
15 upon the above particulars of injuries at the trial of this matter, he did not plead that
16 he suffered from any limp or walked with a shuffling gait.

17 108. Accordingly, I reject this claim and make **no award** under this heading.

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LEFT KNEE INJURY AWARD – FIRST PLAINTIFF

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109. Again there is a sharp conflict in the evidence between Dr. Rose and Dr. Michaels.

110. Dr. Rose found a marked tenderness on palpitation, crepitus and decreased range of motion in his examination of the First Plaintiff. The McMurray was positive – indicating the presence of a meniscal tear. The x-ray of the left knee revealed degenerative joint disease. In his first report Dr. Rose does not make any recommendation for a knee replacement.

111. Dr. Michaels asserted that the bone was aligned. He identified an angle of 5.7 degree inclination. Dr. Michaels said, whilst the range of movement was limited in the left knee, it was not markedly limited. There was a 140 degrees of flexion in the left knee, with the right knee showing 150 degrees of flexion and 150 is the maximum and, 130 degrees is considered the upper end of normal.

112. Dr. Michaels noted from his review of the First Plaintiff's records that there were no complaints about the knee until the First Plaintiff saw Dr. Rose. Dr. Michaels said he would not state that any development of arthritis could be linked to the accident and, from all the reports and from all the treatment, there was no indication of any injury to the left knee. Dr Michaels said he is not trying to minimize the injuries of the First Plaintiff in any way. Moreover, Dr. Michaels' evidence was that there is no problem with the First Plaintiff's knee joint that requires any attention.

113. I note that the First Plaintiff did not plead any left knee injury as a particular injury in either his Statement of Claim dated the 15th August 2006 or in his Amended Statement of Claim dated the 26th July 2012.

114. Accordingly, I reject this claim and make **no award** under this heading.

LEFT ANKLE AWARD – FIRST PLAINTIFF

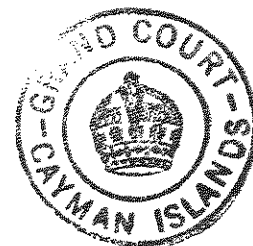
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115. Dr. Rose’s examination of the First Plaintiff’s left ankle revealed, in his view, a limited range of movement. Dr. Rose said the First Plaintiff would continue to suffer limited function of the left ankle. Dr. Rose said there would be increasing pain due to a limited range of movement of the ankle. He said there would also be decreased function alongside the development of post-traumatic arthritis – requiring fusion or total joint replacement at some point in the future.

116. Dr. Michaels said that the First Plaintiff sustained a severe fracture, involving a good portion of the tibia, but the fracture did not involve the ankle joint. Dr. Michaels said the fracture did not extend down below the shaft of the tibia. Dr. Michaels said ankle arthritis is very rare. From his review of all the medical reports at the hospital Dr. Michaels did not see any reports about any complaint relating to the left ankle, nor did the First Plaintiff complain about the left ankle. Additionally, there were no medical reports that the First Plaintiff sustained any injury to the left ankle.

117. Again, I note that the First Plaintiff did not plead any left ankle injury in either his Statement of Claim dated the 15th August 2006 or in his Amended Statement of Claim dated the 26th July 2012

118. Accordingly, I reject this claim and make **no award** under this heading

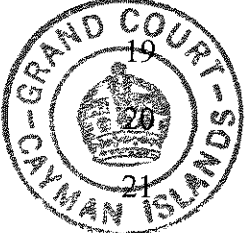


LUMBAR SPINE AWARD – FIRST PLAINTIFF

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119. Dr. Rose took an x-ray during his examination of the First Plaintiff on the 13th April 2012 which revealed, in his view, a loss of lordosis at multiple levels of the lumbar spine. Dr. Rose identified the First Plaintiff walking with a shuffling gait. Dr. Rose linked the osteoarthritis he identified in the lumbar spine to the multi-level thoracic fracture sustained in the accident. Dr. Rose said whenever there is an alteration in the spine, the forces that are generally handled at various levels wind up getting dispersed above and below. Below would be the most common area because that is where our flexible spine is. Dr. Rose expressed the view that once there is increased force in that area, there is a premature wearing of the cartilage and plates and the vertebral bodies and all this results in degenerative changes. Dr. Rose said the First Plaintiff is going to need, in the future, epidural steroid injections, a disectomy, and possibly and probably a spinal fusion.

120. Dr. Michaels says he does not understand how Dr. Rose can jump from some intermittent back pain to epidural steroid injections, a disectomy and then a fusion, without seeing an MRI or any other diagnostic study, other than the x-rays which he took in his office that day. Dr. Michaels said that the x-rays do not show the nerves, the canal and the soft tissue issues. The x-ray does not show nerves or if there are pinched nerves, it does not show any discs, so, therefore, Dr. Michaels questions how Dr. Rose could make “*the jump*” to say the First Plaintiff needs steroids or a disectomy or a fusion. Dr. Michaels said no pain management doctor would ever order steroids without seeing an MRI of the back and it is incomprehensible how Dr. Rose would order epidural steroid injection.



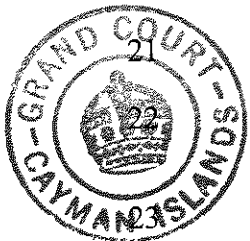
1 121. Dr. Michaels said that if the lamina fracture were impinging upon the canal, surgery
2 would have been done on it to take that fracture off the canal. He said it specifically
3 addresses the fact in the JMH report, and on the CAT scan, that the lamina fracture
4 did not result in any canal stenosis. Dr. Michaels said the First Plaintiff may have
5 some intermittent back pain, but that does not lead to a disectomy or epidural
6 steroid injections as causally related to the accident. Dr. Michaels said he cannot
7 “*make that jump.*” Dr. Michaels said he cannot understand Dr. Rose saying that the
8 First Plaintiff is close to having a spine fusion operation with his present complaints
9 and present situation. Dr. Michaels said spine fusion operations have a high failure
10 rate and it is not warranted in the case of this First Plaintiff.

11 122. Again, I note that the First Plaintiff did not plead any lumbar spine injury in either
12 his Statement of Claim dated the 15th August 2006 or in his Amended Statement of
13 Claim dated the 26th July 2012

14 123. Accordingly, I reject this claim and make no award under this heading

15 124. I consider it important and necessary to provide a further short analysis of the
16 conflicting evidence of the two primary medical experts in relation to the
17 orthopaedic injuries sustained by both Plaintiffs. It is difficult to imagine two more
18 conflicting conclusions.

19 On the 13th April 2012 Dr. Rose, after receiving the First Plaintiff’s history, taking
20 x-rays, and, conducting a physical examination, states in his report: “Overall, this
patient [the First Plaintiff] is severely disabled and will have difficulty functioning
in any capacity on a regular basis.”



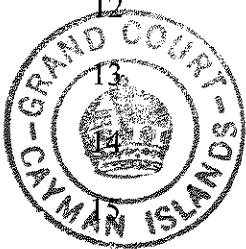
1 On the 15th June 2012 Dr. Michaels, after reviewing the First Plaintiff's history,
2 and, after conducting a physical examination of the First Plaintiff, concludes that:

3 *"The Claimant [the First Plaintiff] exhibits no orthopaedic disability. He may*
4 *work and perform activities of daily living without restrictions relating to his*
5 *orthopaedic injuries."*

6 125. From all the evidence I have read and reviewed, and in particular, the evidence of
7 the First Plaintiff, I reject Dr. Rose's opinion that *"overall (the First Plaintiff) is*
8 *severely disabled and will have difficulty functioning in any capacity on a regular*
9 *basis."* This is totally contrary to the evidence given by the First Plaintiff himself.
10 The First Plaintiff clearly sustained horrific injuries as a result of the accident and,
11 with the help of expert medical care, has made a remarkable recovery. However, he
12 was able to drive within three months of the accident. He was able to accompany
13 his son to sports games after four months, and he returned to work after six months.
14 The First Plaintiff does not require a wheelchair or a walking stick to be
15 ambulatory. In fact, the First Plaintiff does not require any assistance nor is he on
16 any prescribed medication. There is no evidence that the First Plaintiff suffers from
17 any lack of physical mobility.

18 126. The First Plaintiff was able to function as an executive officer with Ernst & Young,
19 and then with PWC from June 2004 to January 2010.

20 He played golf within 12 months of the accident. He cannot quite hit the ball 300
21 yards, but he can still play fairly well. He is a single handicap player and, whilst he
22 cannot play on consecutive days, he can play two or three times per week.



1 He can take care of himself and do normal household chores. He uses an elliptical
2 exercise machine three times per week. He is able to jog – although he has a bit of
3 stiffness after jogging.

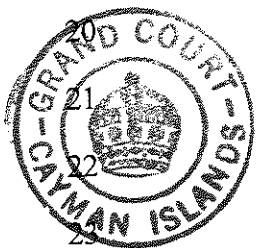
4 127. In my view the First Plaintiff cannot, under any circumstances, be described as
5 “severely disabled” or as having “difficulty functioning in any capacity on a regular
6 basis.”

7 Regrettably I am compelled to find that Dr. Rose was embellishing the extent of the
8 Plaintiff’s injuries when he described the First Plaintiff in those extreme terms.

9 128. Dr. Michaels provided the categories used by the New York State Insurance Fund
10 under the New York Workman’s Compensation Board (NYCB). He said severe
11 disability would be described as “marked” and, to a lesser extent “total disability”
12 which is the most serious of the classifications used by the NYCB.

13 129. I have listened carefully to both medical expert witnesses and observed their
14 demeanours. Dr. Michaels gave his evidence in Court in a measured and
15 straightforward manner. Dr. Rose was flustered and even lost his temper -
16 answering Sir Richard Cheltenham’s reasonable questions in a sarcastic and
17 facetious manner.

18 130. In his examination in chief, and in an answer to the question from the Court, Dr.
19 Rose said he would recommend a fusion surgery. When asked whether it was likely
20 that the First Plaintiff would need a back disectomy and a fusion he said “it’s
21 extremely likely” and he thought the likelihood the First Plaintiff would need one
22 was “greater than 90%”. Later on, under cross examination, when it was put to Dr.
23 Rose that the First Plaintiff did not have persistent back pain nor was on any



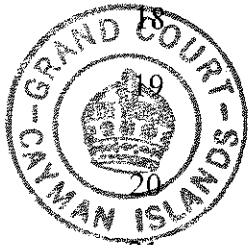
1 medication, Dr. Rose adopted a much softer approach and stated that the First
2 Plaintiff would likely require continued care to his lower back for osteoarthritis –
3 requiring epidural steroid injections. He added that the First Plaintiff “*may*” require
4 surgical intervention at some point in the future for disectomy and fusion.

5 131. In addition, in examination in chief Dr. Rose said that when discussing a disectomy
6 and fusion there is no guarantee of “*a 100% take on fusion [i.e. that the surgery will*
7 *be successful.]*” Dr. Rose went on to state that there is a pseudarthrosis, which
8 means that “it doesn’t fuse” in an attempt at fusion and this can be for many
9 reasons. This then requires a secondary procedure, but this is easily an undertaking
10 of between \$100,000.00 and \$120,000.00. However, shortly after this Dr. Rose
11 stated to the Court that fusion undertakings of the spine are “pretty straightforward”
12 and added that he has done “a lot” of fusions of the spine and there is “not a lot of
13 improvement on the horizon for these types of issues.”

14 132. On being questioned as to whether radical surgery was necessary, Dr. Rose stated in
15 reply that he sees fifteen thousand (15,000) patients per year and does fifteen (15)
16 to twenty (20) surgeries every week and chastised leading counsel for the
17 Defendant for using the word “radical”.

18 133. I find that Dr. Rose’s evidence and diagnosis was not consistent with the evidence
19 of the First Plaintiff or with the medical history of the First Plaintiff.

20 134. Dr. Michaels’ evidence and diagnosis of the First Plaintiff’s injuries were
21 remarkably consistent with Dr. Moriarty’s and Dr. Goldstein’s. I find Dr. Michaels’
22 evidence to be more reliable and more consistent with the First Plaintiff’s own
23 evidence and the First Plaintiff’s medical history since the accident.



HEAD/BRAIN INJURY AWARD – FIRST PLAINTIFF

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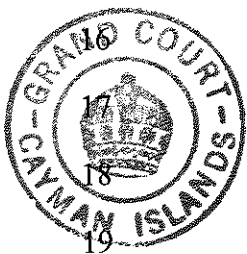
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135. In his Statement of Claim and Amended Statement of Claim the First Plaintiff pleads that he sustained a closed brain injury and severe post- concussion syndrome, resulting in mood disorder, memory impairment and attention and cognitive deficits. The First Plaintiff also pleaded that he had to work very hard to be able to perform on a satisfactory basis, in his employment. He pleads that he has suffered from a degree of depression and is easily fatigued.

136. In his evidence to the Court the First Plaintiff said that in relation to his brain injuries he feels that his memory is his greatest difficulty. He has difficulty remembering people's names and multitasking. Furthermore, he feels he is now less tolerant. He suffers from a diminished self esteem. The First Plaintiff's evidence is that his psychological deficits are caused by neurological deficits. He links to this the fact that he has recently experienced difficulty acquiring employment.

137. In cross examination the First Plaintiff accepted that he had received no medical assistance after his time at the BRC. He further accepted that he had no need for extra help regarding his memory and concentration. The First Plaintiff stated that he likes to use his brain as much as possible. In going to work he was able to rise at 5:40 a.m., get the train at 6:40 a.m., arrive at work at 8:05 a.m., work until 6:30 p.m., get the 6:40 p.m. train and be home at 7:45 p.m.

138. Dr. Shuster, who examined the First Plaintiff on the 13th and 18th January 2010, prepared two extensive reports. In his report Dr. Shuster described the First Plaintiff on the 14th January 2010 as alert and oriented to the person. He also described the First Plaintiff as confused, but responsive and was able to follow simple commands. The First Plaintiff was reoriented to time and place. Dr. Shuster confirms that, from

1 the medical reports, the First Plaintiff was unconscious for several hours. He was
2 transported by air ambulance to Jackson Memorial Hospital in Miami. He regained
3 consciousness and underwent a CT scan of the brain which revealed no traumatic
4 lesions. Dr. Shuster confirmed that the impression was a closed head injury with
5 severe post- concussion syndrome.

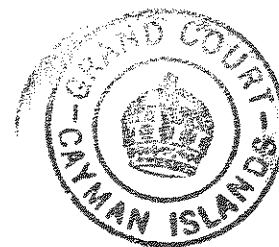
6 139. Dr. Shareef, who examined the First Plaintiff on the 14th January 2004 found that he
7 sustained a closed head injury with moderate to severe post-concussion syndrome.
8 The First Plaintiff was intermittently confused, dazed, very forgetful and unable to
9 concentrate.

10 140. On the 15th January 2004 Dr. Qureshi found the First Plaintiff awake, confused and
11 oriented to name only.

12 141. On the 23rd January 2004 the First Plaintiff was admitted to BRC with a primary
13 diagnosis of neurological dysfunction and concussion. The impression was
14 concussion bilateral hygroma - questionable for a diffuse axonal injury.

15 142. On the 26th January 2004 Dr. Caldeira, reported that the First Plaintiff had severely
16 impaired delayed recall on verbal information and mildly impaired attention.

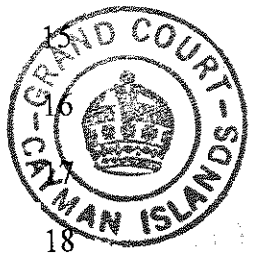
17 143. On the 12th February 2004 the First Plaintiff was assessed for speech and language.
18 He presented with mild cognitive communication impairments characterized by
19 reduction in the area of complex linguistic attention, recall, organisation and
20 reasoning. His overall speech, language and swallowing skills were well within
21 functional limits.



1 144. On the 15th July 2005 Dr. Kuhn generated a report in which it was stated that the
2 findings supported the conclusion that the First Plaintiff had suffered a diffuse
3 axonal injury, which would reduce the efficiency of brain functioning. His findings
4 were also that there was also a brain dysfunction of a mild to moderate degree,
5 which led to a decrease in general efficiency in his brain functioning and
6 contributed to a reduction in his performance levels and productivity levels.

7 145. Dr. Ramirez conducted neuropsychological assessments and found that the First
8 Plaintiff fatigued quickly and had to work hard to perform intellectually at work.
9 His intellectual capacity was within the high average range. His verbal IQ of 131
10 and performance IQ of 102 yielded a full scale IQ of 119.

11 146. On the 24th January 2006 a further comprehensive neuropsychiatric report was
12 generated by Dr. Kuhn. Dr. Kuhn's findings were that in many areas the First
13 Plaintiff was average, but it reflected a significant relative decrease in the First
14 Plaintiff's mental performance. His ability to perform on the job had diminished
15 and he had suffered a decline in mental efficiency and productivity. The medical
16 findings were consistent with the First Plaintiff's complaint that he was "not
17 making things happen" and he was taking "so much longer" to perform his jobs.
18 Accordingly, these findings were consistent with the First Plaintiff's belief that he
19 would have to find a more modest position in relation to his employment.



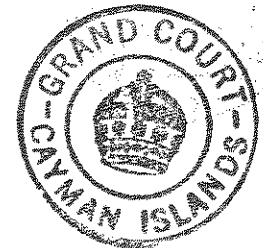
20 147. Dr. Shuster found that the First Plaintiff's overall cognitive functioning falls within
21 the high average level – with verbal skills better developed than non-verbal skills,
22 and working memory and processing abilities falling within the upper portion of the
23 average range. Although the First Plaintiff's tests revealed that his executive skills
24 were within the average level, his verbal skills were rated as high average to

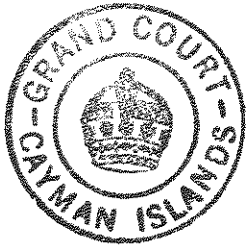
1 superior, and his numerical skills were rated as high average, the First Plaintiff was
2 found not functioning at the pre-morbid cognitive and vocational levels in relation
3 to his memory, learning and motor dexterity.

4 148. The First Plaintiff rates his quality of life as above average. He says his ability to
5 attend, execute, learn and speak have been negatively affected but not severely
6 deteriorated when compared to the general population. Dr. Shuster confirms that the
7 First Plaintiff feels his self esteem has been negatively affected due to difficulty
8 with success at work.

9 149. Dr. Brown prepared evaluations from examinations on the 9th April and the 13th
10 April 2009 and produced the following results:

- 11 i. *Intellectual functioning: First Plaintiff's performance fell within the*
12 *average to high average range.*
- 13 ii. *Cognitive functioning: Plaintiff's performance in memory was low*
14 *average.*
- 15 iii. *Executive function: Average*
- 16 iv. *Verbal function: Low average*
- 17 v. *Attention: average*
- 18 vi. *Information processing speed: High average*
- 19 vii. *Motor skills: High average*
- 20 viii. *Global cognitive score: average.*
- 21 ix. *Memory:*
- 22 a) *Immediate and delayed recognition trials of the verbal memory*
23 *subtest: Between impaired and average.*
- 24 b) *Delayed verbal recognition: average*





1 c) *Non-verbal recognition trials: Between the impaired and low*
2 *average ranges*

3 d) *Delayed non-verbal recognition: Low average*

4 x. *Attention and concentration: Fluctuating visual attention and*
5 *concentration.*

6 xi. *Executive functions and tests: Standard, high average and average*
7 *scores.*

8 xii. *Visual perceptual skills/processing speed: Average*

9 xiii. *Motor skills and information processing speed: High average*

10 xiv. *Verbal functioning: Low average*

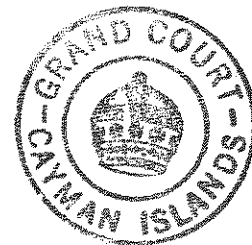
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12 150. Dr. Brown concluded that the First Plaintiff suffered relative weakness and
13 impairments in sustaining visual attention and concentration, initial acquisition of
14 rote verbal information, non-verbal learning and memory, response inhibition and
15 in verbal functioning. Dr Brown said the First Plaintiff was not functioning at the
16 level at which he functioned prior to the accident.

17 151. Dr. Rubenstein on behalf of the Defence examined the First Plaintiff on the 2nd May
18 2012. Dr. Rubenstein viewed the reports of Dr. Brown and Dr. Busichio dated
19 September 2009 and the second updating report of Dr. Shuster of the 20th March
20 2012. Dr. Rubenstein performed a physical examination and the MMSE, which he
21 explained is the standardized screening test for cognitive dysfunction. Dr.
22 Rubenstein found that the First Plaintiff was normal, other than for a minor mistake
23 in immediate recall. He said the First Plaintiff's screening for recent memory
24 calculations, attention span and language function were normal. The First Plaintiff's
25 overall score was 29 out of 30 – well within normal limits. Dr. Rubenstein stated
26 that his diagnosis was that the First Plaintiff had sustained a cerebral concussion

1 with retrograde amnesia for the event which happened over 8 years ago. The
2 MMSE was normal and Dr. Rubenstein could find no evidence of significant
3 cognitive dysfunction at the present time.

4 152. The Plaintiffs' expert, Dr. Brown, had questioned the value of the MMSE test and
5 said it was rather out of date. Dr. Rubenstein said the MMSE is a standardized
6 bedside screening test, which is meant to be an office-based test which tests and
7 scores a variety of the basics of cognitive function, and that includes language
8 function, ability to do calculations, and the ability to extract recent and remote
9 memory and basic information. The Court notes that the MMSE was also used by
10 the doctors at the BRC in order to evaluate the First Plaintiff's mental state. Dr.
11 Rubenstein was of the view that the fact that the First Plaintiff was able to hold
12 down a high level executive job from early June 2004 until the end of 2007, meant
13 that he was functioning at a level which is inconsistent with significant cognitive
14 dysfunction.

15 153. In cross examination Dr. Rubenstein accepted the suggestion from counsel for the
16 Plaintiffs that after about a year to 18 months, any brain injury is permanent and the
17 patient has reached a maximum level of recovery. However, Dr. Rubenstein also
18 said that he most impressed by the fact that the First Plaintiff was able to return to
19 work and worked at Ernst & Young and PWC for a number of years, and continues
20 to work in the financial services and insurance industries.



1 154. From my review of the all the medical evidence in relation to the First Plaintiff's
2 claim for damages for his head/brain jury, I can find no evidence of any personality
3 change or any effect on the First Plaintiff's sight, speech and senses, or any risk of
4 epilepsy. His ability to work was not greatly reduced by virtue of the fact that he
5 continued to work at Ernst & Young for 3 ½ years, and then work at PWC for a
6 further a period of 2 years and some months. Therefore, the First Plaintiff worked
7 as a senior executive for almost 6 1/2 years from early June 2004 to early 2010,
8 before beginning work with GroupSystems on the 2nd May 2011 until the end of
9 September 2011. The First Plaintiff has made a remarkable recovery. He has
10 returned to work, even though he himself said he had to work very hard to perform
11 at a satisfactory level.

12 155. The First Plaintiff's job at Ernst & Young was terminated at a time when the global
13 financial services industry was experiencing great difficulties. What is significant is
14 that the First Plaintiff was able to secure a similar executive position with Ernst &
15 Young's competitor, PWC, actually before his termination date with Ernst &
16 Young. PWC must have been impressed with the First Plaintiff's CV, and his
17 performance in order to then offer him the job at the age of 53. Having taken all the
18 evidence into consideration I find that the brain injury the First Plaintiff sustained
19 comes within Chapter 3(A)(d) of the JC Guidelines² and is of the "less severe"
20 brain damage category. The learned authors state:

21 *"In these cases the injured person will have made a good recovery and will be*
22 *able to take part in normal social life and return to work. There may not have*
23 *been a restoration of all normal functions and so there still be persisting*
24 *problems such poor concentration and memory or disinhibition of mood, which*
25 *may interfere with lifestyle, leisure activities and future work prospects. At the*
26 *top of this bracket there may be a small risk of epilepsy."*

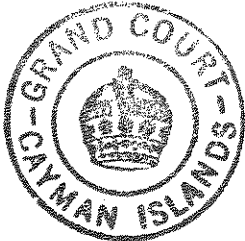
² Guidelines for The Assessment of General Damages in Personal Injury Cases, Eleventh Edition,
Compiled for the Judicial College, Oxford Press

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The learned authors of the JC Guidelines go on to state:

- “The level of the award within that bracket will be affected by:*
- i. The extent and severity of the initial injury;*
 - ii. The extent of any continuing, and possible permanent, disabilities;*
 - iii. The extent of any personality change;*
 - iv. Depression.”*

156. Accordingly, I award, for brain damage, the sum of **US\$50,000.00**.

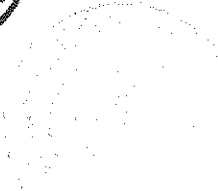


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FRACTURE OF NOSE – FIRST PLAINTIFF

157. The medical evidence reveals that the First Plaintiff sustained a minimally displaced fracture of the nasal bones, but the remainder of the osseous structures of the face was intact. There is no evidence that the First Plaintiff required any active treatment or surgical intervention in relation to this fracture.

158. I agree with the First Plaintiff’s counsel that this injury falls within Chapter 9 of the JC Guidelines at C(iii) and, accordingly, I award the sum of **US\$2,917.00**.



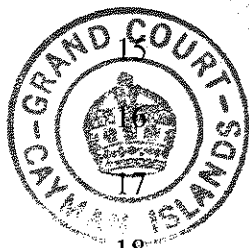
1 *SCARRING – FIRST PLAINTIFF*

2 159. The First Plaintiff suffered multiple facial lacerations resulting in scarring and
3 disfiguration. There is a jagged healed laceration to the First Plaintiff's left
4 eyebrow, a jagged scar to his right eyebrow and a scar between his upper lip and his
5 nose. With reference to the JC Guidelines, the scars over the First Plaintiff's left
6 eyebrow and between his lip and nose are significant, whereas the scar over the
7 right eyebrow is less significant.

8 160. In addition, the First Plaintiff sustained a 37cm healed laceration to the upper right
9 side of his lumbar spine, a 7cm healed scar over his right flank, a 4 x 4cm healed
10 abrasion over the left patella, a 3cm healed incision under the right axilla, scarring
11 to the left tibia and scarring to the left shoulder.

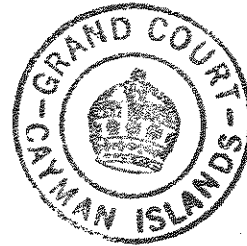
12 161. Leading counsel on behalf of the Defendant cautions the Court to be aware that
13 double counting can result from an itemization of every injury sustained by the First
14 Plaintiff. Leading counsel argues that, notwithstanding the several injuries to
15 several parts of the body, it is often one set of pain arising from different sources
16 and one period of disability. Accordingly, leading counsel submits that it is wrong
17 in principle to attach a sum for each and every injury and to add, simply without
18 introducing a discount for balance.

19 162. As was properly conceded by counsel for the First Plaintiff, a significant proportion
20 of the body scarring related to operations that the First Plaintiff underwent as a
21 result of the accident and have, already, to a large extent, been taken into account
22 under the previous awards set out above and in the overall assessment of General
23 Damages.



1 163. Accordingly, having reviewed the medical evidence, the First Plaintiff's evidence
2 and the photographs, and, taking into account the helpful submissions of both
3 counsel, I award the First Plaintiff the sum of **US\$18,000.00** under this heading.

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1 *THE SECOND PLAINTIFF'S CASE*

2 *THE SECOND PLAINTIFF'S INJURIES, LOSS & DAMAGE*

3 164. The Second Plaintiff in the Amended Statement of Claim pleaded the following:

4 a. *Injuries:*

5 i. Oblique fracture to right distal tibial shaft open;

6 ii. Open wound to the right leg necessitating skin graft from donor site;

7 iii. Obvious deformity of the right leg

8 iv. Multiple skin grafts from the left thigh

9 v. Torn lateral meniscus to left knee and chondromalacia patella requiring
10 arthroscopy

11 vi. Multiple permanent scarring on lower extremities;

12 vii. Multiple contusions and abrasions.

13 b. *Post-accident impairment:*

14 i. The Second Plaintiff continues to suffer from her injuries which appear
15 to be permanent and have impacted her day to day living. Further, she
16 was an avid runner and has been unable to run since the accident.
17 Additionally, the potential for her to be able to run again in the future is
18 very unlikely.

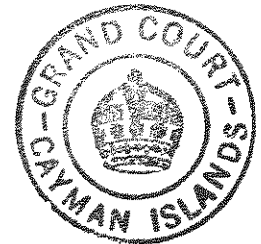
1 165. The Second Plaintiff was admitted to George Town Hospital and subsequently
2 airlifted to JMH in Miami where she underwent a fixation of her right tibia and
3 fibula fracture with an intramedullary rod and screws on the 6th January 2004. She
4 remained in hospital until the 11th January 2004 when she was discharged in a
5 wheelchair and subsequently progressed to a walker, crutches and then a cane.

6 166. In February 2004 the Second Plaintiff underwent a skin graft procedure at the
7 Huntington in New York to treat the open wound in her right leg. The skin graft
8 was taken from the left thigh.

9 167. In August 2004 the Second Plaintiff underwent operative arthroscopy to her left
10 knee. She still suffers ongoing pain in her left knee and walks with a limp.

11 168. The Second Plaintiff's Statement of Claim claims that, on the 18th April 2006, the
12 Second Plaintiff underwent arthroscopic right knee surgery for removal of the
13 hardware from her right leg – placed there during the surgical procedure on the 6th
14 January 2004. The right leg has an obvious deformity. There are also has unsightly
15 upper left thigh multiple skin grafts secondary to injury.

16 169. The Second Plaintiff continues to suffer from her injuries which appear to be
17 permanent and they have impacted her day to day living. The Second Plaintiff was
18 an avid runner and has been unable to continue running since the accident. The
19 potential for her to be able to run again in the future is unlikely.



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THE SECOND PLAINTIFF'S EVIDENCE

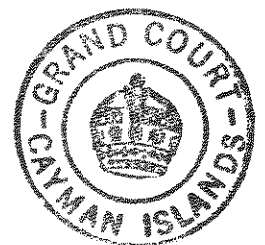
170. The Second Plaintiff recalls being taken into hospital. She understood from the medical team that her right leg sustained a compound fracture of the tibia and fibula and she recalls the surgeon “violently” moving the leg, and that was when she realised the severity of the injury.

171. The Second Plaintiff recalls the trauma she experienced at the JMH in Miami. She recalls her surgery which took place five days after her arrival at JMH, which lasted for 4 ½ hours. After the surgery she said the sheer arduousness of the injury to her right leg became apparent; there was so much damage that “*it looked as if a shark had taken a huge bite*” out of her right leg.

172. Five days after the surgery the Second Plaintiff was released from JMH and allowed to fly home with her daughters and her mother-in-law. At home she was still unable to walk and was confined to a wheelchair. A nurse attended twice per day to change bandages and clean the wound on her right leg.

173. The Second Plaintiff told the Court that, sometime later, she was able to use a walker and she began attending the Huntington to visit her husband. She experienced constant fatigue and pain.

174. The Second Plaintiff's evidence is that her rehabilitation progressed slowly. Approximately three weeks after being on walker she was able to walk with a cane. The Second Plaintiff used the cane for approximately 3 months.



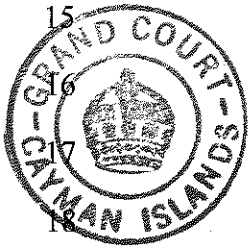
1 175. The Second Plaintiff states that she was concerned about her wound to her right leg
2 and she realised that she would need further skin grafts. The first skin graft
3 involved taking skin from the area of her upper left thigh to her left knee. This was
4 very painful.

5 176. The Second Plaintiff continued physiotherapy three times per week throughout
6 most of April 2004, which she states that she found very painful and exhausting.
7 Physiotherapy continued for most of 2004.

8 177. The Second Plaintiff then began caring for the wound on her own and
9 approximately 6 months after the accident the Second Plaintiff was able to remove
10 the dressings as the wound to the right leg had essentially healed – leaving a very
11 large and obvious “deformity”. The Second Plaintiff was advised that no surgery
12 could correct the “deformity.”

13 178. The Second Plaintiff states that, prior to the incident, she would wear dresses and
14 skirts and enjoy getting dressed up. The Second Plaintiff states that, because of the
15 “deformity”, she no longer wears dresses. The Second Plaintiff states that the
16 “deformity” still looks like a huge shark’s bite – as it has the look of a chunk of
17 skin taken out of her right calf. The Second Plaintiff states that she finds the mark
18 on her right leg “quite embarrassing” particularly when she is at the sea or
19 swimming and there is still significant pain.

20 179. The orthopaedic surgeon for both Plaintiffs, Dr. Moriarty, noticed that the pain in
21 her right knee seemed constant and he ordered an MRI on her knee. It was
22 discovered that the Second Plaintiff had sustained a torn meniscus and floating
23 bone from the trauma of the accident.



1 180. As a result the Second Plaintiff underwent her fourth surgery to the right knee and it
2 took place in August 2005. After this fourth operation, the Second Plaintiff's
3 evidence is that she continued having physical therapy to build her strength and
4 flexibility in the right knee. She describes this as a gruelling process.

5 181. Two years after the accident the Second Plaintiff reports that she began to feel pain
6 in her left knee. Again, she visited Dr. Moriarty. The MIR he ordered revealed a
7 torn meniscus in her left knee, and thus she underwent the same operation and went
8 through the same painful three months of physical therapy as she did with her right
9 knee.

10 182. The Second Plaintiff's evidence is that she is no longer able to do many of the
11 activities she did before the accident. She is no longer able to run. She is limited to
12 walking and is unable to walk too fast or too far and she reports that her ankles
13 swell when she is on her feet for too long. She cannot wear high heeled shoes
14 because of the screw in her ankle.

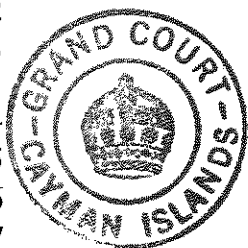
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1 **SECOND PLAINTIFF'S MEDICAL EVIDENCE**

2 183. On the 9th January 2006 the Second Plaintiff was examined by Dr. Robert
3 Goldstein. Dr. Goldstein confirmed the various surgical operations that are set out
4 in the Second Plaintiff's evidence. Dr. Goldstein reported:

- 5 i. *The Second Plaintiff walks with a slight limp – favouring her right*
6 *lower extremity.*
- 7 ii. *Her straight leg-raising was to 90 degrees when bilaterally sitting and*
8 *supine, and there was full range of movement in hips, knees and ankles.*
- 9 iii. *Examination of the right leg revealed a 4cm healed surgical scar over*
10 *the patella tendon.*
- 11 iv. *There were four surgical scars noted on the mid medial proximal distal*
12 *leg, secondary to screw placement. This area was very tender to*
13 *palpitation, especially the area over the distal screws.*
- 14 v. *There was a 4 -9cm scar secondary to the skin graft in the mid medial*
15 *right leg. The area is depressed and there was numbness to light touch*
16 *and pin prick in the lower edge of the scar and there was tingling noted*
17 *throughout the scar.*
- 18 vi. *There was a 5 x 8 cm area noted on the left leg secondary to the skin*
19 *graft donor site.*



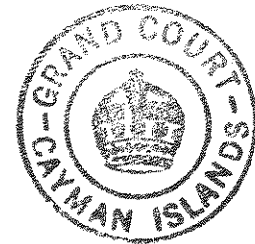
20 184. Dr. Goldstein confirmed that the Second Plaintiff sustained the following injuries:

- 21 i. *Oblique fracture: Right distal tibial shaft – open;*
- 22 ii. *Intramedullary rod fixation with transfixing screws – right leg.;*
- 23 iii. *Open wound – right leg – necessitating skin graft with donor site on the*
24 *left thigh;*
- 25 iv. *Torn lateral meniscus – left knee – and chondromalacia patella,*
26 *requiring operative arthroscopy.*
- 27

1 185. Dr. Goldstein confirmed that these injuries were all causally related to the motor
2 vehicle accident which occurred on the 30th December 2003. However, Dr.
3 Goldstein states that the Second Plaintiff's prognosis is guarded as she is
4 symptomatic with pain in her right leg and left knee. Dr. Goldstein confirmed that
5 these injuries have compromised the Second Plaintiff's normal activities of daily
6 living and have interfered with her ability to run.

7 186. A plastic surgeon, Dr. James Romanelli ("Dr Romanelli") confirms that the scars of
8 the right lower extremity are permanent and the patient will have permanent
9 contoured deformity as well as pain. Dr. Romanelli confirmed that these can be
10 corrected with tissue transfers using micro surgery or multiple-stage surgeries,
11 including tissue expansion:

Procedure	Costs in US\$ (<i>Proposed by Dr. Romanelli</i>)
Surgical fee for micro surgery to correct this deformity	\$45,000.00
Hospital fees – involving hospital stay up to 5 days	\$20,000.00 to \$35,000.00
Post-operative rehabilitation with physical therapy for several months	Up to \$8,000.00
Surgical fees (<i>if multiple-stage surgeries are required to correct the deformity</i>)	\$20,000.00
Hospital fees (<i>if multiple-stage surgeries are required to correct the deformity</i>)	\$15,000.00



1 187. Dr. Rose examined the Second Plaintiff on the 19th March 2012. He confirmed that
2 the Second Plaintiff had sustained permanent partial disability to her right lower
3 extremity. Dr. Rose said she will have permanent pain, swelling and limited range
4 of motion and crepitus above the right and ankle – making it difficult for her to
5 stand and walk for extended periods of time. Dr. Rose states that, in relation to the
6 right ankle, the Second Plaintiff will likely require the use of her rocker-bottom
7 shoe, and will likely require ankle fusion or total joint replacement at some point in
8 the future.

9 188. Dr. Rose set out costs as follows:

Procedure	Costs in US\$ (<i>Proposed</i> by Dr. Rose)
Removal of right tibia	\$11,000.00
Arthroplasty of the right knee	\$94,850.00

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SECOND PLAINTIFF'S AWARDS

RIGHT TIBIA AND FIBULAR FRACTURE AWARD – SECOND PLAINTIFF

189. The Court agrees with counsel for the Second Plaintiff and considers that this injury comes within Chapter 7(L)(b)(iii) of the JC Guidelines and the “Serious” category. It is a serious compound or comminuted fracture involving instability, prolonged treatment, a lengthy period of non weight bearing and a near certainty that arthritis will occur plus scarring. I would therefore award **US\$62,000.00**.

SCARRING TO RIGHT LEG AWARD – SECOND PLAINTIFF

190. I accept that this has caused the Second Plaintiff considerable pain and suffering. There is also a psychological impact on the Second Plaintiff of the scarring, which provides a significant aggravating feature to this injury. She can no longer feel comfortable wearing dresses or swimwear. She tries to hide the scarring and this action on her part is a constant reminder to her of how embarrassed she is by the scar. It covers as significant area of her leg and has caused the Second Plaintiff pain. This injury falls within Chapter 10 of the JC Guidelines where the learned authors state:



“A large proportion of awards for a number of noticeable laceration scars are a single disfiguring scar of the leg...fall in the bracket of £5,430.00 to £16,250.00”

191. I would therefore award **\$35,000.00**.



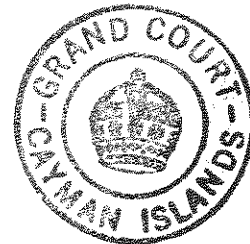
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RIGHT KNEE AWARD – SECOND PLAINTIFF

192. I accept that this is a serious knee injury where there has been disruption of the joint, gross ligament damage, lengthy treatment as well as considerable pain and suffering. Again I agree with counsel for the Plaintiffs that this injury comes within Chapter 7(M)(a)(i) and the “Severe” category and, accordingly, I award the sum of **US\$100,000.**

LEFT KNEE AWARD – SECOND PLAINTIFF

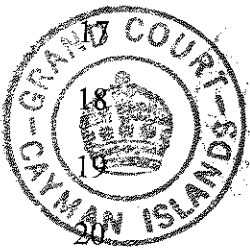
193. I consider that the injuries that the Second Plaintiff received and the consequential surgical procedure bring this injury within Chapter 7(M)(b)(i) and the upper “Moderate” category as it was an injury involving a torn meniscus, resulting in minor instability and requiring and operation. Accordingly I award **US\$20,000.**



RIGHT ANKLE AWARD – SECOND PLAINTIFF

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2 194. The Court finds that it is extraordinary that, of the many doctors who examined the
3 Second Plaintiff only Dr. Rose has seen any significant problem with the Second
4 Plaintiff's right ankle. She has suffered significant pain in her right leg, but none of
5 the other doctors have brought to light any prognosis which would involve a total
6 ankle replacement. The Second Plaintiff did not complain of the ankle in her
7 witness statement. The ankle was not specifically pleaded in the Statement of Claim
8 in 2006 or the Amended Statement of Claim of 2010. When the Second Plaintiff
9 underwent her arthroscopy in the left knee on August 2004, there was no report of
10 any problems with the right ankle. Indeed, Dr. Moriarty stated that the Second
11 Plaintiff's right leg has gone on to heal nicely. In April 2006 Dr. Moriarty
12 performed an arthroscopy on the medial meniscus of the Second Plaintiff's right
13 knee. At that time Dr. Moriarty examined her right lower extremity, which he said
14 revealed well-healed traumatic and surgical scars.

15 In January 2006 Dr. Goldstein found there was as full range of movement of hips,
16 knees and ankles and, there is no evidence of the dramatic, degenerative joint
17 disease which Dr. Rose states has affected both the foot and the ankle. However, I
18 do accept that there is an overlap with the Second Plaintiff's injuries as they
19 primarily impact the function of her right leg. As a result, I accept that the limb as a
20 whole becomes of much less practical use and that the pain, suffering and loss of
21 amenity continue. The Second Plaintiff has been under the care of Dr. Moriarty, an
22 experienced orthopaedic surgeon, and there is no mention of any need for any ankle
23 fusion or replacement in his reports. I consider that this injury comes within
24 Chapter 7(N)(d) which is of a "modest" category and, accordingly, I award
25 **US\$8,000.00.**



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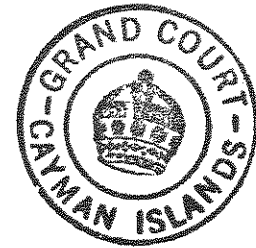
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SPECIAL

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DAMAGES

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THE FIRST PLAINTIFF

LOSS OF EARNINGS – FIRST PLAINTIFF

195. The First Plaintiff returned to work at a senior executive level in early June 2004 and continued through 2005, 2006 until December 2007. The First Plaintiff obtained employment with PWC in late 2007 and was relieved of his office in February 2010. The First Plaintiff secured employment with GroupSystems in March 2011 and remained until September 2011.

196. The First Plaintiff's per-annum earnings were as follows:

Year	Amount	Note
2003	US\$161,462.00	
2004	US\$161,462.00	estimated
2005	US\$161,462.00	estimated
2006	US\$161,462.00 - US\$182,000.00	
2007	US\$182,000.00	
2007	US\$150,000.00	The First Plaintiff admitted that in late 2007 he was at a difficult age to find new employment, but, in October 2007 he secured a similar executive post with Ernst & Young's competitor, PWC, at a salary of US\$150,000.00 with a commission and bonus package
2008	US\$177,944.00	
2009	US\$201,904.00	
2010	US\$ 78,000.00	This amount was earned by the First Plaintiff before he was laid off at the end of February 2010



1 197. Counsel on behalf of the First Plaintiff submits that the cognitive efficiency
2 suffered by the First Plaintiff made it impossible for him to continue in his pre-
3 accident employment, or in any employment at a comparable executive level. Ms.
4 Owen relies upon Dr. Brown who states that he:

5 *"... doesn't think the First Plaintiff could manage with average skills as an*
6 *executive. A man with graduate education and earning \$200,000 [per annum]*
7 *can't manage with average skills, the skills he requires include planning,*
8 *executive skills I agree that he could work at a lower level...."*

9 198. Counsel on behalf of the First Plaintiff submits that Dr. Schuster supports this view
10 by stating: *"The First Plaintiff has failed repeatedly at more complex jobs."*

11 199. In addition, counsel submits that the First Plaintiff's statement that:

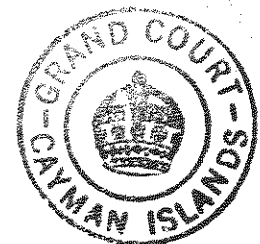
12 *"I would read the website of a Company that I was going to meet and the next*
13 *day I could barely remember much of what I read."*

14 The First Plaintiff also submits that when he was dismissed by PWC in January
15 2010 it was due to "performance reasons."

16 200. It is common ground that recovery in brain injury takes place within a year, and,
17 after two or possibly three years the recovery is complete. Both Dr. Brown and Dr.
18 Schuster submit that the First Plaintiff can work, although not at the highest
19 executive level.

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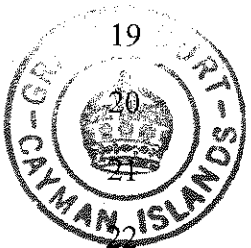
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1 201. Dr. Rubenstein carried out the MMSE and the First Plaintiff's overall score was 29
2 of 30, which is well within normal range. Dr. Rubenstein said bedside screening for
3 dementia was negative, and he found no evidence of any significant cognitive
4 dysfunction at that time. Dr. Rubenstein defined significant cognitive dysfunction
5 as someone who cannot function independently in activities of daily living or
6 maintain employment.

7 202. Dr. Rubenstein admitted that he did no testing to determine the First Plaintiff's pre-
8 morbid functioning level, but said it could be assumed it was reasonably normal –
9 given the First Plaintiff's history of work as a senior executive since his accident.

10 203. The Court was impressed by the First Plaintiff's evidence and his stirring efforts to
11 mitigate his loss. To that extent, to work at a senior executive level for two global
12 accounting firms for 6 ½ years demonstrates to this Court that the First Plaintiff can
13 carry out work at this level to a satisfactory level. The First Plaintiff worked for
14 Ernst & Young for over 3 ½ years after the accident, and then for PWC for just over
15 2 years. If the First Plaintiff suffered from any significant cognitive deficiency, it is
16 highly unlikely that he would have maintained full employment for all that time. It
17 is clear that the First Plaintiff carried out a great deal of his work to a satisfactory
18 level. He was punctual and there is no evidence that, once he resumed working, he
19 had to take any significant time off work because of the accident. His salary
20 steadily increased from 2004 to 2010. The First Plaintiff said he had confidence to
21 speak and to speak well. He could read and did not have any need for assistance
22 regarding his memory and concentration. In fact, there is no evidence that the First
23 Plaintiff received any medical assistance after BRC.



1 However, the First Plaintiff does state that he had some difficulty multi-tasking and
2 remembering names, and that has caused a loss of self esteem..

3 204. As leading counsel for the Defendant submitted, the First Plaintiff in his evidence
4 *“was fully alert, showed no lapse in concentration, or demonstrated any memory*
5 *deficits. He was fully focussed, relaxed, articulate and fully rational in his*
6 *responses. At no time did the First Plaintiff appear unable to deal with subtle*
7 *distinctions.”*

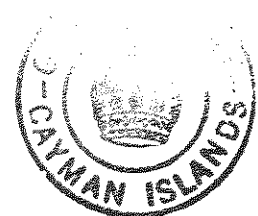
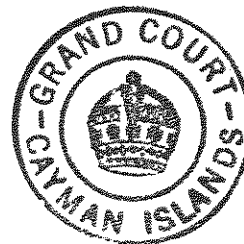
8 205. The Defendant’s leading counsel accepts that it is difficult for the Court to assess,
9 given that it does not appear from Mr. Farrell’s evidence that his job was ever
10 filled. Someone at another office was assisting in the discharge of his job
11 responsibilities which were, by that time, partly taken over by management.

12 Leading counsel goes on to submit that, in short, it would appear that the company,
13 E&Y, in ridding itself of Mr. Farrell, was also trying to affect/effect the economies.

14 As Sir Richard Cheltenham states, it raises a tricky question. What exactly was the
15 cause of his termination? Was his termination informed by the lousy economic
16 environment in part or in whole?

17 206. Leading counsel goes on to submit that one reasonable inference available to the
18 Court is that the First Plaintiff was made redundant. Leading counsel for the
19 Defendant admits that there is no clear causal connection between his termination
20 and his injuries and their sequela.

21



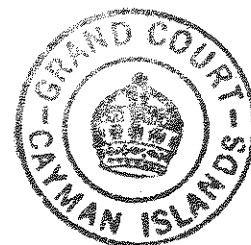
1 207. The First Plaintiff bears the burden of satisfying the causal link between the injuries
2 sustained and any loss of earnings or pension rights. The potential intervening or
3 influencing factors are what has been described as the “lousy economic climate”
4 and his advancing years.

5 208. On the evidence before me the Plaintiff maintained his employment at an executive
6 level to a satisfactory standard from early June 2004 to early 2010. The Court notes
7 that the First Plaintiff was able to secure a similar executive post with PWC in late
8 2007. It is quite conceivable that the lousy economic climate and the age of the
9 First Plaintiff could have been responsible for his termination by PWC and
10 therefore I find, on a balance of probabilities, that the First Plaintiff has not proven
11 that the injuries sustained in the accident on the 30th December 2003 caused this
12 loss. To put it another way, I do not find that it was reasonably foreseeable that the
13 First Plaintiff would lose his post in January 2010 by reason of delayed cognitive
14 impairment. I also find that the First Plaintiff has not discharged the burden of
15 establishing the causal link between the injuries sustained and the loss of earnings
16 in 2010 and 2011.

17 209. It is clear that the doctors have confirmed that the First Plaintiff is able to work. The
18 First Plaintiff has spoken of his enthusiasm to work and his desire to use his brain
19 as much as possible.

20 210. Dr. Shuster’s evidence suggests that the First Plaintiff’s income will be reduced to a
21 figure below US\$95,000.00. The First Plaintiff is keen to work before possibly
22 retiring at the age of 62 years.

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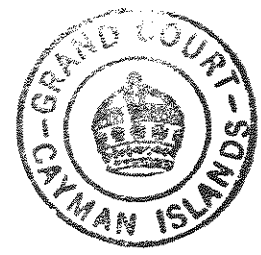
1 211. I am grateful to leading counsel for the Defendant for his generous concession to
2 provide the First Plaintiff with an award for "*prospective loss of earnings*" because
3 of his devalued position on the labour market – using a multiplier/multiplicand
4 approach. Leading counsel submits that "*this approach permits the Court to do the*
5 *best it can in the circumstances and give expression to the difficulties of attributing*
6 *the First Plaintiff being out of work fully and squarely to neurological sequelae*
7 *resulting from the accident.*"

8 212. If I apply the 2.5% discount rate to Table 9 of the Ogden Tables, the appropriate
9 multiplier for a man of 58 years, with a retirement age of 65 years of age, is 6.25.

10 Counsel for the First Plaintiff suggests that the multiplier is split between 1/3rd x the
11 period of unemployment which 2.086 and 2/3rd time in employment at reduced
12 remuneration, which is 4.173. Applying this 4.173 multiplier to the multiplicand of
13 US\$125,000.00 (US\$200,000.00 – US\$ 75,000.00, which is the difference between
14 pre-dismissal income and estimated future income) the First Plaintiff will suffer a
15 future loss of earnings of **US\$591,250.00**.

16 213. As I stated earlier, the First Plaintiff has not established on the balance of
17 probabilities that the injuries sustained from the accident directly resulted in any
18 loss of future wages or pension entitlement. For the avoidance of doubt, I only
19 make this award for "*prospective loss of earnings*" as a result of the Defendant's
20 leading counsel's gracious and generous concession to the First Plaintiff's current
21 position in the job market.

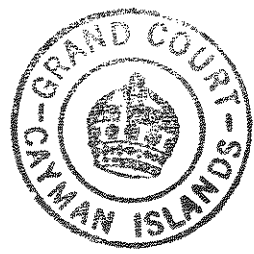
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PENSION LOSS – FIRST PLAINTIFF

214. The First Plaintiff has stated that he has a pension from Ernst & Young and from Dun & Bradstreet. There is no evidence that he did not receive his pro-rated pension entitlements from his employers and this Court cannot find that the Defendant should be liable for any loss of pension – particularly in light of the fact that the First Plaintiff has remained in fulltime employment from the date of his accident on the 30th December 2003 until January 2010. Again, the First Plaintiff has not established on the balance of probabilities that any pension loss is as a result of the injuries he sustained in the accident on the 30th December 2003. Accordingly, I make no award under this heading.



PAST MEDICAL COSTS – FIRST PLAINTIFF

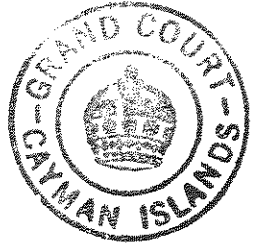
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215. The First Plaintiff claims the sum of US\$256,583.50. This claim is supported by a letter, dated the 27th August 2007 from the First Plaintiff's insurers – Aetna Health Plans.

216. The Defence submits that this amount is not recoverable on the basis that there is no evidence that the First Plaintiff has been pursued by Aetna for this amount.

217. In the Court of Appeal decision of *Coleman v. MacDonald and Smyth* 1952-79 CILR 103, the Plaintiff's medical expenses were covered by medical insurance that was paid for between herself and her employer. The Judgement of the Court of Appeal given by Carberry J.A. held that the Defendant in that case was responsible for paying all of the medical expenses incurred by the Plaintiff in treating her injuries. Carberry J.A. held that, the fact that the First Plaintiff's medical expenses had initially been met by her accident insurance, did not in any way reduce the Defendant's liability to pay them. In *Coleman v MacDonald and Smyth* the Court of Appeal found that it was irrelevant that the Court did not have the exact terms and conditions of the scheme before it, as they Plaintiff, in any event,

“was entitled to recover these expenses from the Defendant responsible for her injuries, once it is clear they were in fact incurred (and paid) where necessary, and the charges reasonable.”

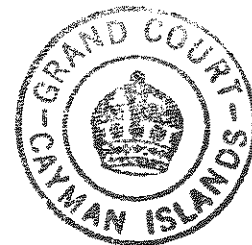


1 218. The Court of Appeal in *Coleman v. MacDonald and Smyth* also held that the
2 recovery of medical expenses from the Defendant could also be justified on the
3 general principle that he had a liability to make good the real loss he had caused to
4 the Plaintiff, which included losses incurred by third parties in meeting the
5 Plaintiff's needs – the Plaintiff's loss was the need for those services, the value of
6 which, for the purpose of ascertaining the amount of his loss, with the proper and
7 reasonable cost of supplying the Plaintiff's needs.

8 219. More recently, the learned Chief Justice in *Wilson v Ebanks* Cause Number G
9 327/04 in his written Judgement dated the 14th June 2011 made an award for past
10 expenses stating at paragraph 57:

11 *"This has been paid for up to now under Mr. Wilson's employment benefit plan*
12 *and, as evidenced in a letter from an attorney acting for his former employer,*
13 *Solarcom Holdings, the total past expenses for which compensation must be*
14 *paid have been agreed at US\$228,361.47."*

15
16 Accordingly, I follow the Chief Justice in *Wilson v. Ebanks* and the Court of
17 Appeal in *Coleman v. MacDonald and Smyth* and I make an award for
18 US\$256,583.50 in relation to the First Plaintiff's past medical costs. When the final
19 Order is drawn up, counsel may wish to consider whether the award under this
20 heading should be paid directly to Aetna.



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PAST MEDICAL COSTS OF SECOND PLAINTIFF

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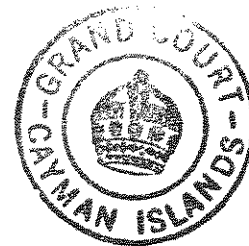
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220. In relation to the Second Plaintiff, the same insurers, Aetna Health Plan, set out medical costs in the letter provided by the Rawlings Company LLC which sets out both the amount billed and the amount paid. The relevant figure for Aetna's Health Plans is the paid amount, which for the Second Plaintiff is **US\$90,726.23**. Accordingly, I award that figure for the Second Plaintiff's past medical costs.



FUTURE MEDICAL CARE AWARD – FIRST PLAINTIFF

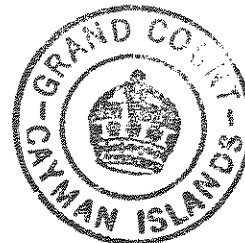
221. Dr. Rose, in his report dated the 13th April 2012, identifies the need for the following medical care:

Procedure	Costs in US\$ (<i>Proposed by Dr. Rose</i>)
Arthroplasty, left knee	\$94,850.00
Epidural steroid injections to the lumbar spine	\$14,850.00
Lumbar spine disectomy and fusion	\$70,000.00
Total right hip replacement with approximately 6 months for physical therapy	\$82,500.00 ³
Ankle fusion or total joint replacement	\$45,000.00
<i>Proposed Total</i>	\$307,200.00

222. I find all Dr. Rose's cost estimates to be very high. In addition, from all the evidence I have heard I find that none of this treatment is necessary, and I find that the First Plaintiff has failed to demonstrate, on the balance of probabilities that such future medical costs are required.

223. However, I accept the Defendant's fair and reasonable suggestion that the First Plaintiff, as a result of the accident may need to see his doctors with more frequency than at present and he may have doctor's bills, medication and even therapy costs to address.

224. Accordingly, based on a life expectancy of 78, I would estimate the sum of \$2,500.00 per year, as a multiplicand, with a multiplier of 20, which provides for a sum of **\$50,000.00** for future medical care.



³ Later in his oral evidence Dr. Rose said this figure could easily be US\$100,000.00 to US\$120,000.00

FUTURE MEDICAL CARE AWARDS – SECOND PLAINTIFF

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225. Dr. Romanelli has provided recommendations for the surgical care of:

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i. The traumatic wound of the right lower leg, treated with skin graft;

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ii. Counter deformity of the right medial calf

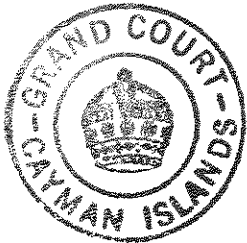
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iii. Wide atrophic scar of the proximal aspect of the right lower leg.

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226. I therefore make the following award:

Procedure	Cost Item	Court's Awards	US\$
<i>Correction of Deformity</i>			
	Surgical fee		\$40,000.00
	Hospital fees		\$27,500.00
	Post-operative rehabilitation		\$6,000.00
	Subtotal		\$73,500.00
<i>Multiple Stage Surgeries to Correct Deformity (if required)</i>			
	Surgical fees		\$25,000.00
	Hospital fees		\$15,000.00
	Subtotal		\$40,000.00
<i>Two Scar Revision Surgeries for Proximal Leg Scar</i>			
	Surgeon's fees		\$5,000.00
	Hospital fees		\$9,000.00
	Post-operative rehabilitation costs		\$2,500.00
	Subtotal		\$16,500.00
<i>Rod Removal</i>			
	Surgeon's fees		\$2,000.00
	Assistant's fees		\$550.00
	Anaesthetist		\$1,000.00
	Hospital		\$3,000.00
	Pathology		\$300.00
	Medication		\$450.00
	Subtotal		\$7,300.00
	Total		\$137,300.00



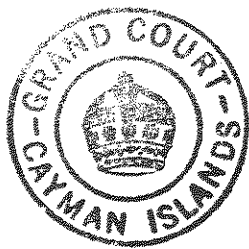
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1 227. Based on the evidence I have heard I find that It is questionable as to whether the
2 Second Plaintiff will need a full knee replacement. However, on the balance of
3 probabilities I am prepared to make an award on the basis that it is more likely than
4 not that she will need a right knee replacement as a result of the accident.

5 228. In *Fisher v. Proprietors of Strata Plan No. 16* (Cause 75/2003) this Court heard
6 similar expert evidence on knee replacement. In that case the Court accepted the
7 figure from Dr. Smith of Cayman Orthopaedics. Dr. Smith is a highly experienced
8 Consultant Orthopaedic Surgeon – having practiced in Canada, Cayman and in the
9 Caribbean. The figure accepted by the Court on the 8th September 2010 was
10 CI\$19,000.00. The difference between these sums for the same surgical procedure
11 is quite remarkable and not easily explained.

12 229. Dr. Michaels provided an outline of the average and reasonable costs currently
13 associated with a total knee arthroplasty procedure in the United States and also
14 researched the United States Healthcare Blue Book and he provided the Court with
15 the following costs for the knee arthroplasty surgery:

Procedure	Healthcare Blue Book Cost in US\$
Surgeon	\$ 2,795.00
Assistant Surgeon	\$550.00
Anaesthesiologist	\$1,500.00
Pathology	\$150.00
Cell saver	\$3,000.00
Implant	\$5,000.00
Hospital stay – 4 days	\$14,037.00
Pre-op testing	\$1,350.00
In-patient rehab – 7 days	\$7,000.00
Out-patient care + physical therapy – 2 months	\$2,400.00
Medication	\$2,500.00
Total	\$40,282.00



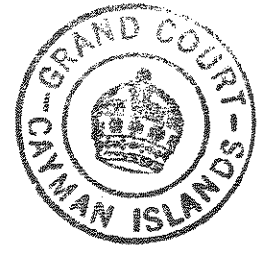
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17 230. Accordingly, I award the sum of **US\$40,282.00** under this heading.

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GRATUITOUS CARE AWARD – BOTH PLAINTIFFS

233. A global figure of US\$10,000.00 was claimed for past gratuitous care on behalf of **both Plaintiffs** and was conceded as being reasonable by leading counsel for the Defendant at trial. Accordingly, I award a sum of **US\$10,000.00**.



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CONCLUSION

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234. The First Plaintiff is awarded the following sums:

Cost Item	Court's Awards	US\$
Back Injury		\$15,000.00
Left Leg Injury		\$65,000.00
Hand injury		\$12,000.00
Left Shoulder		\$15,000.00
Chest Injury		\$6,000.00
Right Hip Injury	No Award	
Left Knee Injury	No Award	
Left Ankle Injury	No Award	
Lumbar Spine	No Award	
Brain damage		\$50,000.00
Fracture of Nose		\$2,917.00
Scarring		\$18,000.00
Loss of Earnings		\$591,250.00
Pension Loss	No Award	
Past Medical Costs		\$256,583.50
Future Medical Costs		\$50,000.00
Gratuitous Healthcare		\$5,000.00
Total		US\$1,086,750.50

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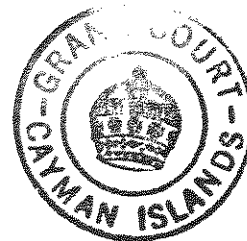
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1 235. The Second Plaintiff is awarded the following sums:

Cost Item	Court's Awards	US\$
Right Tibia + Fibular fracture		\$62,000.00
Scarring of right leg		\$35,000.00
Right Knee Injury		\$100,000.00
Left knee Injury		\$20,000.00
Right Ankle Award		\$8,000.00
Knee arthroplasty surgery		\$40,282.00
Past Medical Costs		\$90,726.23
Future Medical Costs		\$137,300.00
Future Medical Care Assistance		\$117,000.00
Professional Home Care 2004-2012		\$47,840.00
Gratuitous Healthcare costs		\$5,000.00
Total		\$622,866.23

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3 236. Accordingly, I award the Plaintiffs for general and special damages a total of
4 US\$1,709,616.73, with interest thereon to be included in the final order. In
5 addition, in light of the fact that costs follow the event, I order that the Plaintiffs are
6 to have their costs paid by the Defendant, to be taxed if not agreed.

7 237. As this award, the costs and interest will be subject to the 30% deduction for the
8 Plaintiffs' contributory negligence,, I hope that counsel for the parties can agree the
9 final Order. If however this cannot be agreed, I will hear counsel for the parties.

10 Dated this the 20th September 2013

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15 Honourable Mr. Justice Charles Quin
16 Judge of the Grand Court

