

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CIVIL DIVISION**

3 **CAUSE No. G 180 OF 2010**
4
5

6 **BETWEEN CHARLES BRENT YATES**

7 **PLAINTIFF**

8 **AND BRENDA KATHLEEN CHIN**

9 **(as Personal Representative of the Estate**
10 **Of Ysatis Nathine Chin, deceased)**

11 **DEFENDANT**



12
13 *Appearances:*

14 *James Kennedy instructed by Samson & McGrath for the Plaintiff*

15 *Paul Murphy instructed by Stuarts, Walker, Hersant for the Defendant*
16

17
18 **JUDGMENT**

19 On or about 4 May 2007, a motor-vehicle accident took place on North
20 West Point Road. The Defendant was sued as the personal representative
21 of the estate of the late Ysatis Nathine Chin, deceased; whose death was
22 occasioned by the said accident. The Plaintiff alleged that the accident
23 was caused by the negligence of the deceased and liability for the
24 accident was not denied. The trial involved the assessment of damages
25 suffered by the Plaintiff.
26

27 As a result of the accident the Plaintiff suffered fractures to both ankles
28 and soft tissue injuries. In his claim, the Plaintiff sought special and
29 general damages for loss of amenities and other adverse effects.
30

31 The burden lay with the Plaintiff to prove his case on a balance of
32 probabilities. The Defence put the Plaintiff to strict proof with respect to

1 the physical effects of the accident which the Plaintiff claimed to have
2 suffered as well as his claim for loss and damage.

3

4 The following is a Summary of the Plaintiff's Schedule of Loss as amended
5 during trial.

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7 <u>HEAD OF LOSS</u>	<u>AMOUNT CLAIMED</u>
8 1. Past loss of earnings	\$353,204.53
9 2. Loss of Pension	\$ 24,663.96
10 3. Medical Expenses & Other Expenses	\$ 14, 354.85
11 4. Gratuitous Care	\$ 3,360.00
12 5. Interest on Past Loss	\$ 30,862.26
13 6. General Damages for PSLA	\$ 90,000.00
14 7. Interest on General Damages	\$ 6,445.47

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16 **TOTAL PAST LOSS** **\$522,891.07**

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18 FUTURE LOSS

19 8. Loss of earnings	\$1,050,700.00
20 9. Loss of Pension	\$ 65,954.34
21 10. Future Surgery	\$ 35,382.16
22 11. Future one off loss of earnings for surgery	\$ 8,749.98
23 12. Future Household and Gardening Assistance	\$ 224,1165.76

24

25 **TOTAL FUTURE LOSS** **\$1,405,056.24**

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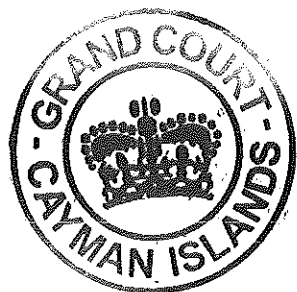
27 **TOTAL CLAIM** **\$1,907,947.31**

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1 As stated by both Counsel some of the heads of loss had been agreed.
2 These were:

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- | | | |
|---|------------------------------------|--------------|
| 4 | 1. Past medical and other expenses | \$14,354.85; |
| 5 | 2. Past gratuitous care | \$3,360.00; |
| 6 | 3. Future surgery | \$35,382.16. |

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10 **The Plaintiff's Evidence**

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12 **Injuries**

13 The Plaintiff's injuries as outlined in his Statement of Claim included the
14 following:

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- 17 1. A fracture of the medial malleolus of the left ankle;
- 18 2. Fractures of the neck of the right talus and the neck of second
19 metatarsal on the right foot;
- 20 3. Multiple chest abrasions and contusions secondary to the Plaintiff's seat
21 belts;
- 22 4. Post-traumatic osteoarthritis of the right tibial talar joint.

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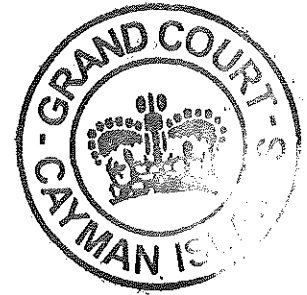
25 In his testimony before the court, the Plaintiff supplemented the foregoing
26 and testified about his continuing pain and suffering.

27

28 The following evidence was not disputed.

29

30 Following the accident on May 4, 2007, the Plaintiff was taken to the
31 hospital as an emergency case and underwent surgery resulting in the
32 insertion of pins into both of his ankles. Initially he remained at hospital



1 for fifteen days. For the next two months after his release from hospital
2 the Plaintiff was incapacitated and bedridden. He was unable to place any
3 weight on his ankles and his elderly parents cared for him. After two
4 months his left ankle healed sufficiently to bear some weight but he
5 remained unable to bear full weight on his right ankle. The Plaintiff still
6 experiences pain whenever he is on his feet especially if he does not use a
7 cane or his custom fitted brace.

8

9 Since his initial release from hospital the Plaintiff has received treatment
10 in both the Cayman Islands and the United States of America. Future
11 surgery is anticipated.

12

13 The Plaintiff also gave evidence about issues which he currently faces and
14 their effect on his lifestyle. Some of this evidence was challenged.

15

16 In April 2009, the Plaintiff had a custom brace for his right foot fitted in
17 Miami. According to the Plaintiff, this takes a lot of pressure off his ankle
18 and transfers it to the knee. The benefits of the brace are that it has
19 provided the Plaintiff with more mobility and freedom with less pain and
20 he does not have to use a walking stick while wearing at and further; it
21 allows him to move and walk more naturally.

22

23 The Plaintiff testified however that there are problems connected to the
24 wearing of the brace. It is heavy and cumbersome and after a period of
25 use it causes the Plaintiff pain and discomfort in his hip and lower back
26 area. Prolonged use also causes bruising and abrasions. The brace
27 restricts the full movement of the Plaintiff's right knee and makes bending
28 his leg difficult. In order to accommodate the brace the Plaintiff has to
29 wear a size 12 or 13 shoe on his right foot and this creates awkwardness
30 in driving or in getting in and out of the back of small cars. However,
31 without the brace, if the Plaintiff uses a walking stick for a prolonged
32 period of time, he develops pain in his upper arm and shoulder.



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The Plaintiff claimed that he can stand unassisted for short periods of time and take small steps which do not involve the rotation of his ankle. Standing for extended periods hurts his ankle and causes pain when walking. This pain sometimes persists into the night and the next day.

According to his testimony, currently, the Plaintiff suffers pain in his right ankle accompanied by chronic swelling and stiffness. This pain is minimized if he sits or is lying down. Walking on uneven ground or at an incline worsens the pain. He wears his ankle brace approximately five days per week at all times when outside of his house. He is conscious that the brace causes his calf muscle to diminish. He cannot drive his work vehicle while wearing the ankle brace. He also experiences occasional pain in his left ankle and forearms.

The Plaintiff is strongly contemplating surgery on his right ankle to fuse the joint. He describes this as a highly complex operation which could either be his last chance at improving his condition or could worsen his condition.

The Plaintiff's Employment History

Having held various jobs after graduating from High School; in June 2004, the Plaintiff commenced employment for Cayman Turtle Farm (1983) Ltd as a part of the construction management team that built the Boatswain's Beach Adventure Park (the Turtle Farm). At the time of the accident, the Plaintiff had been employed as Manager of Buildings and Grounds at Boatswain's Beach. His salary was \$7,500.00 per month. He also received a pension contribution of \$450.00 per month, health insurance coverage, a company car and a company cellular telephone.



1 His injuries kept him out of work for approximately three months; during
2 two of which he received sickness pay. When he returned to work in
3 August 2007, he was on crutches and was assigned desk duties. This
4 involved organizing some of the accounts from the construction of
5 Boatswain's Beach and continuing to act as Buildings and Grounds
6 Manager but only in an office role.

7
8 The foregoing evidence about the Plaintiff's employment history was
9 accepted by the Court as being factual.

10
11 It was the Plaintiff's assertion that his injuries did not heal sufficiently to
12 allow him to return to his pre-accident duties. He stated that on or about
13 January 1, 2008 his employer gave him the option of accepting the
14 position of Freedom of Information Manager at a reduced salary of
15 \$5,224.00 per month; being made redundant or being demoted to a lower
16 position with a salary of less than \$5,000.00 per month. According to the
17 Plaintiff, since he had no idea if he would ever make a full recovery from
18 his injuries he accepted the first option. He held the position of Freedom
19 of Information Manager at a salary of \$5,224.00 per month from January
20 1, 2008 until May 12, 2010 when the position was made redundant.

21
22 According to the Plaintiff, on June 26, 2010 he commenced temporary
23 employment with Charterland Limited which involves performing
24 appraisals of buildings. He did this on a commission only basis. The
25 Plaintiff claimed that due to his injuries he was restricted to performing
26 appraisals which did not involve heavy construction, walking on uneven
27 ground, ladder climbing, scaffold climbing, walking on sloped roofs, going
28 in and out of holes or heavy lifting. In July 2010 the same company
29 offered him a salaried position doing the same work but subsequently
30 determined that his injuries meant that he was unable to perform a
31 sufficient number of appraisals each month to justify a salary. He
32 continued to be paid on commission. According to the Plaintiff, he worked



1 for this company for slightly over a year completing his last inspection on
2 July 11, 2011. During his period of employment he received a total salary
3 of \$5,736.67 in commissions.

4
5 The Plaintiff testified that he also tried to supplement his income by
6 purchasing a business involving the sale of ice creams on April 1, 2010.
7 This was prior to being made redundant and the shop was a retail unit at
8 the Turtle Farm. He claimed that he was unable to turn it into a profitable
9 enterprise and business closed on June 23, 2011. It was his estimate that
10 he lost approximately \$13,500.00 on that business.

11
12 The Plaintiff testified that he subsequently re-opened the ice cream store,
13 employing two women who work approximately 40 hours a week. The
14 Plaintiff works in the store for several hours per day, and this involves
15 some physical labour such as lifting stock. He can drive to his suppliers
16 but he has to walk around their shops in order to purchase items. He
17 stated that he is unable to hold or carry heavy items for a long period of
18 time.

19
20 The Plaintiff testified that in March 2013 he returned to Charterland Ltd.
21 to sell properties at a new residential development called Satinwood Gate
22 in George Town. He currently works as an on-site sales agent and is
23 located at the show home. He provides a physical presence at the site and
24 deals with any person who either drops in for a viewing or attends by
25 previous arrangement. He works from 10:00 a.m. to 3:00 p.m. and these
26 hours coordinate well with his hours at the ice cream shop. The job is
27 sedentary in nature and he works on commission without any base salary.
28 At the time of trial the Plaintiff reported having made two sales in August
29 2013 and September 2013, earning a commission of \$8000.00 for which
30 he had received one payment of \$4000.00.



1 The Plaintiff stated that in mid-July 2011 he travelled to Peru, both to visit
2 a friend and to seek employment there. He was unsuccessful in relation to
3 the latter and returned to the Cayman Islands one month later.



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5
6 Leisure Activities

7 It was the Plaintiff's further testimony that whilst attending school, he
8 enjoyed an active life; playing football, tennis and badminton. He also
9 took part in cycling, scuba diving and hiking and camping trips. When he
10 completed his education he enjoyed many of the same activities as well
11 as playing beach volleyball, mountain biking and boating. The Plaintiff
12 claimed that he also socialized with friends, attended nightclubs and
13 concerts and performed all his own housekeeping and home maintenance
14 work. The Plaintiff claimed that he is no longer able to participate in such
15 recreational activities. Further he avoids events which draw large crowds
16 because due to his imperfect balance he is afraid of being pushed in a
17 crowd and falling to the ground.

18
19 According to the Plaintiff, although he had always been overweight; the
20 change in his lifestyle has brought about an increase in weight to about
21 330 pounds. The Plaintiff has been classified as being morbidly obese.

22
23 The Plaintiff gave evidence that after the accident he had to move into his
24 parents' home because he relied on their assistance with household
25 chores and any task which involved walking. He also hired someone to
26 provide assistance with landscaping and general building maintenance at
27 his parents' home.

28
29 Subsequently, in June 2013, the Plaintiff moved to a property adjacent to
30 his parents' home but which is located on the same parcel of land. It is his
31 evidence that he requires assistance to perform household chores that
32 involves standing as well as yard work. He employs a domestic helper for

1 one hour per day at his home and a person to help with the yard work for
2 one day per month.

3

4

5 Miscellaneous & Medical Expenses

6 According to the Plaintiff every two years he travels to Miami to purchase
7 new shoes and pants which are needed to accommodate the ankle brace.

8 He also gave evidence that he incurred medical costs and costs
9 consequent to travelling to the United States of America for treatment
10 and for his ankle brace.

11

12

13 Past Loss of Earnings and Pension

14 It was the Plaintiff's case that had the accident not occurred he would
15 have continued to be employed at the Turtle Farm in his original role
16 which he had performed for three years without complaint. He also
17 believes that in time he would have been promoted to an even more
18 senior position.

19

20 Prior to working at the Turtle Farm the Plaintiff had worked at Deloitte
21 from 1998 to 2004 as a Senior Valuation Officer earning between
22 \$4000.00 and \$5000.00 per month. For approximately 10 years prior to
23 that he worked at Alistair Patterson as a Valuer. The Court accepted this
24 evidence.

25

26 In his FOI role at the Turtle Farm, the Plaintiff was paid \$62,688.00 per
27 annum with pension benefits of \$261.20 per month. In his previous job at
28 the Turtle Farm he had earned \$90,000.00 per annum plus health and
29 pension benefits of \$450.00 per month. The Plaintiff asserted that the
30 salary level that he earned between January 1, 2008 and May 12, 2010
31 was as much as he could have hoped to receive if he had looked
32 elsewhere for employment. He stated that he believed that his salary



1 might have been in excess of what he could have earned elsewhere given
2 his physical limitations.

3

4 The Plaintiff has not received a pension since May 12, 2010.

5

6

7 Future Loss of Earnings.

8 The Plaintiff agreed with the proposition that he is capable of working full-
9 time in a sedentary capacity. He stated that having reviewed the list of
10 jobs which the reports of Mr. Nordin and Mr. Keys suggest that he is
11 capable of doing; he would be prepared to try and obtain employment in
12 those areas. However in his opinion, his age, lack of relevant experience
13 and his disability would make it difficult for him to secure such
14 employment unless he entered at the bottom of the ladder.

15

16 The Plaintiff stated that although he had experience working as a quantity
17 surveyor, he was unqualified in that field. Additionally it has been almost
18 10 years since he last worked full time in that occupation.

19

20 The Plaintiff does believe that currently he is earning below his potential
21 but asserted that this was not deliberate.

22

23 The Plaintiff was concerned that if he undertook the ankle fusion surgery,
24 a period of at least two months rehabilitation would be required. It was
25 his opinion that he would have to take unpaid leave for this period of
26 rehabilitation.

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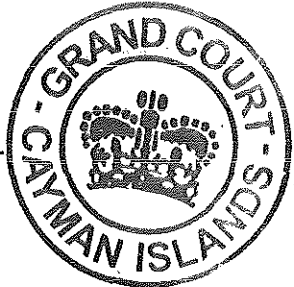
28 The Plaintiff was of the view that in the future he would require assistance
29 on a daily basis for a few hours to deal with household chores. He claimed
30 a period of six hours assistance per week at a rate between \$11.00 and
31 \$14.00 per hour. He also claimed future assistance for gardening of two
32 hours per week at a rate between \$11.00 and \$14.00 per hour.



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Plaintiff's Expert Reports

The Plaintiff relied on the Expert Reports filed by: Dr. Pervez Ali; Mr. Derek Nordin and Mr. Theo Bullmore.



Dr. Pervez Ali submitted a Medical Report dated June 30, 2009 following a review of the notes and charts of doctors: Dr. R J Crider; Dr. Sekhar; Dr. Ian Dale; Dr. Thomas P. San Giovanni. He also reviewed reports and assessments made by Dr. G. Spoliansky and Dr. Thorpe. Counsel for the Plaintiff summarized this report highlighting certain area.

In the report of Dr. Pervez Ali dated 30th June 2009; the Plaintiff was described as having sustained "blunt trauma to the upper torso from the seatbelt, resolved, bilateral forearm strain, resolved, left medial malleolar ankle fracture treated surgically, healed, right ankle talar neck fracture dislocation with second metatarsal fracture now with healed metatarsal fracture clinically, and failure fixation of talar neck fracture, malunion/non-union, possible avascular necrosis, definite post traumatic osteoarthritis of the tibial talar joint".

Dr. Ali made a "finding of significant limitation of range of motion of the right ankle with abnormalities identified in a clinical examination of both the range of motion, of swelling, of subtalar abnormality on a range of motion testing and tibial talar stress testing causing pain with malalignment in a varus fashion of the hind foot as well".

Dr. Ali opined that the Plaintiff was "only going to get worse. Specifically, he already has findings of post traumatic osteoarthritis". Dr. Ali reported that the Plaintiff would "have a permanent impairment and inability to perform heavier aspects of his housekeeping at home".

1

2 Dr. Ali indicated that he expected the Plaintiff "to have a permanent
3 impairment with regards to any activities which require him to walk more
4 than slow pace. He will not be able to use this ankle for any sport and this
5 is a permanent issue". Further the Plaintiff "has sustained a career ending
6 injury to his right foot, for any heavy work or employment tasks, which
7 he was able to carry out before the accident, in regards to heavy
8 construction, walking on uneven ground, ladder climbing, scaffold
9 climbing, going in and out of holes, heavy lifting etcetera. This is a
10 permanent impairment."

11

12 Dr. Ali concluded that the Plaintiff "has sustained a severe permanent
13 impairment in regards to his right foot and ankle particularly that he is
14 unable to carry his work task, home maintenance and housekeeping task
15 as he carried" (them) "out before the accident". His report stated that
16 these injuries were sustained from the accident leaving the Plaintiff "with
17 a permanent and severe impairment, with ratings to be applied that
18 would leave him with a Whole Person Impairment minimum of 15%."

19

20

21 Also before the Court on behalf of the Plaintiff were two Vocational
22 Assessment Reports dated August 16, 2012 and August 21, 2013
23 respectively, from Mr. Derek Nordin, Vocational Rehabilitation Expert.

24

25 In his first report, Mr. Nordin considered the types of employment that
26 the Plaintiff could possibly undertake given the background of his injuries,
27 the lasting physical effects on him, his education and training. Mr. Nordin
28 stated that he believed that the Plaintiff had lost his ability to do work of a
29 physical nature and that this would severely limit his future vocational
30 options. He stated that it was his assumption that the Plaintiff would be
31 limited to work of a sedentary nature although he may be capable of
32 engaging in occupations which involve limited amounts of standing



1 throughout the day. It was also his opinion that given the Plaintiff's
2 limited education, his access to a large number of sedentary occupations
3 would be restricted.

4
5 The average earnings of the jobs that he listed were derived from the
6 2006 Canadian census data for full-time, full-year work. He suggested the
7 posts of: taxi/limousine driver; hotel front desk clerk; customer service,
8 information and related clerk; retail sales clerk and production clerk. The
9 salaries for these, after currency conversion, ranged from CI \$20,281 to
10 CI \$49,109. Mr. Nordin did specify in his first report that he did not have
11 access to specific earning information for these occupations in the
12 Cayman Islands and as such the figures provided should be considered
13 estimates.

14
15 Mr. Nordin offered the opinion that given the Plaintiff's limited education
16 and ongoing physical restrictions he may well not be viewed as an ideal
17 candidate by any prospective employer; given the choice of other
18 candidates with more education and without his restrictions.

19
20 It was noted that the Plaintiff did manage to get work doing appraisals for
21 Charterland Ltd. and that he may have an option to do more of that work
22 in the future. This was however by no means certain. Mr Nordin
23 anticipated that for the foreseeable future the Plaintiff would continue to
24 operate his ice cream shop as this provided him with the most flexible
25 employment situation. Further, the Plaintiff may supplement his earnings
26 by doing occasional appraisal work. He concluded that the Plaintiff's
27 residual earning capacity had been negatively impacted by the accident
28 and its aftermath.

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30 The second report from Mr. Nordin represented an Addendum in response
31 to specific questions regarding requests for clarification concerning his
32 first report.



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In the Addendum he clarified the impression that he may have given that the Plaintiff was capable of accessing the suggested occupations on a full-time basis. He stated that it was his opinion that the Plaintiff may only be able to work at some of these occupations on a part-time basis because some of them often involved substantial time standing behind a desk or walking; for example the posts of retail sales clerk and hotel front desk clerk. He considered it unlikely, given the Plaintiff's ankle impairments that he could do those occupations full-time. Accordingly he concluded that the Plaintiff would stand to earn less for some of these occupations than the full-time averages which had been given.



In preparing his second report, Mr. Nordin had had the opportunity to review the Chamber of Commerce salary and benefits survey (4th edition) from the Cayman Islands. This is a document which reports on private sector salary and benefits practices in effect in the Cayman Islands as of September 1, 2006 and which surveys the total of 152 occupations in the Cayman Islands. In this report, Mr. Nordin provided the Cayman Islands average base salary information for the occupations he had previously listed. He stated that different countries organize occupations and industries differently and as such he attempted to locate job titles which appeared to be closest to those he had previously provided. He provided a new table which expanded the list of occupations that he had previously provided. Ranging from tellers to buyers and purchasing agents, the salaries ranged from CI \$23,00.00 to CI \$45,000.00.

Mr. Nordin also offered commentary on the report filed by Mr. Paul J. Key dated January 15, 2013. He indicated that the Defence Expert having identified himself as a Chartered Valuation Surveyor, was not considered by him to be qualified to offer an opinion on the Plaintiff's residual employability potential. This was because Mr. Key was not a qualified Vocational Consultant.

1

2 He referred to the comment in the report by Mr. Key that Quantity
3 Surveyors and related occupations required a relevant degree as well as
4 professional qualifications, which the Plaintiff did not possess. He also
5 noted the comments by Mr. Key that Quantity Surveyors can expect to
6 earn significantly less than the Plaintiff did as a Construction Manager.
7 According to Mr. Nordin, these considerations were irrelevant with respect
8 to the primary vocational loss sustained by the Plaintiff as a result of the
9 accident. He stated that in his first report it had been noted that it had
10 been eight years since the Plaintiff had worked in the field of Quantity
11 Surveying and it remained to be seen whether the Plaintiff would be seen
12 as a good candidate for that type of employment at this stage.
13 Additionally, the Plaintiff had reported that his work as a Quantity
14 Surveyor involved a physical component which he would likely experience
15 difficulty with at this time.

16

17 Mr. Nordin considered it more significance that the Plaintiff's position as
18 Manager of Buildings and Grounds at the Turtle Farm had involved
19 significant on-site work, including walking between various locations, that
20 he had been able to do without difficulty prior to the accident. His post-
21 accident inability to cope with all of his required job duties had led to the
22 loss of that job and a lower paying job. Mr. Nordin indicated that the
23 report from Mr. Keys contained nothing which would lead him to alter his
24 original vocational assessment.

25

26

27 The final report which was relied on by the Plaintiff was prepared by Mr.
28 Theo Bullmore, Chartered Accountant and Plaintiff Financial Investment
29 Expert. A Summary of the content of his report will be referred to
30 hereafter.

31

32



1 **Defence Expert Reports**

2 Both Counsel agreed that their medical experts were in general
3 agreement about the status of the Plaintiff's injuries and his general
4 health.

5

6 Dr. Ajit Ambekar submitted a medical report dated 17th February 2012, on
7 behalf of the Defence. He reported that X Rays and CT Scans confirmed
8 the initial ankle fractures. The left ankle was confirmed to have a well
9 united fracture of medial malleolus with intact screws in place. The right
10 ankle had confirmed non-union of the fracture, broken screws and
11 significant collapse of the body of Talus with secondary osteoarthritis of
12 ankle and sub-talar joints.

13

14 In his Prognosis, Dr. Ambekar indicated the following:

15

16 "Although the patient has adjusted to the level of pain and instability of
17 the right ankle with the special brace and a cane, the present symptoms
18 are expected to persist permanently". Replacement Arthroplasty of the
19 ankle will not be possible in this case as presence of intact dome of talus
20 is necessary to anchor the implant. Although it may be possible to
21 alleviate the symptoms by a major surgical procedure called 'Pan-talar
22 arthrodesis' (Fusion of the lower end of the shin-bone to the heel bone
23 across the talus), the procedure carries very significant risks – particularly
24 in view of the patient's weight and smoking habit. I am in agreement with
25 the 'Ankle and Foot specialist' Orthopaedic Surgeon (Dr. San Giovanni of
26 Miami) that Mr. Yates should continue with the external bracing and
27 consider Pan-Talar Arthrodesis only as an absolute 'last resort'.

28

29 The minimal and intermittent (activity induced) pain of in left ankle and
30 wrist are likely to be permanent.

31



1 Due to the permanent limp as a result of his right ankle dysfunction, this
2 patient is also susceptible to the long-term risk of developing secondary
3 osteoarthritis in his Right Knee and Lumbar spine. However, his morbid
4 obesity would also be a significant contributory factor in this regard and
5 'intentional' loss of weight may reduce this risk to some extent. Due to
6 the combination of these factors, it is not possible to predict a precise
7 time-span before the secondary arthritis in the knee and spine sets in but
8 my 'best guess estimate' would be about 10 years.

9 The index injury will not have a direct adverse effect on the patient's
10 longevity."

11

12 In his Disability Assessment of the Plaintiff, Dr. Ambekar stated in his
13 report:

14

15 "Temporary total disability persisted for about 4 months. The injury to
16 the right ankle precludes resumption of employment involving frequent
17 climbing ladders/stairs, walking on inclined or uneven surfaces and
18 bending down to pick up heavy objects. Patient is also unfit to undertake
19 occupations that demand prolonged standing or walking.

20

21 Therefore the patient has significant partial permanent disability from
22 resuming his pre-accident occupation of a Buildings Surveyor if the
23 specific assignment involves the above activities. However, subject to the
24 aforementioned physical constraints he remains fit for similar or
25 sedentary occupations. He has demonstrated his ability to do so by
26 running his own business that does require certain amount of physical
27 component."

28

29 With reference to the Judicial Studies Board Evaluation (10th edition) and
30 the section on Orthopaedic Injuries, Dr. Ambekar declared the Plaintiff's
31 right ankle to fall in the category "Severe" and stated that in his opinion



1 the disability would be at the top end of the scale. He categorized the
2 Plaintiff's left ankle as "Modest".

3
4 The Defence Medical Expert Dr. Russell O'Connor was the only Defence
5 witness to testify at trial. He submitted a report dated 15th February
6 2012. Having adopted the content of his report, Dr. O'Connor testified
7 during cross-examination that the Plaintiff had a permanent restriction
8 due to the injury to his right ankle.

9
10 Dr. O'Connor stated that it was highly likely that future surgery would be
11 required. If this surgery took place, in his opinion the best case scenario
12 for the Plaintiff is that he would be away from work for three months. It
13 all depended on how well the Plaintiff healed after surgery. However there
14 was a high risk of the surgery being more complicated than most because
15 of the type of injury involved.

16
17 The doctor indicated that there was a possibility that surgery could make
18 matters worse. There was a possibility of either resulting infection or the
19 amputation of the right foot.

20
21 Dr. O'Connor also commented on the life expectancy of a morbidly obese
22 person, such as the Plaintiff had been characterized. He stated that
23 morbid obesity reduced life expectancy in general by 8 to 10 years. He
24 pointed out that there would be a further reduction if one factored in
25 smoking, which the Plaintiff admitted to doing.

26
27
28 The final report submitted on behalf of the Defendant was a Vocational
29 Expert Report from Mr. Paul J. Key dated January 15, 2013 and which was
30 filed on January 16, 2013. Mr. Key is a Chartered Valuation Surveyor and
31 it is his report on which Dr. O'Connor had commented.



1 Mr. Key referred to the Plaintiff's assertion that he is a Quantity Surveyor.
2 He stated that a Quantity Surveyor is usually considered to be a
3 professional working within the construction industry concerned with
4 building costs, construction, contractual matters. Such a person is usually
5 a member of a professional institution such as the Royal Institution of
6 Chartered Surveyors ("RICS"). He stated that surveying is a very diverse
7 profession which under the United Kingdom standard covers twenty
8 separate specialisms in three sectors being: land; property and
9 construction. He stated that in the Cayman Islands, for economic reasons,
10 it is highly unusual to find a firm which is solely dedicated to quantity
11 surveying and further that a surveying firm usually takes on a variety of
12 work including market valuations of raw land and real property. He stated
13 that the term "quantity surveyor" tends to be used loosely in the Cayman
14 Islands.

15

16 Although not a Chartered Quantity Surveyor himself, Mr. Key acting on
17 information received, indicated the duties normally expected to be
18 discharged by a quantity surveyor and in particular the physical elements
19 of those duties. His information indicated that when they engage in on-
20 site visits for a new construction project, a large percentage of the work
21 involved walking on uneven ground, climbing ladders, climbing
22 scaffolding, walking on sloped roofs, going in and out of holes and
23 climbing unfinished stairs. A quantity surveyor who is unable to perform
24 any of these duties would be limited in his/her ability to perform on-site
25 inspections. This however would not preclude those duties being
26 performed by a co-worker. He stated however that he would not expect a
27 surveyor to have to perform any of these tasks when surveying
28 completed construction projects. He also stated that there would be no
29 project which would involve a quantity surveyor in any heavy construction
30 or heavy lifting.

31



1 Mr. Key commented that there were a number of tasks which could be
2 performed by a quantity surveyor that did not involve on-site inspections.
3 He stated that the work of a quantity surveyor is primarily office based
4 and that in his estimation 70% to 85% of the work-time could be spent
5 completing sedentary tasks. In his opinion the tasks associated with
6 surveying completed construction projects could not be described as
7 physically demanding. According to Mr. Key, despite the Plaintiff's
8 physical limitations, he could not conclude that these tasks could not be
9 performed by him.

10

11 Mr. Key also reported that surveying work in relation to property/ land
12 valuations is physically less demanding. Measuring and taking
13 photographs of the property are generally the only physical activities
14 required. It was suggested that the Plaintiff may be able to perform the
15 tasks required for property/land valuation.

16

17 Mr. Key commented on the Plaintiff's lack of qualifications post high
18 school graduation. He commented that he would not be qualified to hold
19 himself out as a Quantity Surveyor. However based on his experience in
20 working in surveyors' offices for twenty years, the Plaintiff was qualified
21 to perform basic site and office tasks.

22

23 Mr. Key felt that the Plaintiff was "qualified to undertake inspections, data
24 collections, photographing land sites, residential properties and small
25 commercial buildings in order to develop a specification for inclusion into
26 prepared model reports, collate comparable sales evidence and draft
27 reports for Professional Surveyors." As such, the Plaintiff's job description,
28 if he worked within a firm of surveyors would be "surveyor's assistant".
29 Given the state of the economy currently, Mr. Key considered it likely that
30 this post would pay between CI \$30,000.00 to CI 35,000.00.

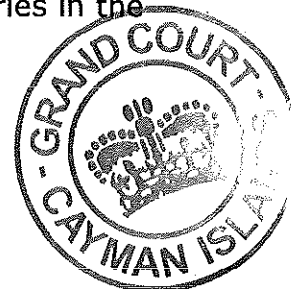
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1 Mr. Key commented on the Plaintiff's broad experience, having been
2 employed in various occupations. He reviewed local job advertisements
3 and expressed the view that a range of job opportunities were available to
4 the Plaintiff, which were desk-based and sedentary.

5
6 Mr. Key referred to the salaries that the Plaintiff earned as Buildings and
7 Grounds Manager and as FOI Manager. He comparing those salaries to
8 available jobs in the private sector for surveyors and found several
9 positions with a salary range between CI \$47,520.00 to CI \$77,000.00
10 per annum. Those posts however required a relevant degree and
11 professional qualifications.

12
13 Mr. Key concluded that the salaries earned by the Plaintiff at the Turtle
14 Farm were at the upper end of the spectrum that qualified Quantity
15 Surveyors earn. He considered that those salaries, paid at the Turtle Farm
16 were incomparable and that in the private sector the Plaintiff would
17 require a degree and professional qualifications to entertain salaries in the
18 same range.



19
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21
22 **Submissions on Damages**

23 Counsel for the Plaintiff presented a Schedule of Loss to the Court. The
24 submissions under the individual headings will be examined.

25
26 **Past Loss of Earnings**

27 The Plaintiff's claims under this heading spanned the period between the
28 date of the accident in May 2007 and the date of the trial.

29
30 (i) May – August 2007

31 The Plaintiff's claim for the loss of one month's salary in the sum of CI
32 \$7,500.00 was not disputed by the Defendant.

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(ii) January 1, 2008 – June 12, 2010

It was the Plaintiff's contention that the evidence adduced supported the claim that the Plaintiff lost his original job at the Turtle Farm as Buildings and Grounds Manager because his injuries prevented him from fulfilling those duties. It was submitted that the evidence of the medical experts confirmed that the Plaintiff's injury is permanent in nature and precludes him from doing any walking on uneven ground or standing or walking for long periods of time.

In January 2008 the Plaintiff commenced duties as FOI Manager at a reduced salary. It had been the Plaintiff's evidence that his employers offered him the choice of either taking this position, being demoted to a position which paid less than \$5,000.00 per month or being made redundant.

The Court was asked to accept the evidence presented and make the inference from the Plaintiff's work history and the medical evidence that the Plaintiff established on a balance of probabilities that he would not have been reassigned to another post and suffered a reduction in salary but for the accident. Counsel for the Plaintiff submitted that the Defendant had presented no evidence in rebuttal.

On behalf of the Plaintiff, it was submitted that he had fully mitigated his loss by taking employment as FOI Manager at the Turtle Farm.

The Plaintiff therefore submitted a claim for loss of earnings for this period in the sum of CI \$66,823.19.

The Defendant disputed the Plaintiff's claim for past loss of earnings for the period January 2008 to June 12, 2010.



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Counsel for the Defendant disputed the Plaintiff's claim that he had been unable to return to his pre-accident duties at the Turtle Farm. His testimony before the Court that he had been unable to perform the duties of Building and Grounds Manager because he was unable to walk around the buildings was challenged by the Defendant. It was submitted that there was no independent evidence concerning the Plaintiff's pre-accident and post-accident duties.

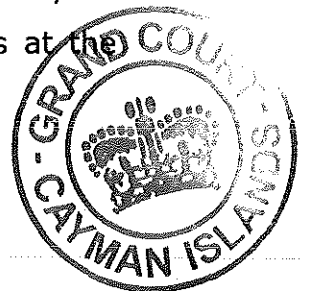
Defendant's Counsel referenced statements made by the Plaintiff to Dr. Russell O'Connor suggesting that prior to the accident the majority of his work had been sedentary. Defendant's Counsel challenged letters submitted by the Plaintiff in support of his assertions and submitted that the Plaintiff should have presented stronger evidence on this point from the Turtle Farm.

It was submitted that the Plaintiff had failed to provide proof of the following:

1. That his injury led to him being given an ultimatum by the Turtle Farm of either taking the Freedom of Information job, being made redundant or taking a job at the Turtle Farm at the salary of less than CI \$5,000.00;
2. That the position of Building and Grounds Manager still exists at the Turtle Farm.

(iii) June 13, 2010 – November 26, 2013

There is no dispute that in June 2010 the position of FOI Manager at the Turtle Farm was declared redundant. Consequently, the Plaintiff lost his job. The Plaintiff claimed a complete loss of salary for the period June 13, 2010 to November 26, 2013 in the sum of CI \$311,171.34.

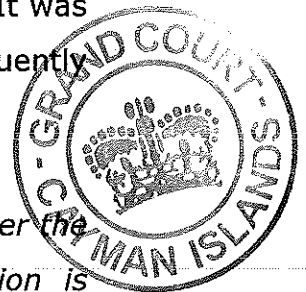


1 It is the Plaintiff's claim that "but for" the accident and the serious injuries
2 that he received; he would not have been reassigned to the post of FOI
3 Manager and subsequently been susceptible for selection for redundancy.
4 He contended that had he held his original post, he would still be so
5 employed at the time of trial. It was his evidence that he had held the
6 post for three years prior to the accident and that he had been doing well
7 in the job.

8
9 The case of **Morris v Richards [2003] EWCA Civ 232** was cited in
10 support of the Plaintiff's position. In that case the claimant was involved
11 in a traffic accident which was the fault of the defendant. Due to the
12 injuries she sustained she was unable to continue in employment as a
13 radiographer. She obtained another job but resigned from it after seven
14 months claiming that she had been discriminated against. She had not
15 found another job by the time of trial. The defendant appealed the
16 damages which were awarded to her for the period after she had
17 resigned, alleging remoteness.

18
19 As summarized, it was held on appeal that the proper starting point was
20 the fact that the defendant bore the blame for the injuries suffered by the
21 claimant and it was due to the defendant's wrongful action that the
22 claimant had lost the job which she liked and had been trained for. It was
23 stated by Schiemann, LJ that obtaining another job and subsequently
24 losing it, did not automatically disqualify a claimant from

25
26 *"recovering from the tortfeasor damages in respect of the period after the*
27 *loss of her new job ("the period in issue"). The crucial question is*
28 *whether, in respect of the period in issue, it is just that she should*
29 *recover damages from the tortfeasor. If she was at fault in losing her new*
30 *job then she will have difficulty in recovering for the period in issue. If she*
31 *was not at fault then in general she will recover. The question whether*
32 *she was at fault is one which in principle the trial judge should resolve*



1 bearing in mind that it was the wrongful act of the defendant which put
2 the claimant in the position of having to find a new job and that therefore
3 she should not be judged too harshly.”

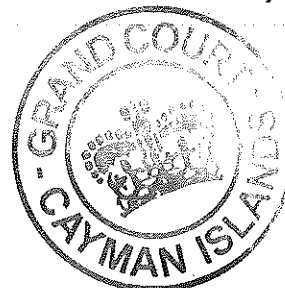
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6 The learned judge went on to cite with approval, the approach of the
7 Court in **Melia v Key Terrain Ltd (1969) No. 1 55B** cited in *Kemp &*
8 *Kemp The Quantum of Damages para. 13-007.*

9
10 The injured man in that case had been offered two jobs after his accident
11 with one paying three pounds less per week than the other. He took the
12 worst paid job, finding it more congenial and consequently the tortfeasors
13 submitted that this part of his loss was self-inflicted. The *Melia* court
14 rejected that submission and the following was stated by Sachs, U:

15
16 *“The question for consideration is whether the claimant should have*
17 *mitigated the damage he suffered by taking a job which would have*
18 *brought him in an extra” (three pounds) “a week but would have involved*
19 *him in night work on alternate weeks. He has never in his life before done*
20 *night work and has a strong distaste for it. It also involved repetitive work*
21 *of a type of which he had not previously experience and to which many*
22 *people are averse.*

23
24 *As between a claimant and a tortfeasor the onus is on the latter to show*
25 *that the former has unreasonably neglected to mitigate the damages. The*
26 *standard of reasonable conduct required must take into account that a*
27 *claimant in such circumstances is not to be unduly pressed at the instance*
28 *of the tortfeasor. -the claimant’s conduct ought not to be weighed in nice*
29 *scales at the instance of the party which occasioned the difficulty.”*

30
31
32 Keene, LJ in the *Morris* case added:



1
2 *"once the position is reached that the judge was entitled to make the*
3 *findings which he did, this appeal cannot succeed. The liability of a*
4 *tortfeasor is not to be reduced because the injured party, having lost*
5 *employment because of the injury, takes a different job in an attempt to*
6 *mitigate his or her damage but loses that job because it is beyond his or*
7 *her capabilities."*



8
9
10 Counsel for the Plaintiff submitted that the Plaintiff had acted reasonably
11 in taking the FOI job in mitigation of his loss. Further, the loss of the job
12 had not been due to any fault on the part of the Plaintiff and this would
13 not result in a breaking of the causal chain. Counsel submitted that the
14 Defendant should not benefit from the redundancy and further that
15 hindsight was not an appropriate yardstick upon which to measure the
16 reasonableness of the Plaintiff's actions.

17
18 It was conceded by Counsel for the Plaintiff that whether or not the
19 Plaintiff had mitigated his loss after the loss of the FOI job was a valid
20 question for the Defendant to pose. It was submitted that the appropriate
21 test was the reasonableness of the Plaintiff's actions.

22
23 Reference was made to the Plaintiff's testimony during cross-examination
24 that in hindsight he could have earned more since the date of the
25 accident. Counsel for the Plaintiff urged to Court to consider the Plaintiff's
26 efforts in investing in the ice cream business prior to the loss of his job as
27 FOI officer. Counsel also pointed to the Plaintiff's employment with
28 Charterland Ltd. doing both property valuations and working as a real
29 estate agent. It was submitted on behalf of the Plaintiff that these
30 attempts to earn money were reasonable despite the fact that the Plaintiff
31 could possibly have earned more money. It was submitted that since the
32 accident the Plaintiff had worked to the maximum extent of his physical

1 capabilities and it was noted that this had been accepted by Dr. Russell
2 O'Connor and the other medical experts. It was suggested that the
3 Plaintiff's work history showed his determination to find employment and
4 satisfy his duty to make a living.

5
6 Counsel submitted that it was the duty of the Court to assess at what
7 point in time it becomes unreasonable for the Plaintiff to continue to earn
8 less than the experts on both sides stated that he was capable of earning.
9 It was also submitted that the question of what was reasonable with
10 regards to salary depended on the evidence of the experts and the
11 Plaintiff's evidence.

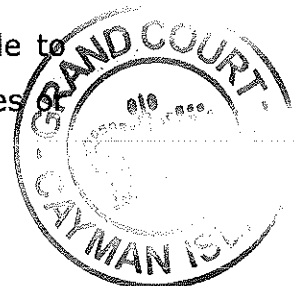
12
13 The Plaintiff's evidence was that he was currently earning of CI \$1,000.00
14 per month from his ice cream business and would shortly have earned the
15 sum of CI \$8,000.00 as a realtor between March and December 2013.

16
17 It was the evidence of Mr. Key that the Plaintiff could earn between CI
18 \$30,000.00 and \$35,000.00 as a surveyor's assistant. Otherwise, Mr.
19 Nordin set out a range of occupations open to the Plaintiff.

20
21 It was submitted on behalf of the Plaintiff that the Court's calculation
22 should be based on the arithmetic of the starting point of the Plaintiff's
23 pre-accident earnings (\$90,000.00) less his reasonable earnings as
24 determined by the judge. The difference between these two figures would
25 represent the past loss for the period June 12, 2010 and November 26,
26 2013.

27
28 Plaintiff's Counsel submitted that a *Blamire* award was not applicable to
29 past loss. Past loss was either established on a balance of probabilities
30 it was not.

31
32 The Plaintiff claimed the sum of CI \$311,171.34 under this head.



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Not surprisingly, Counsel for the Defendant disputed the Plaintiff's claim for the complete loss of earnings for the period June 2010 until November 26, 2013. It was submitted that the court was not in a position to determine that the Plaintiff's redundancy was caused by the accident as a matter of fact. It was further denied that the court would be able to find that this loss was caused as a matter of law.

Counsel for the Defendant submitted that the assertion that but for the accident, the Plaintiff would still be working as Building and Grounds Manager at the Turtle Farm was not capable of amounting to causation in law because the redundancy took place 2½ years after the Plaintiff became FOI Manager. He wondered if the Defendant would still be liable if the redundancy had taken place 10 or 20 years after the Plaintiff assumed his new position. The actions of the Turtle Farm, it was submitted, was an intervening act that the Defendant was not responsible for.

Defendant's Counsel pointed out that the court should consider that the redundancy was made in the context of general spending cuts made by the Cayman Islands government. Additionally it was submitted that redundancies are a risk to which any employee is exposed.

Defendant's Counsel cited Macgregor on Damages (18th edition) at paragraph 6-043:

"where there is a full and free choice in the intervening act, the defendant is much less likely to be held liable. The basic reason for this is that where a completely free intervening act is a lawful one damage does not generally result, and where it is a wrongful one it will be held to form a new cause"



1 It was submitted that in all circumstances, the Plaintiff's redundancy was
2 an intervening lawful act that the Defendant had no control over. It was
3 submitted that the act was of a type which absolved the Defendant of
4 liability.

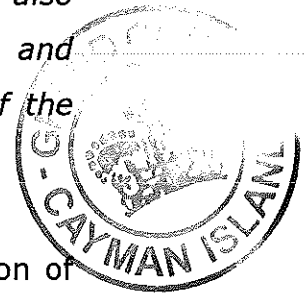
5
6 Alternatively, it was submitted that in the circumstances of this case it
7 would not be "fair, just or reasonable" to hold the Defendant responsible
8 for the loss claimed. Reference was made to the principles of causation
9 referred to by Neil LJ in the case of **James McNaughton Paper Group**
10 **Limited v Hicks Anderson & Co.[1991] 2QB 113** at paragraph 124:

11
12
13 *"It is perhaps sufficient to underline that in every case the court must not*
14 *only consider the foreseeability of the damage and whether the*
15 *relationship between the parties is sufficiently proximate but must also*
16 *pose and answer the question: In this situation is it fair, just and*
17 *reasonable that the law should impose on the defendant a duty of the*
18 *scope suggested for the benefit of the plaintiff?"*

19
20 Additionally Defendant's Counsel pointed to the principle of mitigation of
21 loss and the Plaintiff's admission during cross-examination that he had
22 not taken reasonable steps to mitigate his loss. According to Counsel, this
23 admission debarred the Plaintiff from claiming any part of this head of
24 loss. Counsel referred to **British Westinghouse Company v**
25 **Underground Railway [1912] A.C. 673.**

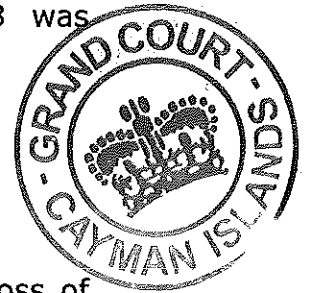
26
27 Counsel argued that if it was accepted that the Defendant had failed to
28 mitigate his loss, then the Court would be stepping into the realm of
29 speculation if it decided to make an award nonetheless.

30
31 Counsel also submitted that the award of CI \$16,089.85 which the
32 Plaintiff received upon his redundancy represented over three months'



1 salary and was therefore proper compensation by the Turtle Farm for a
2 reasonable period of time during which the Plaintiff could have taken
3 steps to properly mitigate his loss.

4
5 Subtracting the sum of \$32,290.00 that the Plaintiff earned for the period
6 June 12, 2010 to November 26, 2013, the Plaintiff's net Claim for loss of
7 earnings during the period May 2007 to November 26, 2013 was
8 \$353,204.53.



9
10
11 Past Loss of Pension

12 Counsel for the Plaintiff made submissions on the Plaintiff's past loss of
13 Pension.

14
15 When paid a salary as Building and Grounds Manager, the Plaintiff
16 received \$450.00 per month or \$14.79 per day for pension. During the
17 month in 2007 that he was not paid after the accident he suffered a loss
18 of \$450.00.

19
20 When the Plaintiff's salary was reduced in his role as FOI officer, he
21 received a monthly pension of \$261.50 or \$8.58 per day. This
22 represented a reduction of \$188.50 per month or \$6.19 per day.

23
24 For the period January 1, 2008 to June 12, 2010 the Plaintiff claimed loss
25 of \$6.19 for 893 days totaling \$5,534.19. For the period June 12, 2010 to
26 November 26, 2013 the Plaintiff claimed the sum of \$18,679.77
27 representing sum of \$14.79 per day for numerical 1263 days. The total
28 claim for loss of pension made by the Plaintiff was \$24,663.96.

29
30 The Defendant accepted the Plaintiff's claim for loss of pension in the sum
31 of CI \$450.00 for the period May 2007 to August 2007.

32

1 The Defendant challenged the Plaintiff's claim for reduction in pension
2 from January 2008 to June 12, 2010 on the basis of the causation issues.
3 The Defendant also challenged the Plaintiff's claim for loss of pension
4 from June 12, 2010 to November 26, 2013 on the basis of the issues of
5 causation and mitigation of loss.

6
7
8 Past Medical & Other Miscellaneous Expenses

9 The Defendant had previously agreed to the Plaintiff's claim for
10 \$14,354.85 in past medical expenses and other miscellaneous expenses.
11 Also agreed was the Plaintiff's claim for \$3,360.00 for past gratuitous
12 care.

13
14
15 Interest on Past Loss

16 Counsel for the Defendant conceded that the Plaintiff was entitled to
17 interest for the time and at the rate claimed by Plaintiff. The rate was half
18 the Court Rate, 1.1875% per annum.

19
20 The Plaintiff claimed interest for the substantive claims submitted for:
21 past loss of earnings; past loss of pension; past medical and other
22 miscellaneous expenses and past gratuitous care. If the figures submitted
23 by the Plaintiff are accepted, the sum claimed under this head was
24 \$30,362.26.

25
26
27 General Damages and Interest – Pain, Suffering and Loss of Amenity

28 On behalf of the Defendant it was submitted that the court should take
29 guidance from the Judicial College Board Guidelines and the case of Bright
30 v Seetec Business Technology Centre referred to in Kemp & Kemp. It was
31 submitted that the award for ankle injuries in that case, which involved
32 the fracture of both ankles with resulting degenerative changes; when



1 adjusted for inflation would be thirty five thousand, eight hundred and
2 sixty pounds or CI \$47,157.33.

3
4 Reference is made to the case of **Archer v UBS [2009 CILR 531]** and
5 the comment by the judge therein concerning "a small increase to reflect
6 the higher cost of living". It was neither conceded that this case applied to
7 the instant case nor that it was binding authority. It was submitted that if
8 found applicable, any award should be between CI \$50,000.00 and CI
9 \$55,000.00.

10
11 While there was a dispute concerning quantum, Counsel for the
12 Defendant conceded interest as claimed by the Plaintiff.

13
14 Counsel for the Plaintiff referred to the findings of Dr. Perez Ali, whose
15 findings have been previously referred to. Counsel also referred to the
16 evidence of Dr. Russell O'Connor who concluded that the long term
17 consequences for the Plaintiff were worrying. Also, that there was a
18 significant chance that surgery will not be successful; however without it,
19 things will get worse for the Plaintiff. Additionally, there is a real risk that
20 the Plaintiff's right foot will have to be amputated.

21
22 Counsel for the Plaintiff referred to the Judicial College Guidelines for the
23 Assessment of General Damages in Personal Injury Cases (12th edition)
24 with respect to ankle injuries. He submitted that the Plaintiff's right ankle
25 fell under the category of "Severe" which carries a range of damages
26 between twenty three thousand to thirty six thousand and eight hundred
27 pounds. He submitted that the injuries to the left ankle would fall in the
28 "Moderate" category carrying a range of damages between ten thousand
29 one hundred pounds and nineteen thousand five hundred and fifty
30 pounds.

31



1 With respect to the Plaintiff's right ankle, Counsel claimed the maximum
2 sum prescribed by the Judicial Guidelines or its equivalent of CI
3 \$48,393.47. He also claimed the maximum sum prescribed by the
4 Guidelines for the left ankle or its equivalent of CI 25,709.03.

5

6 Counsel for the Plaintiff cited **UBS v Archer v UBS (Cayman Islands)**
7 **Limited [2009] CILR 531** and claimed an uplift in damages. Counsel
8 quoted Quin, J as stating that when assessing damages for pain, suffering
9 and loss of amenity in the Cayman Islands, one should look at English
10 case law and the Judicial College Guidelines but thereafter increase the
11 award to account for the higher cost of living locally. To this end rather
12 than the total of CI \$74,102.50, the Plaintiff's claim under this head was
13 CI \$90,000.00.

14

15 Counsel for the Plaintiff claimed interest on these general damages at the
16 rate of 2% per annum for a period covering the date of the Writ of
17 Summons which was April 29, 2010 to the anticipated date of trial which
18 was September 1, 2012. The daily interest was \$4.93 and the claims for a
19 period of 1307 days making the total interest claimed \$6,445.47.

20

21

22 Future Loss of Earnings and Pension

23 This area was the most hotly disputed by both sides.

24

25 Counsel for the Plaintiff rejected the Defence contention for a *Blamire*
26 award. He quoted Keene, LJ in **Bullock v Atlas Ward Structures Ltd.**
27 **[2008] EWCA Civ 194** to emphasize the point that Courts rarely
28 resorted to such awards. Obviously, such awards greatly reduce damages
29 payable to a Plaintiff.

30



1 Counsel stated that the usual approach could only be rejected due to
2 uncertainty. Thereafter the *Blamire* approach could only be used if based
3 on an informed assessment of the scale of losses faced by the Plaintiff.

4
5 Citing the Court of Appeal case of **Ward v Allies and Morrison**
6 **Architects [2012] EWCA Civ 1287**, Counsel for the Plaintiff stated that
7 the normal approach was for a Court to look first at:

8
9 *"the multiplicand/ multiplier methodology and the Tables and guidance in*
10 *the current edition of Ogden should normally be applied when making an*
11 *award of damages for future loss of earnings, unless the judge really has*
12 *no alternative..... However, in order to carry out the conventional exercise*
13 *a judge has to deal with two aspects before a multiplicand figure can be*
14 *calculated."*

15
16
17 Counsel for the Plaintiff submitted that the following had to be
18 established.

- 19
20 1. On a balance of probabilities what career path it is likely the plaintiff
21 would have taken for both type of work and remuneration had the
22 accident not occurred.
- 23 2. On a balance of probabilities what work the plaintiff was going to be
24 able to undertake following the accident, whether that would be less
25 remunerative than the work that he would have undertaken had
26 there been no accident and, if so, by how much.



27
28
29
30 With respect to item "1", Counsel for the Plaintiff submitted that the
31 evidence adduced had established that the Plaintiff had maintained steady
32 employment since leaving school. Further, for three years prior to the

1 accident and at the time of the accident he had held the same post at the
2 same salary. It was submitted that but for the accident the Plaintiff would
3 still be employed at the Turtle Farm at a salary of \$90,000.00 per annum.

4
5 With respect to item "2", Counsel for the Plaintiff submitted that there
6 was agreement by all of the medical experts on the current physical
7 restrictions faced by the Plaintiff and the scope of the work that he can
8 undertake.

9
10 The Plaintiff referred to the report of Derek Nordin, vocational expert
11 which sets out the range of occupations with salary that the Plaintiff can
12 undertake. The Defendant's expert gave an opinion on the Plaintiff
13 returning to work as a surveyor's assistant and the salary that he can
14 expect.

15
16 Counsel for the Plaintiff submitted that the question for the Court is "what
17 work is the Plaintiff able to undertake, given his injuries. The reports of
18 Nordin and Key addressed the issue of whether this work is less
19 remunerative than if no accident had occurred.

20
21 It was submitted that the Plaintiff's earning less than the experts suggest
22 that he could earn, could be treated as a failure to mitigate.

23
24 The Ogden Tables

25 In urging the use of the Ogden tables, Counsel for the Plaintiff submitted
26 the following questions for the Court's consideration.

- 27
28 (i) Is the Plaintiff disabled?
29 (ii) What is the appropriate discount rate?
30 (iii) Should the Plaintiff's life expectancy be reduced given his clinical
31 morbid obesity?



1 Counsel for the Plaintiff referred to the evidence and submitted that his
2 client satisfied the definition of "disabled" pursuant to paragraph 35 of the
3 Ogden tables which set out:

4

5 *"a person is classified as being disabled if all three of the following*
6 *conditions in relation to the ill health or disability are met:*

7 *(i) has an illness or a disability which has or is expected to last for over a*
8 *year or is a progressive illness*

9 *(ii) satisfies the Equality Act 2010 definition that the impact of the*
10 *disability substantially limits the person's ability to carry out normal day-*
11 *to-day activities*

12 *(iii) their condition affects either the kind or the amount of paperwork*
13 *they can do"*

14

15

16 The Tables further specify that normal day-to-day activities are those
17 which are carried out by most people on a daily basis. The disabilities or
18 health problems referred to are those which have a substantial adverse
19 effect on the person's ability to carry out these activities. Counsel for the
20 Plaintiff referred to the definition of problems with "Mobility" as indicated
21 in the Tables.

22

23 "Mobility - for example, unable to travel short journeys as a passenger in
24 a car, unable to walk other than at a slow pace or with jerky movements,
25 difficulty in negotiating stairs, unable to use one or more forms of public
26 transport, unable to cool out of doors unaccompanied."

27

28 Counsel referred to the Plaintiff's evidence concerning his ability to move.

29

30 With reference to the Ogden Tables, Counsel for the Plaintiff submitted
31 the following figures for the Court's consideration.

32



1 The Plaintiff's age was 47 years old and at the time of his accident he had
2 not been disabled. It was submitted that "but for" the accident he would
3 have continued to earn \$90,000.00 per annum and further; his normal
4 retirement age would have been 65 years. This was conceded by Counsel
5 for the Defendant. Counsel asked the Court to accept that as suggested
6 by the experts, the Plaintiff's anticipated earning rate going forward was
7 \$35,000.00 per annum. This is in contrast to his actual earnings at
8 present. Further, the Plaintiff's educational attainment at the date of the
9 accident was "GE-A".

10

11 As it related to the Plaintiff's expected earnings, the multiplier to age 65
12 using Table 9 is 17.34 using 0% rate of return. The adjustment factor
13 contingencies other than mortality using Ogden 7, table A is 0.86 for a
14 non-disabled male with the Plaintiff's characteristics. The figure 17.34
15 multiplied by 0.86 yields a multiplier of 14.91.

16

17 Using the formula submitted by Counsel, $(14.91 \times \$90,000.00)$, by my
18 calculations the Plaintiff's "but for" earnings would have been
19 \$1,341,900.00.

20

21 With respect to anticipated actual earnings, the starting base level of
22 earnings from the date of trial was submitted at \$35,000.00 and again
23 the multiplier from table 9 was 17.34 using 0% rate of return. Using
24 Ogden 7, Table B which applies to disabled males, the adjustment factor
25 for contingencies other than mortality is 0.48, the resultant multiplier is
26 8.32 (0.48×17.34) .

27

28 Using the formula submitted by Counsel $(\$35,000.00 \times 8.32)$, by my
29 calculations, the anticipated earnings are \$291,200.00.

30



1 A deduction of the anticipated actual earnings from the "but for" loss of
2 earnings resulted in a future loss of earnings in the sum of
3 \$1,050,700.00.

4
5 Counsel for the Plaintiff conceded that the Court had discretion to adjust
6 the multiplier up or down based on the circumstances. He submitted that
7 the Defendant had not established a case for such interference and
8 argued that the Ogden tables should not be tinkered with.

9
10 As stated earlier, on behalf of the Defendant it was submitted that the
11 appropriate approach for an award should follow the principles in **Blamire**
12 **v South Cumbria HA [1993] PIQR Q1 (CA)**. That case established two
13 questions for a Court:

- 14
- 15 1. What was the likely pattern of the plaintiff's future earnings had he
16 not been injured?
 - 17 2. What was the likely pattern for the plaintiff's future earnings given
18 the fact he has now been injured?

19
20 *Re: Question #1*

21 Counsel for the Defendant challenged the Plaintiff's assertion that were it
22 not for the accident and the injuries he received therefrom, he would
23 have continued to earn the salary of CI \$90,000.00 per year. Reference
24 was made to the Plaintiff's concession during cross-examination that he
25 did not know if he would still be employed at the Turtle Farm, at the time
26 of trial. Additionally, it was submitted that no evidence had been adduced
27 that the position of Buildings and Grounds Manager still existed at the
28 Turtle Farm and was remunerated at the same rate.

29
30 Consequently it was submitted that the court could not accept that the
31 Plaintiff's pre-accident earnings would remain at CI \$90,000.00 until the
32 date of his retirement.



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Re: Question #2

Counsel for the Defendant challenged the Plaintiff's assertion that he is only capable of earning the sum of CI \$35,000 per year from the date of trial to the age of retirement.

Defendant's Counsel speculated on what the real monthly earnings for the Plaintiff would be in real estate sales and suggested that CI \$48,000.00 is a realistic earning potential. It was also submitted that the Plaintiff's ice cream business could improve and bring it more than the annual sum of CI \$12,000.00.

Counsel for the Defendant referred to the Chamber of Commerce Salary and Benefit Survey (4th edition) as authority for the proposition that given the Plaintiff's background and training it would be reasonable to assume that he could earn \$60,000.00 per year. It was pointed out that this was his approximate salary as FOI Manager. Counsel submitted that the evidence showed that the Plaintiff was hardworking and adaptable. It was suggested that the Plaintiff could earn \$48,000.00 per annum in real estate as well as \$12,000.00 per annum from his ice cream business for a total of \$60,000.00 per annum.

It was submitted that the Plaintiff had failed to mitigate his loss and it was impossible to speculate what employment benefits would have accrued to the Plaintiff had he joined a recruitment agency and developed a career. It was further submitted that the expert report of Derek Nordin was unreliable because the figures in his first report related to job opportunities in Canada and it was useless to compare salaries in entirely separate jurisdictions. It was suggested that no guidance could be accepted on this opinion of the Plaintiff's residual earning capacity.



1 Counsel also pointed to the fact that as FOI Manager, the Plaintiff had
2 received a salary of CI \$62,000.00 per year. It was submitted that this
3 was the best evidence of the Plaintiff's actual earning capacity.

4
5 Finally, Counsel for the Defendant submitted that before a court could
6 make an award on the multiplier/multiplicand basis it had to be satisfied
7 that it could accurately predict the likely earning patterns of the Plaintiff
8 both pre-accident and post-accident. It was submitted that in this case; it
9 was inappropriate to make an award on the basis requested by the
10 Plaintiff. Counsel for the Defendant submitted that an appropriate award
11 under this head would be between CI \$100,000.00 and CI \$150,000.00.

12
13 With respect to the Plaintiff's submissions, Counsel for the Defendant
14 reiterated the position that the *Blamire* approach was the appropriate one
15 and made the following submissions without prejudice to that position.

16
17 Counsel repeated the Defence contention that the Plaintiff would not have
18 continued to earn CI \$90,000.00 per annum and receive a monthly
19 pension contribution of CI \$450.00. Further, he submitted that the
20 Plaintiff's residual earning capacity was at least CI \$60,000.00 per
21 annum. His monthly pension had to be assessed based on the salary the
22 court assessed he would have received but for the accident. It was further
23 submitted that the court had to take into account any pension that the
24 Plaintiff would receive in the future.

25
26 Counsel for the Defendant did not concede that the Plaintiff was disabled
27 in accordance with the definition applied in the Ogden Tables. Further, it
28 was submitted in the alternative that the court could apply a figure
29 between the disabled and non-disabled discount tables.

30
31 Defendant's Counsel submitted that the appropriate rate of return should
32 be 2.5% in the Cayman Islands referencing **K Wilson and K Wilson v C**



1 **Ebanks and JJ Ebanks [2011] 1 CILR 447**. It was submitted that the
2 report of the Plaintiff's Financial Investment Expert, Mr. Theo Bullmore
3 was insufficient to displace this presumption and further, it did not
4 undertake an exercise as contemplated in the case of **Simon v Helmot**
5 **[2012] UKPC 5**.

6
7 Further arguing for a discount, Counsel referred to the testimony of the
8 Plaintiff whereby he had testified that he would invest the money in
9 property and seek to double his investment if the right investment
10 opportunity arose. Counsel for Defendant's final submission on this point
11 was that he further discount rate should be applied of 8% to 12%.

12
13 It was submitted that if the previous figures were accepted then the
14 future loss of pension would be calculated based on the same premise.

15
16 It was submitted that but for the accident, the Plaintiff would have
17 anticipated receiving \$450.00 per month by way of pension contributions
18 until retirement. This amounts to an annual sum of \$5,400.00.

19
20 If the figure of \$35,000.00 is accepted as the Plaintiff's anticipated
21 earnings, it was submitted that on this figure he would receive \$145.83
22 per month by way of employer pension contribution or the annual sum of
23 \$1,749.96.

24
25 Using the multiplier of 14.91 referred to previously, the Plaintiff's "but for"
26 pension earnings would be \$80,514.00 (14.91 x \$5,400.00). Using the
27 multiplier of 8.32 referred to previously, actual pension earnings would be
28 \$14,559.66 (8.32 x \$1,749.96). A deduction of the second sum from the
29 first sum yields a claim for future loss of pension in the sum of
30 \$65,954.34.





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Appropriate Discount Rate

Counsel for the Plaintiff referred to the principle that the aim of personal injury litigation is to compensate the plaintiff for 100% of loss. He submitted that this was the premise on which the discount rate of 2.5% had been used in the United Kingdom following the judgment in **Wells v Wells [1999] 1 AC 345.**

Counsel for the Plaintiff referenced the fairly recent case of **Simon v Helmut [2012] UKPC 5** which emanated from the jurisdiction of Guernsey. In this case, which went all the way to the Privy Council, the principle was approved that the jurisdiction of Guernsey was not restricted by the provisions of the Damages Act which applies in the United Kingdom. As such, courts in that jurisdiction had the freedom to apply rates of discount which were significantly lower than 2.5%.

Counsel for the Plaintiff referenced the local case of **K Wilson and K Wilson v C Ebanks and JJ Ebanks [2011] 1 CILR 447.** Counsel in that case had urged the court to apply a rate of discount which was lower than 2.5%. The Honourable Smellie, C.J. had stated therein:

"The value of the Ogden Tables as a tool of assessment has since been considered by the House of Lords. Insofar as the Ogden Tables advise the application of a notional rate of investment return for arriving at what the rate of discount to the lump sum award should be, they achieved acceptance and approval by the court: Wells v. Wells... The question however remained: what should the notional rate of investment return be? The House of Lords accepted as the benchmark the yield offered by Index Linked Government Securities ("ILGS") which, at that time, was some 3.5%; but when reduced further to reflect income tax which the plaintiffs in Wells v. Wells had to pay, the rate of discount was found to be 3%. A rate of return regarded as based on ILGS could be described as

1 wholly artificial in the Cayman Islands were no such securities are offered.
2 And while and informed investor could rely on professional advice leading
3 to access to ILGS or other gilt-edged investments, such advice can be
4 expensive. Taking it into account would therefore typically justify
5 factoring in a full percentage point to the rate of discount. For those and
6 other reasons of the dissimilarities, the validity of the wholesale adoption
7 of the Ogden Tables in the assessment of damages in this jurisdiction has
8 been doubted.....”

9
10
11 The learned Judge then referred to the judgment of Quin, J in **UBS v**
12 **Archer v UBS (Cayman Islands) Limited [2009] CILR 531**. In UBS
13 the Honourable Judge commented that “*in the absence of a set of*
14 *actuarial tables compiled with specific reference to the demographics of*
15 *the Cayman Islands, the courts here have wisely relied upon the Ogden*
16 *tables as a reasonable source of actuarial data*”. He then applied a
17 notional rate of investment return of 2.5%.

18
19
20 The Honourable Smellie, C.J. then went on to adopt 2.5% “*as a fair rate*
21 *of discount because I think it realistically reflects the rate of return that a*
22 *risk-free conservative approach – that which a reasonable investor.....*
23 *would adopt – will probably yield for the medium to long term, rather*
24 *than the higher 3% or still higher 4.5% of the conventional approach*”.

25
26
27 Counsel for the Plaintiff submitted that there was no legislation on point
28 which bound the Courts in the Cayman Islands to the rate of return of
29 2.5%. He noted that while *Wilson v Ebanks* was decided post *Helmut*, it
30 did not appear that the earlier case had been drawn to the attention of
31 the learning judge. Counsel stressed the fact however that despite
32 applying the discount rate of 2.5%, the learning judge had stated that



1 ILGS may be inappropriate for the Cayman Islands. Counsel asked the
2 court to consider the appropriate rate for the Cayman Islands.

3
4 At this point Counsel for the Plaintiff referred to the expert report of Mr.
5 Theo Bullmore, chartered accountant.

6
7 Mr. Bullmore's report referenced both *Simon v Helmot* and *Wilson v*
8 *Ebanks*. He recommended using the yields on US Treasury Inflation
9 Protected Securities ("TIPS") rather than ILGS in the context of the
10 Cayman Islands. His primary basis for this recommendation concerned
11 exchange-rate risks involved with the purchase of Sterling securities. He
12 concluded his Report by stating as follows:

13
14 *"if the yield on tips is adopted as a basis for risk free real returns in the*
15 *Cayman Islands, then in my opinion the appropriate yield to use in this*
16 *case would be 0.152%, which would round down to 0.00%."*

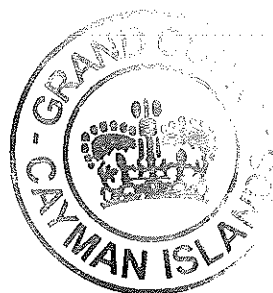
17
18 Counsel for the Plaintiff submitted that if the Court was trying to achieve
19 100% compensation on the basis that the Plaintiff will be risk averse, the
20 appropriate rate at this time would be 0%.

21
22 As previously stated, Counsel for the Defendant had submitted that the
23 appropriate rate of return should be 2.5% in the Cayman Islands
24 referencing *Wilson v Ebanks*.

25
26
27 Future Surgery

28 The Defendant had previously agreed to the Plaintiff's claim for
29 \$35,382.16 for future surgery.

30
31
32 Future Loss of Earnings for Surgery



1 Counsel for the Plaintiff submitted that the evidence before the court
2 showed that when the Plaintiff undergoes surgery in the future, he will be
3 out of work for three months. It was submitted that the Plaintiff would
4 suffer a total loss of earnings for that period.

5
6 Since it was submitted that the Plaintiff's anticipated earnings is
7 CI \$35,000 per annum, this amounts to a salary of \$2,916.66 per month.
8 With reference to Table 27 of the Ogden tables, Counsel for the Plaintiff
9 claimed a 0% rate of return resulting in a discounting factor of 1. The
10 sum claimed under this head is \$8,749.98.

11
12 Counsel for the Defendant submitted that after the court made a
13 determination in relation to the Plaintiff's annual salary the Defendant was
14 prepared to concede that the Plaintiff was entitled to one month's salary
15 only.

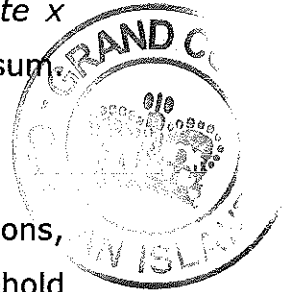
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18 Future Household & Gardening Assistance

19 Counsel for the Plaintiff referred to the opinion of Dr. Ali that the Plaintiff
20 will require housekeeping and home maintenance assistance. He also
21 submitted that Dr. O'Connor on behalf of the Defendant had agreed that
22 the Plaintiff will need assistance with the yard work, seasonal yard work
23 and with household chores.

24
25 The Plaintiff submitted a claim for two hours per week for the yard work
26 and six hours per week for household assistance for a total of eight hours
27 per week. It was submitted that the loss will continue for life. Counsel for
28 the Plaintiff claimed the life multiplier of 38.49. This figure is noted in the
29 Ogden Tables with a rate of return of 0.0%.



1 The Plaintiff's claim was based on the following formula: *hourly rate x*
2 *hours per week x weeks per year*. This resulted in an annual sum.
3 Thereafter, the following was: *annual sum x multiplier*.



4
5 The cost originally claimed per hour was CI \$14.00. During submissions,
6 Counsel for the Plaintiff conceded that the original claim for the household
7 helper had been \$13.00 per hour and he verbally adjusted the claim but
8 did not calculate a final figure.

9
10 Counsel for the Defendant denied the Plaintiff's claim for future household
11 and gardening assistance. It was submitted that on the basis of the
12 Plaintiff's evidence that he is able to do household chores apart from
13 mopping and sweeping yet he still performs these chores less than once a
14 week, he is therefore still capable of performing those chores. It was
15 submitted that at most, the Plaintiff was entitled to assistance for one
16 hour per week with household chores.

17
18 It was also submitted that it was the Plaintiff's evidence that while he
19 could maintain his plants; he had not attempted to mow his lawn. He
20 claimed that he was unable to maintain his trees; however on the
21 evidence, prior to the accident he hired persons to deal with this. It was
22 submitted that the Plaintiff's claims concerning gardening, failed.

23
24 Counsel for the Defendant submitted that the court should not adopt a
25 lifetime award approach. The court was asked to adopt a halfway
26 approach going up to the age of 65 years. It was submitted that the
27 Plaintiff's claim was inflated.

28
29 In response, Counsel for the Plaintiff submitted that the evidence had
30 been that while the Plaintiff lived in his parents' home his mother had
31 done the household work. In any event, it was submitted that it was
32 irrelevant to say that if the Plaintiff had not paid in the past, he should

1 not be compensated for the future especially since medical experts
2 recognized that he needed assistance.



3
4
5 **Findings**

6 Having reviewed the evidence in this case, I made the following findings
7 of fact and other determination.

8
9 The Plaintiff, now aged 47 years had been employed as Buildings and
10 Grounds Manager at the Turtle Farm, earning \$90,000.00 per annum and
11 \$450.00 per month in pension benefits.

12
13 I find that while aspects of his previous employment were sedentary, a
14 significant portion involved walking, going on-site, supervising offloading
15 and sometimes assisting in offloading.

16
17 After the accident, the Plaintiff mitigated his loss by returning to his
18 former post albeit on crutches.

19
20 I find as a fact that the Plaintiff was no longer able to continue carrying
21 out the duties of Buildings & Grounds Manager after the accident.

22
23 I find that on or about January 1, 2008 the Plaintiff's employer gave him
24 the option of accepting the position of Freedom of Information (FOI)
25 Manager at a reduced salary of \$5,224.00 per month; being made
26 redundant or being demoted to a lower position with a salary of less than
27 \$5,000.00 per month.

28
29 The Plaintiff continued to mitigate his loss by accepting the FOI job at the
30 Turtle Farm, albeit the fact that this job brought him less income and
31 pension benefits. He also opened an ice cream shop but initially he made
32 a loss on this.

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I find as a fact that having lost his job as FOI Manager, the Plaintiff commenced employment with Charterland Ltd performing appraisals of buildings on a commission only basis. I further find that the Plaintiff was offered a salaried position but that this offer was retracted by the company because his injuries restricted his physical capacities and thus limited the number of appraisals which he could perform. As such he continued in this post on a commission basis until July 2011 earning \$5736.67 for the period.

The Plaintiff's testimony about his current job as on-site sales agent with Charterland Ltd was not challenged. His earnings from this job and from the ice cream shop were also not challenged.

I find as a fact that the Plaintiff did travel to Peru in July 2011 in search of employment and was unsuccessful. I consider that this effort constituted an attempt to further mitigate his loss.

I find that there is no basis for concluding that Plaintiff would not still hold the position of Manager of Buildings and Grounds at the Turtle Farm and at the salary that he previously commanded.

I find as a fact that had the accident not occurred the Plaintiff would have continued to be employed at the Turtle Farm in his original role and with a salary of \$90,000.00 per annum with pension benefits of \$450.00 per month.

I find that despite the fact that the redundancy occurred some 2½ years after the Plaintiff was forced to take on the post of FOI Manager, on the principle espoused in *Morris v Richards*, I find that this was not due to any fault on the part of the Plaintiff and that there was no break in the causal chain.



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While the time period involved is longer than that in *Morris*, I find that the Plaintiff would not have been in the FOI job were it not for the actions of the Defendant. I did not accept the redundancy as an intervening act for which the Defendant bore no responsibility. I find that the Defendant should not benefit from the redundancy.

I find that after he lost his job as FOI Manager, the Plaintiff took reasonable steps to mitigate his loss given his circumstances.

According to the Medical Experts, his employment options were limited to sedentary occupations. While the Plaintiff conceded that he did not join a recruitment agency, he did attend at the Department of Employment Relations to register. Additionally, he took employment with Charterland Ltd. along with investing in his ice cream business. These were not unreasonable choices to make despite the fact that they brought in less income than he could have made elsewhere.

I considered the Plaintiff's concession that in hindsight he could have earned more money by doing something else to be nothing more than a latter day evaluation of the choices that he had made. I find that the Plaintiff acted reasonably and exercised options which were available to him. The evidence has established that the Plaintiff has always showed a determination to find employment and he has always worked to the maximum extent of his physical capabilities. The Plaintiff, in my view, up to the time of trial had made reasonable efforts to mitigate his loss. I do not accept that he should be penalized for those efforts. I do find that post trial, consequent on his own evaluation; the Plaintiff should assume an employment position which brings in more income.

The next consideration is about the salary the Plaintiff could reasonably be able to earn.



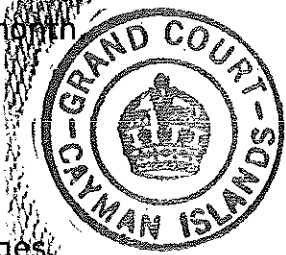
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I do not accept the proposition put forward by Counsel for the Defendant that the Plaintiff is capable of earning \$48,000.00 per annum from real estate sales. That figure appears to be highly speculative.

I do find substance in the opinions of the vocational experts, Nordin and Keys. Based on their estimates, I find that it can be accepted that the Plaintiff is capable of earning \$35,000.00 per annum from a sedentary desk job.

Between the Plaintiff's testimony and the testimony of the medical experts I find no basis to doubt the assertion by the Plaintiff that his injuries have prevented him from enjoying leisure activities as he previously did. I also find as a fact, that while the Plaintiff can and does do some work in his home; he is no longer able to perform all his own housekeeping and maintenance work as he did before the accident.

I find as a fact that due to his difficulties in standing and moving about; the Plaintiff has had to employ a domestic helper for one hour per day at his home and a person to help with the yard work for one day per month.



Award of Damages

I turn now to other areas of dispute in the Plaintiff's claim for damages.

With respect to the period January 1, 2008 to June 12, 2010; based on my previous findings I accept the Plaintiff's claim for the loss of the difference in his salary as Buildings and Grounds Manager and FOI Manager for this period and award \$66,823.19.

Additionally, with respect to the period June 13, 2010 to November 26, 2013; again based on my previous findings I award the Plaintiff's claim for

1 his loss of salary based on what he would have been paid as Buildings and
2 Grounds Manager for this period "but for" the accident. I award
3 \$311,171.34 as claimed.

4
5 With the addition of the agreed month's salary of \$7,500.00 and the
6 subtraction of \$32,290.00; being the amount earned by the Plaintiff
7 between June 12, 2010 to November 26, 2013; I award the Plaintiff's
8 claim for past loss of earnings in the amount of \$353,204.53.

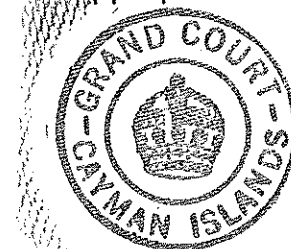
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10 With respect to past loss of pension for the period January 2008 to
11 November 26, 2013; based on my findings concerning issues of causation
12 and mitigation of loss, I do award the Plaintiff's claim of \$24,663.96.

13
14 With respect to interest on past loss, having accepted the Plaintiff's
15 submissions and the rate of interest having been agreed, I award the
16 claim of \$30,862.26.

17
18 Concerning general damages for pain and suffering and loss of amenities,
19 I accepted the submission with reference to the Judicial College
20 Guidelines that the injury to the Plaintiff's right ankle should be
21 categorized as "severe" and the injuries to the left ankle as "moderate". I
22 also accede to the submission to award the maximum proposed under
23 those guidelines. Using the Cayman Islands currency equivalent to the
24 British pound; that amounts to \$48,393.47 for the right ankle and
25 \$25,709.03 for the left ankle. The award totals \$74,102.50.

26
27 I found the reasoning of Quin, J in *Archer v UBS* to be quite persuasive
28 concerning the issue of an uplift in the award. Rather than the sum
29 claimed of \$90,000.00 however, I considered it appropriate to award the
30 sum of \$80,000.00.

31



1 Both Counsel had agreed on both the rate of interest (2%) and the period
2 of time that it should cover (29th April 2010 to 1st September 2012) with
3 respect to this award. Consequently with respect to interest on general
4 damages for pain and suffering and loss of amenities I award \$5,724.66.

5

6 The next head of claim involves the future loss of earnings and pension.

7

8 Having considered the submissions herein and the law, I find that I have
9 a proper basis to make an award on the multiplicand/multiplier basis.

10

11 The evidence of the medical experts confirmed that the Plaintiff's ankle
12 injuries were extremely serious and unfortunately permanent in nature.
13 Injury precludes him from doing much walking on uneven ground or
14 standing or walking for long periods of time. In the future, he is expected
15 to undergo surgery which carries the risk of infection and possible
16 amputation.

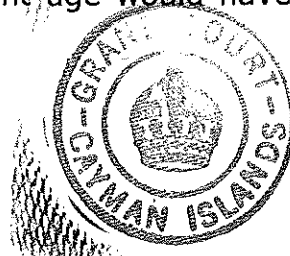
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18 It is my finding that the Plaintiff currently meets the definition of
19 "disabled" pursuant to the Ogden Tables. I also find that using the Ogden
20 Tables, the Plaintiff's educational attainment at the date of the accident
21 was "GE-A".

22

23 At the time of his accident, the Plaintiff had not been disabled. As stated
24 earlier I found that "but for" the accident, he would have continued to
25 earn \$90,000.00 per annum. I have also found that since being made
26 redundant, the steps which the Plaintiff has taken were reasonable in the
27 circumstances but that going forward from trial, I expected him to start
28 earning CI \$35,000.00 from a sedentary occupation. \$35,000.00
29 therefore would be his anticipated earning rate per annum. Additionally it
30 has been conceded that his normal retirement age would have been 65
31 years.

32



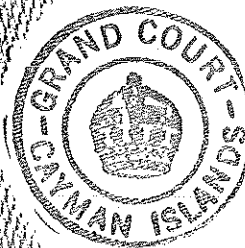
1 Reference has been made throughout to the morbid obesity of the Plaintiff
2 and reduced life expectancy. I did accept that the Plaintiff's weight was a
3 risk factor in his future surgery. Otherwise, I have found little compelling
4 material in relation to this issue that is substantive.

5
6 In *Wilson v Ebanks* the following was stated by Smellie, C.J.:

7
8 *"It is settled principle that some discount should be applied to a*
9 *multiplicand arrived at by calculation of the full amount of expected*
10 *income, to reflect the present-day value of a lump sum payment which*
11 *would otherwise have been earned periodically in the future, and to*
12 *reflect the life risks other than mortality which could affect the plaintiff's*
13 *ability to earn – in other words, a reduced multiplier in terms of number*
14 *of years' purchase to take account of the early payment and those risks.*
15 *The reason is that the lump sum should represent an advance payment of*
16 *income to be earned over a number of years in the future and which it*
17 *must be assumed the plaintiff will invest to yield an income. If no discount*
18 *is applied to the full multiplicand sum, the result would likely be*
19 *overcompensation and injustice to the defendants, who should be*
20 *required to compensate the plaintiff under this head of pecuniary loss only*
21 *for the actual loss assessed."*

22
23 Having considered the submissions made, I agree that I am not bound to
24 accept it, but I do find the figure of 2.5% to be a fair rate of discount and
25 will apply it here.

26
27 As it relates to the Plaintiff's expected earnings, the multiplier to age 65
28 using Table 9 is 14.05 using 2.5% rate of return. The adjustment factor
29 contingencies other than mortality using Ogden 7, Table A is 0.86 for a
30 non-disabled male with the Plaintiff's characteristics. The figure 14.05
31 multiplied by 0.86 yields a multiplier of 12.08. I find that the Plaintiff's
32 "but for" earnings would have been \$1,087,200.00 (12.08 x \$90,000.00).



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With respect to anticipated actual earnings.

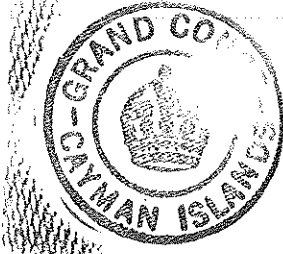
The starting base level of earnings from the date of trial is \$35,000.00 and again the multiplier from table 9 is 14.05 using 2.5% rate of return. Using Ogden 7, Table B which applies to disabled males, the adjustment factor for contingencies other than mortality is 0.48. The resultant multiplier is 6.7 (0.48 x 14.05). The anticipated earnings are \$234,500.00 (\$35,000.00 x 6.7).

A deduction of the anticipated actual earnings from the "but for" loss of earnings resulted in a future loss of earnings in the sum of \$852,700.00.

I accept that I have discretion to adjust the multiplier up or down based on the circumstances. I do not find that a case has been established for such interference.

With respect to the future loss of pension; I have accepted the submission that the Plaintiff is anticipated to earn \$35,000.00 from a sedentary position. I also accept that this would yield a pension of \$145.83 per month by way of employer pension contributions. As such I accept the Plaintiff's calculations of future loss of pension and award \$65,954.34.

I have accepted that the Plaintiff's anticipated earnings from sedentary work is CI \$35,000.00 per annum (\$2,916.66 per month). I do accept that the Plaintiff could likely be away from work for three months as suggested by Dr. O'Connor. However I consider that the just award for future loss of earnings for surgery is one month's salary only. I will award that full sum without more. I consequently award the sum of \$2,916.66 under this head.



1 Based on my previous findings I do accept that while he is able to do
2 some home and garden maintenance, in the future the Plaintiff will
3 require household and gardening assistance. I consider it appropriate to
4 award the Plaintiff for household assistance for five hours per week (20
5 hours per month) at a rate of \$13.00 per hour. I will also award him
6 gardening assistance for one hour per week (four hours per month) at a
7 rate of \$14.00 per hour. This assistance then totals six hours per week at
8 the total average salary of \$13.50 per week.

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11 I am persuaded by the practice of the Court in *Archer v UBS*. Having used
12 Table 8 of *Ogden* which provided multipliers for loss of earnings to a
13 pension age of 60 for females, a rate of return of 2.5% was selected to
14 provide a multiplier of 10.22. The Court then applied the same multiplier
15 to the award to the plaintiff for Home Care.

16

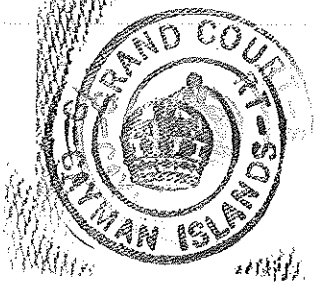
17 I do not consider that the justice of this case allows for a lifetime award
18 under this head. I will return to Table 9 of the *Ogden* Tables which
19 provides multipliers for loss of earnings to a pension age of 65 for males
20 and once again utilize the multiplier of 14.05 which I previously used. The
21 annual sum would be \$4,212.00 (($\$13.50 \times 6 \times 52$). Applied against the
22 multiplier this amounts to an award for future household and gardening
23 assistance in the sum of \$59, 178.60.

24

25 With the inclusion of the figures which were agreed by Counsel with the
26 awards which I have made, the summary of my assessment of the
27 damages in this case follows hereafter.

28

29	1. Past loss of earnings	\$353,204.53
30	2. Loss of Pension	\$ 24,663.96
31	3. Medical Expenses & Other Expenses	\$ 14, 354.85
32	4. Gratuitous Care	\$ 3,360.00



1	5. Interest on Past Loss	\$ 30,862.26
2	6. General Damages for PSLA	\$ 80,000.00
3	7. Interest on General Damages	\$ 5,724.66
4	TOTAL PAST LOSS	\$512,170.26

5
6

7 FUTURE LOSS

8	8. Loss of earnings	\$852,700.00
9	9. Loss of Pension	\$ 65,954.34
10	10. Future Surgery	\$ 35,382.16
11	11. Future one off loss of earnings for surgery	\$ 2,916.66
12	12. Future Household and Gardening Assistance	\$ 59,178.60

13

14	TOTAL FUTURE LOSS	\$1,016,131.76
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16	TOTAL	\$1,528,302.34
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19 The total award is therefore \$1,528,302.34. I grant the Plaintiff costs to
20 be agreed or taxed.

21

22 *Nova Hall*

23 Nova Hall

24 Judge of the Grand Court (Acting)

25 15th May 2014

