CICA 12/2014
(Cause No. 180/2010)

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT

BEFORE

The Rt. Hon. Sir John Chadwick, President
The Hon. Elliott Mottley, Justice of Appeal
The Hon. Sir George Newman, Justice of Appeal

BETWEEN

BRENDA KATHLEEN CHIN
(As personal representative of the estate of Ysatis Chin, deceased)
(Defendant) Appellant

-and-

CHARLES BRENT YATES
(Plaintiff) Respondent

Mr. Andrew Hogarth QC, instructed by Mr. Matthew Dors of Ritch and Conolly appeared for the Appellant, Brenda Kathleen Chin as personal representative of the estate of Ysatis Chin.
Mr. Jonathan Jones QC, instructed by Mr. James Kennedy of Samson & McGrath appeared for Respondent, Charles Brent Yates

Hearing: 12th & 13th August 2014 Judgment reserved
Judgment delivered: 22 August 2014
Reasons released: 11 September 2014

REASONS FOR JUDGMENT

Sir George Newman, JA

1. This is an appeal and cross-appeal against parts of a judgment and order made by the Chief Magistrate Ms Nova Hall sitting as a Judge of the Grand Court on an assessment of damages arising out of a traffic accident which occurred on the 4th May 2007. Liability was not in dispute.

2. The Judge awarded a total of CI$1,528,302.00 to the plaintiff the respondent on this appeal (hereafter "Mr. Yates"), made up as follows.

HEAD OF LOSS	
1. Past loss of earnings	$ 353,204.53
2. Loss of Pension	$ 24,663.96
3. Medical Expenses & Other Expenses	$ 14,354.85
4. Gratuitous Care	$ 3,360.00
5. Interest on Past Loss	$ 30,862.26
6. General Damages for Pain and Suffering of Loss and Amenity	$ 80,000.00
7. Interest on General Damages	$ 5,724.66
TOTAL PAST LOSS	**$ 512,170.26**
FUTURE LOSSES	
8. Loss of earnings	$ 852,700.00
9. Loss of Pension	$ 65,954.34
10. Future Surgery	$ 35,382.16
11. Future one off loss of earnings for surgery	$ 2,916.66
12. Future Household and Gardening Assistance	$ 59,178.60
TOTAL FUTURE LOSSES	**$1,016,131.76**
TOTAL CLAIM	**$1,528,302.34**

3. The appellant challenges the award for general damages on the grounds that the Judge erred in her approach to the assessment and challenges, on a number of grounds, the Judge's award for loss of future earnings. It has been accepted that the Judge failed to give credit for a redundancy payment received by Mr. Yates.

4. Mr. Hogarth QC has criticized the judgment of the trial Judge for a lack of clarity and a failure on the part of the Judge to provide explanations for many of her conclusions.

5. It is fair to say that whilst the judgment carefully sets out much of the evidence, as well as the countervailing arguments, her conclusions on the facts and the law and the reasons underlining parts of the total award are marked by a degree of brevity. This means that this court must attempt by close examination of the record to ascertain the reasoning which the Judge brought into to play. However it has to be said that the judgment cannot escape criticism for a degree of over sight on certain issues which expose the total award to strong challenge.

6. I note that the trial finished at the end of November 2013. Judgment was not given until May 2014.

7. It is well-established that this court should not interfere where a judge has applied the law correctly, taken advantage of having seen or heard the witnesses and has awarded damages which are neither extraordinarily high nor extraordinarily low (See this court in Eaton v Johnston [2004-2005] CILR 580 following the dicta of Lord Justice Greer in Flint v. Lovell, [1935] 1 K.B. at page 360)

8. Invariably if the terms of the judgment do not disclose how advantage has been taken of seeing and hearing witnesses this court is placed in some difficulty. Further the way is opened to arguments being raised by counsel which were not advanced below and potential unfairness to a respondent can arise.

9. Against this background Mr Jones QC leading counsel for Mr. Yates, has submitted that it can be concluded the Judge did take advantage of seeing and hearing Mr Yates in reaching her conclusions on what Mr Yates would do in the future and further did take advantage of seeing and hearing Dr. O'Connor, the only other witness who gave oral evidence, in reaching her conclusion on the reliability and persuasiveness of the evidence she heard.

Summary of Essential Facts and the course of the evidence

10. On the 4th May 2007 as Mr. Yates was driving his car he was involved in a head on collision with a car driven by Ysatis Chin, who died as a result of the collision.

11. Mr. Yates, who was aged 41 at the time, sustained serious injuries as well as multiple abrasions and contusions from the wearing of his seat belt. He was taken to hospital where he underwent emergency surgery to both his ankles. X-rays revealed the fracture to the medial malleolus in his left ankle, a fracture dislocation of his right ankle and a fracture of the neck of the right talus. There was a fracture of the second metatarsal of his right foot. Pins were inserted into both ankles. He remained in hospital for 15 days and upon release was incapacitated for 2 months. He was unable to place any weight upon his right ankle and because of his lack of mobility he required care. His left ankle healed well and sufficiently for it to bear weight but his right ankle could not bear full weight. At the date of trial despite extensive treatment it was clear that the injuries to

his right ankle gave raise to permanent impairment, pain and suffering and loss of amenity and the prospect of further surgery.

12. It is noteworthy that he returned to work, on crutches, in August 2007. He was given a desk job. The extent of physically mobility which his job required of him before the accident was the subject of strong challenge. He had been employed by Cayman Turtle Farm (1983) Ltd ("the Turtle Farm") since June 2004, having been "head hunted" from his post with Deloitte Property Management, where he had been a Quantity Surveyor/Appraiser/Insurance Adjustor since 1998. His employment record was very good and one can infer from the salary paid to him at the Turtle Farm that he was a valued senior employee.

13. He had commenced working at the Turtle Farm as part of the construction management team engaged to develop a multi-million dollar enterprise called the Boatswain's Beach Adventure Park (now called the Cayman Turtle Farm Island Wild Life Encounter). He received a basic salary of CI$7,500.00 per month, a pension contribution of CI$450.00 per month, health insurance coverage and a company car. The construction phase ended in January 2007 at which date he was appointed to be the manager of Buildings and Grounds being paid on the same salary and benefits as before. On the 4th May 2007, just 4 months later, the accident occurred severely disrupting his employment and career prospects.

14. His medical treatment following his release from hospital continued in the Cayman Islands and the United States of America. Between February 2009 and March 2010 he travelled 4 times to Miami for treatment, notably having a custom brace moulded and fitted to increase his mobility and reduce pain consequent upon the use and exercise of his right ankle. Use of the brace assists his mobility but it continues to give rise to pain and discomfort. As a result he does not use it all the time.

15. Mr. Yates gave evidence that in the course of the months after his return to work in August 2007 his medical condition arising from the accident had not improved sufficiently to enable him to undertake all pre-accident duties and on 1st August 2008 (a year after his return to work) he was given the choice of being made redundant or accepting the position of Freedom of Information Manager at the Turtle Farm, at a lesser salary. It was not accepted that he had been given any such "ultimatum" and he was cross-examined on his account of the circumstances which occurred. Nor was it accepted that the reason for him ceasing to be manager was related to his condition. The suggestion, forcibly advanced, was that his job as manager of Buildings and Grounds

had become no longer economically viable. Mr. Yates disputed all these suggestions. He stated that the true position was that he was on crutches and had no idea when, if ever, he would make a full recovery from his injuries and that he concluded it was sensible for him to accept the post at a salary of CI$5,224.00 a month. Employment in this post at this rate continued until he was made redundant by the Turtle Farm on the 12th May 2010. The redundancy, which was not disputed, was relied upon as break in the chain of causation but the Judge rejected this submission and there is no appeal against it.

16. These central aspects of Mr. Yates' case have not been challenged in this court but it is clear from an examination of the notes of evidence and the written final submissions that a vigorous attempt was made by counsel for the appellant to undermine his reliability and to suggest some dishonesty on his part. For example the salary of CI$7,500.00 was supported by a letter requested by Mr. Yates from the Human Resources Department of the Cayman Turtle Farm Limited. Mr. Yates had requested it in response to a suggestion from his lawyer that he should obtain proof of his salary. Challenges in cross-examination led to suggestions he was being dishonest about his earnings leading to him reply in order to defend himself *"I knew I had to be honest with my lawyer and the insurance".* It is not clear from the record what dishonesty was being alleged about insurance. He was forcefully challenged about the ultimatum. It was put to him that he was capable of doing the Buildings and Grounds manager's job even though he was on crutches (see page 221 record bundle). The Judge records in her notes of evidence (page 222) this particular exchange:

> "Q: I suggest that you were able to continue doing these duties and it was an economical redundancy. The job of Building and Grounds Manager was no longer viable.
>
> A: I don't accept that."

The cross-examination continued to suggest that his job as Buildings and Grounds Manager did not involve him in such a degree of physical activity which prevented him holding on to the job. The case for the appellant was that the post of Buildings and Grounds Manager was no longer economically viable. It was put to him that he was not telling the truth and the notes record, at page 223;

> *"I disagree with the suggestion that I am not telling the truth."*

17. The reliability of Mr. Yates was next put in issue over an alleged failure to mitigate his losses and counsel returned to a suggestion that he had lost his job as Manager because the Government had been making cuts across the board. The notes then record an exchange upon which Mr. Hogarth, in my judgment, has placed undue-reliance in this court:

> "Q: You can't say with certainty that you would have been employed at the Turtle Farm in the future
>
> A: Who can?"

It is common place that it can be counterproductive to attack a witness' honesty and credibility if you then fail in the exercise. It is clear that in the areas where Mr. Yates was attacked it had been open to the appellant to obtain evidence from the Turtle Farm rather than make fragile based allegations. The forensic exercise probably led to Mr. Yates' reliability being enhanced in the eyes of the Judge.

18. For convenience and brevity I shall use a summary of Mr. Yates' employment record, from the time he was made redundant, from paragraph 15 of Mr. Jones QC's skeleton argument in this court.

    1. Made redundant 12th May 2010
    2. Obtained temporary employment with Charterland Ltd on commission basis on 26th June 2010 until July 2011
    3. Attempted to supplement his income by purchasing the Ice Hut Creamery. Closed leaving him a loss of CI$13,500.00.
    4. Mid July 2011 to 25th August 2011 he was in Peru trying to find employment.
    5. October 2011 re-opened the Ice Cream business, employing 2 people, whilst he took out work as a real estate agent.
    6. March 2013 he re-engaged with Charterland to sell properties working as an on-site sales agent. By November 2013 he had made 2 sales.

General Damages

19. The Judge calculated her award of CI$80,000.00 as follows.

Right Ankle	CI$48,393.47
Left Ankle	CI$25,709.03

TOTAL CI$74,102.50

She then followed Mr. Justice Quin's approach in *Archer v UBS* and uplifted the award to CI$80,000.00. There has been no challenge to the making of an uplift which is done to reflect the higher cost of living in the Cayman Islands. The appellant's case is that the award is wrong for two reasons:

1. the Judge, having added together the assessment for each ankle failed to stand back and look at the total in the round and thus failed to consider it by reference to the suggested brackets for the range of ankle injuries which can occur and failed to consider any comparable awards for injuries to both ankles;

2. the Judge erred in concluding that the injury to the left ankle fell into the *"moderate"* category set out in the Judicial College Guidelines. It was submitted that it was a modest injury. It is accepted that the injuries to the right ankle did place it in the severe category.

20. The categorizations are taken from the Judicial College Guidelines. For "severe" ankles the range is between £23,000.00 to £36,800.00. In my judgment the right ankle injuries are plainly within the description in the guidelines and to the top of the bracket for recovery in cases of severe injury. Moderate injuries are described as including fractures giving rise to difficulties in walking on uneven ground, difficulties standing or walking for long periods of time, awkwardness on stairs, irritation from metal plates and residual scarring. A risk of future osteoarthritis is also included. The range for moderate injury is £10,000.00 to £19,550.00. In my judgment the evidence to the injury to the left ankle and its consequences do not support a case for the injuries being categorized as "moderate."
21. The Judge stated:

> *"I accepted the submissions with reference to the Judicial College Guidelines that the injure to the plaintiff's right ankle should be categorized as "severe" and the injuries to the left ankle as "moderate". I also [accede] to the submission to award the maximum proposed under those guidelines."*

22. There was a fracture to the medial malleolus of the left ankle. But the evidence is that the fracture united well after screws were put in place. By the beginning of 2012 it was recorded (Dr. O'Connor page 69 of the record bundle) that there had been very infrequent left ankle pain. Dr. Ambekar (page 92) records *"…….. minimal and intermittent (activity induced) pain of on left ankle….. which is likely to be permanent".* A second witness statement of Mr. Yates dated 12th November 2013 (para. 7 page 31) records:

> *"I continue to have occasional pain in my left ankle and forearms. This is much less severe than the pain in my right ankle but still causes me some intermittent discomfort."*

23. In my judgment no evidential basis existed to categorize the left ankle injury as "moderate", let alone to place it at the highest end of the bracket for such an injury. I would categorize the injury as "modest", where recovery has not been complete, where intermittent discomfort can and will arise and where a sum of £6,500.00 should be awarded. There was no clear evidence of long-term osteoarthritis or of the ankle giving way.

24. It is fair to say that, before service of the skeleton argument for this appeal, it had not been contended that the "moderate" categorization made by the Judge was wrong. For my part the erroneous categorization of the left ankle appears to me to be plain and obvious. The error was compounded by a maximum award in that bracket.

25. As to the level chosen by the Judge for the right ankle I agree that it falls at the higher end of the bracket for recovery but do not agree that it merits the maximum. I would award £34,500.00 which is close to the maximum. I turn now to the Judge's failure to stand back and look at the total of the assessment for each ankle. The sterling total of the amount I would award amounts to £41,000.00.

26. It is clear from the cases (see the unreported case of Sadler v Filipiak & ANR Court of Appeal 10 October 2011) and Clarke v Maltby [2010] EWHC 1865 that judges should be alert to the danger that if two discrete assessments are simply added together there is a

danger of double counting and there will be a danger of an award being outside the range of awards for the type of injures under consideration.

27. Mr. Hogarth drew attention to the top of the bracket for very severe injuries to the ankle namely £51,200.00, approximately CI$67,328.00. He submitted that by adding together her assessments the Judge exceeded that figure. I accept the value of looking at awards for more severe injury than that sustained by Mr. Yates. The Judge should have stood back and consider the totality of her award. Having adopted the approach of adding together the assessments, when standing back from the total of £41,000.00, it can seen to be well into the very severe bracket. I am of the view that £6,500.00 as an award for the left ankle can be seen as discrete compensation for the left ankle and thus I would only make a small reduction to the total of £41,000.00 to £40,000.00, thus placing the total inside but at the bottom of the comparable severe bracket. The "modest" nature of the injuries to the left ankle has produced a "modest" recovery in damages which, in my judgment, involves little or no risk of double counting and when converted and added to the award for the right ankle should result in an award of general damages of £40,000.00 ($54,000.00) uplifted for the higher cost of living in the Cayman Island, to $60,000.00.

Loss of Earnings

28. The Judge found as follows:

> *"I find that there is no basis for concluding that the plaintiff would not still hold the position of Manager of Building 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 CI$90,000.00 per annum with pension benefits of CI$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 casual chain.*
>
> *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 find that after he lost his job as FOI Manager, the plaintiff took reasonable steps to mitigate his loss given his circumstances"

A little later the Judge quoted as follows:

"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".

It was submitted by Mr Hogarth that the Judge had simply accepted, without reason and without regard to the uncertainties of life, that he would have enjoyed the certainty of continuous employment as Buildings and Grounds Manager at the Turtle Farm for more than 17 years until he was 65 years old. It was submitted the Judge was led up "the garden path" and fell into error because she should have assessed the chances the future would have held for Mr. Yates. Having considered the notes of evidence, the arguments and written submissions which disclose the course of the trial below, fairness requires that the Judge's brief statement on the central issues should be seen and understood in the context of the issues ventilated at the trial.

29. The Judge was not "led up the garden path". On the contrary one can see from the notes of evidence (page 215) how counsel for Mr. Yates accepted that in seeking to find the correct figure for the lump sum there would be variables to be taken into account and that the *"…… the court has to discount the lump sum."* Counsel also accepted that there should be a discount for life expectancy. It is not clear what regard the Judge paid to these submissions. It was clearly right to accept that there were uncertainties. Mr. Yates himself commented *"who can be certain".* The issue for the Judge was whether there were so many imponderables or uncertainties that the court should not use the conventional multiplier/multiplicand approach. It was loosely suggested that the extent of the uncertainties meant that there should be a "Blamire award".

30. The case of Blamire v South Cumbria Health Authority [1993] P.I.Q.R. Q1 (Court of Appeal) was cited to the Judge. The facts of the case were very different from those which arise in the instance case. The female plaintiff was a nurse aged 22 when she injured her back. Her career as a nurse had just started. The trial judge found that she would have followed nursing as her chosen vocation but there was uncertainty as to what she would have earned, whether she would have had children and whether she would have worked only part time. In short there were imponderables which clearly arose on the plaintiff's own case.

31. The Judge recorded the difference in argument by setting out Mr. Yates' case as raising two questions:

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

The Judge set out the questions identified in Blamire as being the case for the appellant.

> *"1. What was the likely pattern of the plaintiff's future earnings had he not been injured?*
>
> *2. What was the likely pattern for the plaintiff's future earrings given the fact he has now been injured?"*

For my part I can see little between the two sets of questions. I take the issue on this appeal to be whether there were so many imponderables that the Judge should not have adopted the conventional multiplier/multiplicand approach.

32. I do not accept Mr. Hogarth's submission that the Judge erred in applying, what Mr. Hogarth termed the *"but for"* test. It is critical to each of the first questions set out above that the position under consideration is that which would have prevailed, in one, *"……had the accident not occurred"*, in the other, *"…..had he not been injured."* It was for the Judge to examine the evidence and reach a conclusion on Mr. Yates' earning capacity prior to the accident. She was bound to look at his employment history, his record, his progress, his character, his general reliability, his determination, and the type of work for which he had proved himself to be capable and to consider the stability of the work he was engaged in at the date of the accident.

33. At the date of the trial he was over 47 years old. There were more than 17 years until his retirement age of 65. The resolution of disputed issues in a trial is resolved by considering the material and the countervailing arguments. Mr. Yates' case was that had the accident not occurred or in other words, had he not been injured, he would

remained employed as Manager of the Turtle Farm until his retirement at the age of 65 and that he would have continued to be remunerated at the same rate. He was not asserting that to be a certainty. It was his assessment of what would have been the course of his working life. According to how reliable the Judge considered him to be it was open to her to accept it.

34. It can be said that the forensic goal which Mr. Yates undertook involved a heavy evidential burden but he accepted in cross-examination that he could not be certain and that in his opinion no one can be certain. Obviously he remained as certain as he could be that he would have been working at the Turtle Farm as the Byildings and Grounds Manager until he was 65 years old. This evidence, which was relied upon by Mr. Hogarth to attack the conclusion reached by the Judge, does not, in my judgment, go anywhere near supporting the proposition that Mr. Yates' himself accepted that his case was riddled with so many imponderables that the Judge should have eschewed the conventional approach and should have calculated both the pre-injury earning capacity and the post injury future earning capacity by assessing the chances the future would have held for the plaintiff (See appellant skeleton argument paragraph 2(2)(II)). Claims for loss of a chance arise where the plaintiff's case for damages depends upon the future occurrences of hypothetical action normally that which a third party would have taken to confer a benefit on the plaintiff (See Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602; Chaplin v. Hicks [1911] 2 K.B. 786, C.A. and Kitchen v. Royal Air Force Association [1958] 1 WLR 563)

35. Nor do I accept that the Judge's conclusion, that there was *"no basis" for concluding that the plaintiff would not still hold the position, has to be regarded as flawed because of a lack of reasoning or because there was no reasonable evidential basis available for the conclusion".*

36. A judge's finding has to be examined in the context of the trial, account can then be taken of the lines of argument and the cross-examination which have taken place. Judges draw the parameters of a case and frame their decisions by reference to the case which is being presented to them. In paragraph 42 of the skeleton final submissions for the defendant (Record bundle page 207) reliance was placed on Mr. Yates' answer recorded as; *"who can say whether I would still be employed at the Turtle Farm"*. Various points are then advanced in the submissions to support the contention that the job would not have remained open until he was 65. Those points include reliance upon the cross-examination which included the material put to question the reliability, credibility and honesty of Mr. Yates. Specific reliance is placed on the cut backs in

government as a source of uncertainty. The general submission was that the Judge should not take an isolated job as the measure of Mr. Yates' earning capacity.

37. It would unquestionably have been clearer had the Judge taken these points in turn or even referred to them, and expressed how unpersuaded she was by them or by the case advanced for the defendant. That said it is clear from the judgment that she was not persuaded. It is clear that the challenge based on the economic viability of the manager's position in 2008, the conduct of Mr. Yates in accepting the position as FOI and the allegation of a failure to mitigate were all rejected in favour of Mr. Yates. It seems sufficiently clear to me that the Judge found Mr. Yates to be an honest and reliable witness. A hardworking and determined person who had always been in employment and bettered himself. He had returned to work on crutches within three months of the accident. He attempted to find employment when made redundant. He started a new business selling ice cream and travelled to Peru to seek work. More centrally to the question whether the manager's post would have continued, she clearly rejected the suggestion that it had ceased when he took the FOI post. She must have rejected the claim that he could have continued to do the job which was an allegation which went to his honesty and went to the nature of the job he had done. She must have rejected the serious allegation that he had not been the subject of an ultimatum because, *"in truth it had been decided that the post was not economical".*

38. Either side could have obtained evidence from the Turtle Farm, but apart from the letter confirming the salary of Mr. Yates, the company's assistance was not sought. In my judgment, in the circumstances of this case as I have endeavored to summarize them, the absence of evidence from the Turtle Farm should be regarded as neutral factor.

39. As to the case law I have no hesitation in adopting the judgment of Lord Justice Potter in Herring v the Ministry of Defence [2004] 1 ALL ER 44 at paragraph 23 to 27 as the most helpful and clear exposition of the approach to be taken by a court facing the task of assessing a fair figure for future earnings loss. At paragraph 23 Potter LJ stated:

> *"Where, at the time of the accident, a claimant is in an established job or field of work in which he was likely to have remained but for the accident, the working assumption is that he would have done so and the conventional multiplier/multiplicand method of calculation is adopted…… adjusting the multiplicand and appropriate point along the scale of the multiplier…."*

Potter LJ added:

".....it will generally be appropriate to make a moderate discount in the multiplier in respect of the contingencies or vicissitudes of life".

This is the approach which the Judge in this case should have followed.

40. The Judge was entitled to adopt the conventional approach. There was sufficient evidence for the working assumption to be adopted. The Judge was correct to resort to the Ogden Tables as the ready reckoner for the calculation. However she fell into error in her unqualified acceptance of the figures in the tables and her failure to adjust the multiplier and the multiplicand where necessity arose (see paragraph 54 of the judgment).

Calculating the Future Losses

41. Paragraph 5 of the Grounds of Appeal concerns an alleged failure on the part of the Judge to take into account, when assessing the relevant multipliers, the evidence that the Plaintiff's obesity and his smoking habit, neither condition being attributable to the accident, reduced his life expectancy by between 8 to 10 years. If this is a good point its consequences affect the multiplier for both the "but for" earnings and the anticipated future earnings.

42. The Appellant's expert Dr. O'Connor gave oral evidence regarding Mr. Yates' life expectancy. It is possible the Judge was not impressed by the persuasiveness of some parts of Dr. O'Connor's evidence but she did not express any reservations about his opinion on reduced life expectancy. On the contrary she recited the effect of it and simply found it irrelevant.

43. Dr. O'Connor's opinion was:

"…… morbid obesity reduces life expectancy in general by 8 to 10 years….. there will be a further reduction if one factors in smoking, which the plaintiff admitted doing".

There was statistical evidence to support the opinion. It was agreed that Mr. Yates was morbidly obese, the Judge accepted it *"….. as a risk factor in his future surgery".* She added delphically; "*Otherwise I found little compelling material in relation to this issue which is substantive".*

44. The case for Mr. Yates at the trial and in this court has been that a man aged 48 years has an average life expectancy of a further 37.47 years, namely to 85 years and, as a result, a reduction of 10 years to 75 years is immaterial if the calculation is being made to retirement at 65 years.

45. The point has some weight but not enough to justify ignoring the opinion altogether. The Judge should have taken Mr. Yates' morbid obesity into account. His smoking was confined to cigars and, as Mr. Jones submitted, his ability to cease the habit, apparently occasional rather than strongly addictive, had to be considered. Further one should not ignore a successful effort being made to reduce obesity.

46. The Judge commenced each of her Ogden Table calculations with the figure for a man aged 47 at date of trial, at a discount rate of 2.5%, namely 14.05 and then calculated a multiplier. It is at this starting point that effect should be given to his reduced life expectancy.

47. Mr. Jones pointed out that there had been no appeal against the 14.05 multiplier. He was correct to do so. Further it was only at the end of his argument that Mr. Hogarth advanced a totally fresh calculation, which at the request of the court, he set out on a separate sheet. That proposed a discount of 2.13 on the multiplier for reduced life expectancy. This somewhat complex calculation, which was based on tables and propositions not in evidence below was accepted de bene esse. Mr. Jones had no proper opportunity to respond to it and in my judgment it would be unfair to pay substantive attention to it. I observe that at best it leads to a discount of 2.13.

48. It is unsatisfactory when important argument is developed at a very late stage. That said Ground 5 raised the point on reduced life expectancy and paragraphs 5(1) to 5(10) of the Appellant's skeleton argument expanded upon it.

49. I have considered how this part of the case can be fairly resolved. Mr. Yates was almost 48 years old at the date of trial. Had he been treated as such the multipliers would have been 13.42. (See Ogden Table 9). To take account of this factor, the lack of challenge to 14.05 and the reduced life expectancy I have concluded that one should take a multiplier of 13.00.

Earning Capacity

50. The Judge was plainly entitled on the evidence to conclude that before the accident Mr. Yates had an earning capacity of CI$90,000.00 per annum with a contribution to his pension and other benefits. Having accepted Mr. Yates' evidence and having had the benefit of assessing his reliability, judgment and honesty she was entitled to conclude, on the balance of probabilities that he would have been the manager at the Turtle Farm, at the date of the trial and that he would, as he had firmly maintained, have remained in that position until he attained 65 years of age with the same salary. That was a working assumption available on the evidence. But the essence of a working assumption is that it must be subjected to scrutiny to ensure that it does not lead, without careful enquiry, to a conclusion on a fixed certainty.
51. She should have considered whether the case required adjustment to be made to the multiplier and/or the multiplicand. In my judgment she should have taken account of the projected period being for a period of more than 17 years. It is a length of time in which a number of changes can occur which could impact upon the continuation of the specific employment which formed the content of her working assumption. There was some evidence that the level of remuneration at the Turtle Farm was higher than that which might be obtained elsewhere. It was evidence which merited attention. There was little or no evidence of what opportunity he might have to obtain similar managerial employment at a similar level of remuneration but for the evidence that, as FOI, he was forced to take a substantial reduction from CI$90,000.00 to CI$62,000.00.

52. The plaintiff was born on the 7th January 1966. At the date of the trial in November 2013 he was nearly 48 years old. Mr. Hogarth suggested the court should adopt a 10 to 12% discount reducing CI$90,000.00 to CI$78,000.00. The figure can be seen as representing a point almost mid-way between the best evidence on the figures in the case, namely CI$90,000.00 and CI$62,000.00 and it reasonably mitigates the absolute certainty which the Judge allowed. I would therefore calculate the multiplicand for lost future earnings to be CI$78,000.00 Taking Table A, loss of earnings to pension age 65 at 0.86, multiplying 13.0 x 0.86 produces a multiplier of 11.18 and but for earnings of CI$872,040 (11.18 x $78,000).

Anticipated Earnings

53. The respective arguments on this issue were between CI$48,000.00 for which the appellant contended and the CI$35,000.00 which, on the facts the Judge held to be the correct figure. Mr. Jones, QC pointed out, that it was a figure at the mid-way of what Mr. Yates had actually earned since the accident but in my judgment the appellant's

challenge fails because CI$35,000.00 was only figure which had a basis in the evidence. Further it was the evidence of each vocational expert. I can find no justification for this court interfering with this finding of fact.

54. The appellant raised a further ground of appeal under this head of claim. It was submitted that the Judge should have brought into account profits in the ice cream business at CI$12,000.00 per annum. The profitability of the ice cream business could hardly be viewed as secure. It had failed and had been closed down. Whilst it opened up again, it required two employees for Mr. Yates to keep it running. It seems clear to me that if Mr. Yates was to achieve success in his new career as a realtor salesman he would need to work full time at it. The ice cream business, which represented something of a credit to his determination to earn a living, was properly disregarded as a long term source of income

55. The Judge calculated anticipated earnings by using the Ogden Tables; Ogden 7, table B, which applies to disabled males taking the adjustment factor for contingencies other than mortality as 0.48. Mr. Hogarth submitted that she was wrong to do so and should have adjusted the figure in table B.

56. There was no dispute that Mr. Yates was disabled. The grounds of appeal allege that having taken the figure from Ogden Table 8 at 0.48 there been an element of double discounting for the agreed disability. It was submitted, adopting the reasoning from the judgment in Conner v Bradman Limited [2007] EWHC 2789 at paragraph 71 to 74, that there should have been an adjustment to the 0.48. The reason for making such an adjustment is that the rigidity of the mathematical tables should not be allowed to take over from the evidence in each case. The Judge did not express any particular conclusions which reflected particular chances of disruption to Mr. Yates employment. Indeed she had been clearly of the view that his determination to work would be a guiding influence on his future employment. For these reasons I would take 0.62 being mid-way between 0.48 and 0.86. Calculation 0.62 x 13.00 = 8.06. 8.06 x $35,000 = $282,100.

Miscellaneous Calculations

57. The loss of earnings figure is CI$872,040.00 - CI$282,100.00 = CI$589,940.00.

58. Loss of pension. Mr Hogarth made no submissions about what the consequences of success in reducing the lost earnings should be on the loss of pension figure of

CI$65,954.34. There has been no material placed before the court to show how the level of pension at the Turtle Farm was calculated. No evidence is available about the terms attached to the pension nor any evidence about how it might have been reduced as a benefit for Mr. Yates. I have considered simply reducing the future lost pension rights pro rata to the reduction in lost earnings but after reflection I have decided not to adopt this approach. There have been no submissions from either side and to adopt the approach seems to be too speculative.

Respondent's Notice

59. A Respondent's Notice contended that the Judge should have applied the multiplier for the Ogden Tables at 0% discount rather than 2.50%.

60. It was submitted that since there was no equivalent in the Cayman Islands to the Damages Act 1996 in England, which enables the Lord Chancellor to set the rate at 2.5%, the present assumption that 2.5% is a fair rate of return in the Cayman Islands should be reviewed by this court. The starting point for the contention is the judgment in Simon v Helmot [2012] UKPC 5 where the Privy Council, on an appeal from the Court of Appeal of Guernsey, considered the issues arising from the unreliability of taking a rate of return from Index Linked Government Securities ("ILGS"). The Respondent obtained an order dated 27th September 2013 from the Chief Justice permitting *"expert evidence… to address whether the 2.5% remaining an appropriate rate of discount in the light of empiric market experience with the ILGS on which Wilson v Ebanks was based"*

61. Advantage was taken of the order to serve a report from an accountant, Mr Bullmore. He expressed the view that ILGS figures should only be used within a subset of persons with 18 years or less maturity. He expressed the view that otherwise a 0% discount rate should be taken. There was no accountancy evidence served by the appellant. It has to be noted that there was very little time before the trial date.

62. In my judgment the invitation to this court to embark on a review of an area of such complexity without detailed evidence has to be rejected. I have reservations about the lasting utility of the exercise. As in England it may be something which can be given attention at government level. I would dismiss the respondent's Notice.

63. Final Award (CI$)

1.	Past loss of earnings	$ 353,204.53

2.	Loss of Pension	$ 24,663.96
3.	Medical Expenses & Other Expenses	$ 14,354.85
4.	Gratuitous Care	$ 3,360.00
5.	Interest on Past Loss	$ 30,862.26
6.	General Damages for Pain and Suffering of Loss and Amenity	$ 60,000.00
7.	Interest on General Damages (@ 7.15%)	$ 4,293.50
	TOTAL PAST LOSS	**$ 490,739.00**
	FUTURE LOSSES	
8.	Loss of earnings	$ 589,940.00
9.	Loss of Pension	$ 65,954.34
10.	Future Surgery	$ 35,382.16
11.	Future one off loss of earnings for surgery	$ 2,916.66
12.	Future Household and Gardening Assistance	$ 59,178.60
	TOTAL FUTURE LOSSES	**$ 753,371.76**
		$1,244,110.76

I would award the total of CI $1,244.110.76 less the agreed credit for the redundancy payment.

Elliott Mottley, Justice of Appeal

I agree

Sir John Chadwick, President

I also agree