IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE No. G 180 OF 2010

BETWEEN **CHARLES BRENT YATES**

PLAINTIFF

AND **BRENDA KATHLEEN CHIN**
(as Personal Representative of the Estate Of Ysatis Nathine Chin, deceased)

DEFENDANT

Appearances:
James Kennedy instructed by Samson & McGrath for the Plaintiff
Paul Murphy instructed by Stuarts, Walker, Hersant for the Defendant

JUDGMENT

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

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

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

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

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

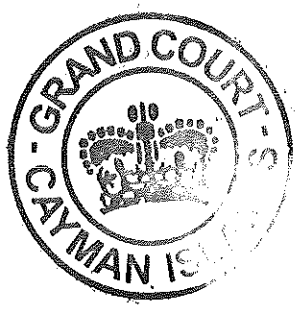
HEAD OF LOSS	AMOUNT CLAIMED
1. Past loss of earnings	$353,204.53
2. Loss of Pension	$ 24,663.96
3. Medical Expenses & Other Expenses	$ 14, 354.85
4. Gratuitous Care	$ 3,360.00
5. Interest on Past Loss	$ 30,862.26
6. General Damages for PSLA	$ 90,000.00
7. Interest on General Damages	$ 6,445.47
TOTAL PAST LOSS	**$522,891.07**

FUTURE LOSS	
8. Loss of earnings	$1,050,700.00
9. Loss of Pension	$ 65,954.34
10. Future Surgery	$ 35,382.16
11. Future one off loss of earnings for surgery	$ 8,749.98
12. Future Household and Gardening Assistance	$ 224,1165.76
TOTAL FUTURE LOSS	**$1,405,056.24**
TOTAL CLAIM	**$1,907,947.31**

GRAND COURT CAYMAN ISLANDS

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

1. Past medical and other expenses	$14,354.85;
2. Past gratuitous care	$3,360.00;
3. Future surgery	$35,382.16.



The Plaintiff's Evidence

Injuries

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

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

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

The following evidence was not disputed.

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

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

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

Leisure Activities

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

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

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

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

Miscellaneous & Medical Expenses

According to the Plaintiff every two years he travels to Miami to purchase new shoes and pants which are needed to accommodate the ankle brace. He also gave evidence that he incurred medical costs and costs consequent to travelling to the United States of America for treatment and for his ankle brace.

Past Loss of Earnings and Pension

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

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

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

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

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

Future Loss of Earnings.

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

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

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

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

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

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, mal-union/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 mal-alignment 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".

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

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

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

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

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

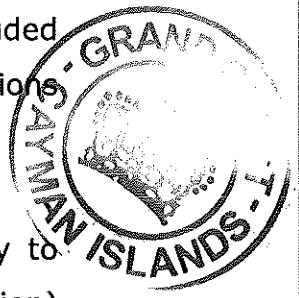
The average earnings of the jobs that he listed were derived from the 2006 Canadian census data for full-time, full-year work. He suggested the posts of: taxi/limousine driver; hotel front desk clerk; customer service, information and related clerk; retail sales clerk and production clerk. The salaries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

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

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

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

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.

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

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

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

Defence Expert Reports

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

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

In his Prognosis, Dr. Ambekar indicated the following:

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

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

Due to the permanent limp as a result of his right ankle dysfunction, this patient is also susceptible to the long-term risk of developing secondary osteoarthritis in his Right Knee and Lumbar spine. However, his morbid obesity would also be a significant contributory factor in this regard and 'intentional' loss of weight may reduce this risk to some extent. Due to the combination of these factors, it is not possible to predict a precise time-span before the secondary arthritis in the knee and spine sets in but my 'best guess estimate' would be about 10 years.
The index injury will not have a direct adverse effect on the patient's longevity."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Submissions on Damages

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

Past Loss of Earnings

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

(i) May – August 2007

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

(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.

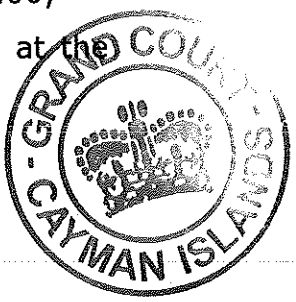
The Defendant disputed the Plaintiff's claim for past loss of earnings for the period January 2008 to June 12, 2010.

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.



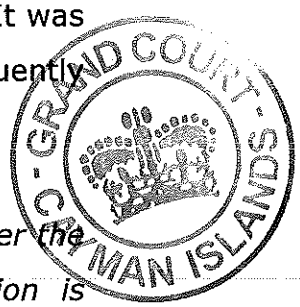
(iii) June 13, 2010 – November 26, 2013

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.

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

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

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



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

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

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

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

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

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

Keene, LJ in the *Morris* case added:

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

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

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

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

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

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

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

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

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

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

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

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"

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

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

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

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

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

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

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

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

Past Loss of Pension

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

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

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

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

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

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

Past Medical & Other Miscellaneous Expenses

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

Interest on Past Loss

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

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

General Damages and Interest – Pain, Suffering and Loss of Amenity

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

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

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

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

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

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

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

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

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

Future Loss of Earnings and Pension

This area was the most hotly disputed by both sides.

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

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

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

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

Counsel for the Plaintiff submitted that the following had to be established.

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.

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

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

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

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

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

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

<u>The Ogden Tables</u>

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

(i) Is the Plaintiff disabled?

(ii) What is the appropriate discount rate?

(iii) Should the Plaintiff's life expectancy be reduced given his clinical morbid obesity?

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

"a person is classified as being disabled if all three of the following conditions in relation to the ill health or disability are met:
(i) has an illness or a disability which has or is expected to last for over a year or is a progressive illness
(ii) satisfies the Equality Act 2010 definition that the impact of the disability substantially limits the person's ability to carry out normal day-to-day activities
(iii) their condition affects either the kind or the amount of paperwork they can do"

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

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

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

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

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

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

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

With respect to anticipated actual earnings, the starting base level of earnings from the date of trial was submitted at $35,000.00 and again the multiplier from table 9 was 17.34 using 0% 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 8.32 (0.48 x 17.34).

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

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 $1,050,700.00.

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

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

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 earnings given the fact he has now been injured?

Re: Question #1

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

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

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.

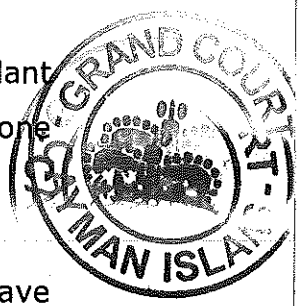
Counsel for the Defendant referred to the Chamber of Commerce Salary and Benefit Survey (4th edition) as authority for the proposition that given the Plaintiff's background and training it would be reasonable to assume that he could earn $60,000.00 per year. It was pointed out that this was his approximate 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.

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

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

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



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

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

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

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

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

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

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

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

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

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 Helmot [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

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

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

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

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

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

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

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

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

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

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

Future Surgery

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

Future Loss of Earnings for Surgery

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

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

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

Future Household & Gardening Assistance

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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.

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.

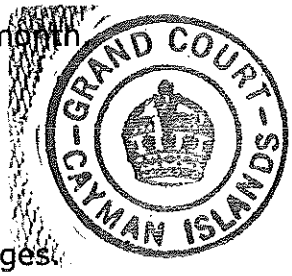
The next consideration is about the salary the Plaintiff could reasonably be able to earn.

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

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

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

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

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

Concerning general damages for pain and suffering and loss of amenities, I accepted the submission with reference to the Judicial College Guidelines that the injury 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. Using the Cayman Islands currency equivalent to the British pound; that amounts to $48,393.47 for the right ankle and $25,709.03 or the left ankle. The award totals $74,102.50.

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

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

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

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

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

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

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

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

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

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

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

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

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.

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

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

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

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

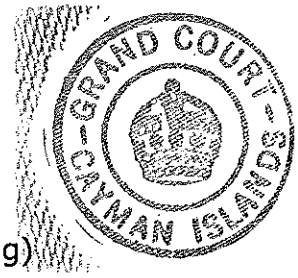
1. Past loss of earnings	$353,204.53
2. Loss of Pension	$ 24,663.96
3. Medical Expenses & Other Expenses	$ 14, 354.85
4. Gratuitous Care	$ 3,360.00

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

FUTURE LOSS

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 LOSS	**$1,016,131.76**
TOTAL	**$1,528,302.34**

The total award is therefore $1,528,302.34. I grant the Plaintiff costs to be agreed or taxed.



Nova Hall
Judge of the Grand Court (Acting)
15th May 2014