

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. G. 327 OF 2004

BETWEEN
KEITH WILSON
KARLENE WILSON
1ST PLAINTIFF
2ND PLAINTIFF

AND
AND
CRYSTAL EBANKS
JARED JASON EBANKS
1ST DEFENDANT
2ND DEFENDANT
(subrogated by Saxon Motor & General Limited)

IN OPEN COURT
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 26TH - 27TH MAY, 10TH AND 14TH JUNE, 2011



APPEARANCES:
Mr. Clyde Allen for the Plaintiffs
Mr. Kerrie Cox of Stenning & Associates for the Defendants

JUDGMENT

1. The plaintiffs Keith and Karlene Wilson are husband and wife.

2. On the 24th August 2001, while on vacation in Grand Cayman they were struck by a car driven by the second defendant along the West Bay Road.

3. The collision was caused by the second defendant's negligence - driving at speed overtaking a line of stationary traffic and failing to stop, before colliding with the plaintiffs as they attempted to cross the road emerging from the line of traffic.

4. The second defendant's liability is not in issue: he was convicted in the Summary Court on his own plea of guilty to dangerous driving, admits liability for the collision and has had judgment in that regard entered against him in default of filing a defence.

5. The first defendant was the registered owner of the car which the second defendant was driving with her permission at the time of the collision. Her insurance covered the

14-06-11

attained maximum medical improvement ("MMI"). Given the relative meaning of that

10. Despite such a traumatic experience, Mr. Wilson is now agreed by the doctors to have

placed in the right frontal area to reduce the potentially lethal swelling.

subdural haematoma. At the Baptist Hospital, an intracranial pressure monitor had to be

fractures, as well as bilateral contusions to the frontal lobes of the brain and a small left

9. The medical records indicate that Mr. Wilson suffered right occipital and basilar skull

weekly basis ever since.

neurological restorative programme, in which he has remained undergoing therapy on the

rehabilitation. There he spent seven weeks until he was discharged into the outpatient

Georgia to the Emory University Center for Rehabilitative Medicine, for inpatient

weeks at the Baptist Hospital; Mr. Wilson was later transferred closer to home in Atlanta,

severely damaged. Having been operated upon, stabilized and treated for more than two

be air-lifted to the Baptist Hospital in Miami the following day. His right knee was also

to the ground. He sustained serious head injuries, was rendered unconscious and had to

8. He was struck much more directly and forcefully, thrown over the top of the car and then

although struck, her injuries were confined to her right shoulder.

pushed partially out of harm's way by Mr. Wilson at the moment of collision so that

7. His injuries were much more serious. From the narrative, I gather that Mrs. Wilson was

The assessment will therefore relate to damages to be awarded to Mr. Wilson.

Wilson's claim has been settled by agreement since the commencement of this hearing.

6. The issue for me now is therefore what quantum of damages should be awarded. Mrs.

insurance company having subrogated to the position of the defendants.

second defendant and so the matter is presented for the assessment of damages with the

term, the prognosis for the future is, to a significant extent, agreed as between the

neuropsychologists engaged on his side and on the side of the defendants – Dr. Robert

Godsall PhD and Dr. Thomas Burns Psy. D. respectively.

11. Having attained MMI, Mr. Wilson is capable of a significant degree of independent

living, including driving his own car on an almost daily basis in order to keep medical

and other appointments. He has not, however, returned to steady employment and it is

one of the central issues of the exercise before me now whether he can be expected to do

so.

12. All the experts, including Dr. Godsall and Dr. Burns, agree that he has not and will not be

able to work again in his former pre-accident occupation as a Computer Systems

Hardware Analyst (someone who assembles, diagnoses problems with and repairs

computer systems). At that occupation Mr. Wilson earned some USD43,680 per annum

at the time of the injury.

13. It is Dr. Burns's opinion, however, that ultimately if Mr. Wilson were to undertake

vocational assessment, he might be able to find suitable employment although not at the

level he was employed before the injury. Dr. Godsall's opinion is that Mr. Wilson will

only ever be able to maintain employment in an environment in which he is given routine

tasks and in which he is constantly supervised – in effect therefore, that he has been

rendered practically unemployable. This is demonstrated in Dr. Godsall's opinion, by the

fact that Mr. Wilson was unable to carry out the functions of a janitor – the post in which

his former employers had allowed him to return to work as a form of vocational therapy.

It had quickly become apparent that he was unable to initiate and perform even the most

routine responsibilities of that post without constant and direct supervision.

14. As matters have unfolded, this difference between the experts will not however, be significant. This is because they both agree that it is very unlikely that any employment Mr. Wilson could secure would compensate him at a level above that which his Social Disability Benefit and unemployment insurance now provide – a combined sum of US\$2,371 per month. This is a factor which must be taken into account by me in the assessment of damages. It indicates, when taken with the consequences themselves of the injury, that the only reasonable conclusion to reach is that Mr. Wilson has been rendered practically unemployable. But this conclusion will of course involve, when quantifying his damages, that the Social Disability Benefit which he would not otherwise be receiving must be discounted from the sum of the award for pecuniary losses. Different considerations apply to the unemployment insurance benefit (\$600 per month) which Mr. Wilson obtains only because he has had the foresight to pay the premium over the years for that coverage from his own pocket. There is no reason in principle therefore, why the Defendants should be ascribed the benefit of that coverage so as to reduce the pecuniary losses for which they are liable.

15. Following is a summary of the agreed conclusions of Dr. Godsall and Dr. Burns as to the final nature and effect of the neurological injuries sustained by Mr. Wilson. They both agree that he now suffers from cognitive disorder (“executive impairment”) secondary to traumatic brain injury. A consequence is mood disorder (with major “depressive like” episodes), secondary to the general medical condition – traumatic brain injury involving skull fracture and subarachnoid/subdural haemorrhage.

21. Fundamentally, the narrow areas of disagreement between Dr. Godsell and Dr. Burns may be described as being first; as to whether Mr. Wilson's level of brain damage as exhibited by his executive dysfunction should be regarded as being in the mild/moderate

20. Mr. Wilson is on a regimen of medication resulting from the injury or effects of the injury, the need for which will continue indefinitely.

neuropyschological counselling but also for family counselling as well.

19. The injury has also affected Mr. Wilson's psychosocial functioning, resulting in significant depression and anxiety. This level of emotional distress has likely exacerbated the impact of the executive dysfunction and for this reason Mr. Wilson will continue to need the assistance of therapeutic services such as counselling, although one of the issues before me now is for how much longer. An aspect of the emotional distress has manifested itself in impotence (erectile dysfunction) indicating the need not only for

18. It is the executive dysfunction that will preclude Mr. Wilson from returning to his former occupational functions as a computer analyst/technician.

17. Repeated assessments have documented executive dysfunction. Executive functioning is the integrated and co-ordinated activity by and between various areas of the brain towards accomplishing goal directed behaviour. It is described as the brain's ability to engage in the co-ordination and integration of activities such as reasoning, judgment, problem-solving, decision making and initiation of tasks to achieve goal directed behaviours.

16. Based upon a qualitative review of the multiple assessments which have been conducted upon Mr. Wilson since his injury, the following is a summary of their agreed opinion on the effect upon Mr. Wilson's cognitive abilities.

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more subjective accounts of Mr. Wilson's change of abilities, attitudes and behaviour as

25. For the purposes of the foregoing categorization, I have also taken into consideration the

USD157,600]

Guidelines") suggest a range of general damages of £59,500 to £98,500. [USD95,200 TO

24. For this Category 2(A)(c)(ii) of brain damage, the JSB 2010 Guidelines ("the

cases in which there is moderate to modest intellectual deficit, the ability to work is greatly reduced if not removed and there is some risk of epilepsy. [Other factors presented and which would tend to put those into the next higher category, include personality change and effect on sight, speech and senses].

"Category 2(A)(c)(ii) -

the Judicial Studies Board, 2010 Edition):

Guidelines of the Assessment of General Damages in Personal Injury Cases compiled by

described in the following way (as categorised in the very helpful Tenth Edition of the

23. I conclude that Mr. Wilson must be regarded as having moderate brain damage, to be

indefinitely. This should help to reduce that risk.

as a prophylactic to epilepsy and so is regarded as medication he should continue to take

moderate risk, of epilepsy. Mr. Wilson's regime of medication includes one that is given

obliged to accept Dr. Godsall's opinion. I therefore conclude that there is a risk, albeit a

with the uncertainties of the prognosis of the future outcome of brain injuries, I feel

22. Given that both experts recognise the inexactitude of their discipline, dealing as it does

with each passing year the risk decreases.

epilepsy. Dr. Burns says no risk; Dr. Godsall says there is a risk of epilepsy although

is in respect of the long term prognosis whether Mr. Willson is predisposed to a risk of

category (Dr. Burns) or in the moderate category (Dr. Godsall). Secondly, the difference

related by himself, his wife and his elder brother from the witness box. Their testimonies suggest a marked change in personality – from the energetic outdoorsman who often went camping with his family and hunting with his brother and friends, to the now energated individual unable even to muster the will and energy to tend to his garden; let alone the more demanding tasks of household maintenance and repairs – all tasks that Mr. Wilson used to perform before the injury. Whereas before the injury Mr. Wilson was regarded as gregarious, outgoing and sociable his now irritable, short-tempered personality has made him “not much fun to be around anymore”, according to his brother. The reported consensus is that his social life has been markedly impaired. These subjective accounts, reliable though the experts say they be regarded, are considerations which must be taken carefully in their proper context.

26. While the objective medical neuropsychological and behavioural assessments all recognise the psychosocial changes resulting in depression and anxiety; the doctors speak nonetheless to what Dr. Godsall describes as “the paradox of the nature of the symptoms”. This “paradox” is manifest in the fact that while the anecdotal evidence speaks to increased irritability, impatience and even outbursts of violent behaviour on the part of Mr. Wilson, he is usually quiet, subdued and attentive. This was as he appeared in Court, but for a single, vehement response during heated cross-examination which was quickly self-restrained. The paradox is also manifest in the fact that Mr. Wilson is capable of meeting commitments, such as driving himself to scheduled appointments, although it must be accepted that he would likely fail to do so without constant reminding from his wife. An insight into the paradox is Dr. Godsall’s explanation that routine tasks such as driving a car would be manageable, even while complex tasks involving decision-

28. Some award must therefore be made to provide for care and supervision in the future; whether by Mrs. Wilson or by someone else. Indeed, I was also impressed by Mrs. Wilson's account of the impact her having to cope with her husband's change of personality has had upon their relationship. She takes the brunt of his irascibility and financial affairs.

27. More specifically, the issue here is whether Mr. Wilson is capable of unsupervised living – an issue that goes among other things, to a claim for special damages to pay for his ongoing care and supervision. I do not accept that there is at present the need for such commercial care. This is notwithstanding that I am persuaded by Mrs. Wilson's evidence in particular, that Mr. Wilson does need constant reminding to take medication, to keep medical appointments and to do other things. A further illustration of this is the new role she has had to assume (with the admitted help of Mr. Wilson's brother) of managing their injuries upon his experience of the amenity of life.

making and initiative, would not. Another insight is provided by what Dr. Godsall described as Mr. Wilson's "disinhibitive behaviour": unregulated behaviour to be expected due to the impairment of the functioning of the frontal lobes of the brain. I am told an example of this is Mr. Wilson's hitherto uncharacteristic willingness to make inappropriate remarks to members of the opposite sex. This new pattern of behaviour on his part already caused some embarrassment in the work place – during his stint with his former employer – and exacerbated the need for constant supervision to the impracticable degree. While these are factors that reinforce the conclusion already reached that Mr. Wilson has been rendered practically unemployable, they are also relevant, when taken in their proper context, to the assessment of the impact of his

32. McGregor on Damages, 17th Ed. (at para 35-229) describes the Guidelines as “an essential tool in the assessment of damages for non-pecuniary loss in personal injury claims (suggesting that reference may also nonetheless continue to be made to “the Guidelines.

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

General Damages:

Section A

30. Against the foregoing factual background, I now proceed to the assessment. including as his anxiety may well be a contributory cause of impotence.

29. This case involves a complex of Mr. Wilson’s change of attitude to life resulting from his diminished cognitive abilities, his anxiety over the loss of his ability to earn and provide as he did before, and faltering relationships with friends and family, especially his wife; Finnis v Caulfield (below) at para 44-45.

the future chance of marriage breakdown and the resulting need for commercial care, quantify this risk, it is recognised that the Court can award a lump sum to take account of result of behavioural changes resulting from brain injuries. While it is impossible to unpronounced at present), that the marriage might fail – as so many marriages do – as the relationship. An award for future care must take account of the probability (however better or for worse”, but there is no ignoring the impact his injury has had upon their good wife, she expresses her commitment to stay the full course of their marriage “for frustration, even while she must tend to his supervision and general well-being. As a

valuable and exhaustive lists of awards in Kemp & Kemp, the Quantum of Damages,

passim"). I agree and that is the approach I have taken in arriving at the award for Pain,

Suffering and Loss of Amenities ("PSLA") in this case.

33. Of course, as a judge assessing damages in this jurisdiction which has its dissimilarities

with England and Wales, I am obliged to consider the appropriateness of a simple

straightforward adoption of awards from that jurisdiction. This has been a relevant

consideration over the years having regard especially to what some critics have described

as the "overly conservative" approach of the Courts in England and Wales to the award

of general damages. This is a criticism that has not, however, remained unheeded. The

Law Commission of England and Wales in its Report on Damages for Personal Injury: Non Pecuniary Loss (Law Con. No. 257 (1999): recommended that awards over £3000

(that is: those for other than minor injuries) should be, if not doubled, at least increased

one and a half times.

34.

In the continued absence of legislative reform in that regard in England and Wales, the

Commission's proposal was considered and in some measure adopted by the Courts. In

what has come to be regarded as the leading case – Heil v Rankine [2001] Q.B. 272, - the

Court of Appeal has, instead of doubling or increasing by one-half, decided that awards at

the highest level – those for catastrophic injuries – were most in need of adjustment and

that they should be increased by approximately one-third, with a scale tapering

downward for awards below the catastrophic level (then in 2001 at £150,000 to

£200,000) down to the level of awards at £10,000. Below that level they saw no need for

any adjustment. Thus, the increase for awards which would fall in the middle of the

range, would be in the region of one-seventh or 14 percent.

35. Since *Heil v Rankine* it appears that the decided cases have come to reflect the approach advised by the Court of Appeal and this is apparent from the Guidelines which continue to compile the decided cases as adjusted by reference to the Retail Price Index ("RPI"), which is itself regarded as providing a simple straightforward measure of the value of money from time to time (See the Guidelines (2002) Ed. p.3 and p.5).
36. It is significant to note that the highest level of awards thus identified remain within the limits recently prescribed by local legislation in this jurisdiction; that is: C1\$500,000 *See The Medical Negligence (Non-Economic Damages) Law, 2011, section 3.*
37. Having regard to our traditional reliance on the common law as developed in England and Wales for guidance in this jurisdiction, I am satisfied that the Guidelines as they reflect the decided cases can indeed be an essential tool in the assessment of general damages in this jurisdiction as well. However, as the introduction to the Tenth Edition emphasizes, the authors of the Guidelines do not attempt to prescribe what levels of damages ought to be awarded – rather, to set out what they consider to be the current level of awards and settlements adjusted where necessary for inflation. It thus remains for the judge in every case to exercise his judgment by examination of the circumstances of the case by reference also to the decided cases and say what the actual amount of the award should be.
38. In an effort to most fairly resolve where within the range of general damages identified by the Guidelines Mr. Wilson's case should be placed; I have considered the number of those cases which were cited by Counsel on both sides of this case, many of which are listed in *Kemp & Kemp*.
39. The following I have found to be most helpful.

44. The brain injury was placed by the judge in sub-category (ii) of the moderate brain damage section of the Guidelines (2(A)(c)), even though there was no risk of epilepsy, in order to take account of psychological sequela. The brain injury had led to permanent emotional and personality changes which tended to isolate B from his peers. Two stints of employment, both of which required routine and undemanding work, resulted in

43. *Burden v Foster* [2003] 3 Q.R. 10: B, male, aged 15 at the time of accident and 22 at the trial, suffered a head injury resulting in diffuse brain damage and permanent psychological and cognitive disabilities when he was run over by a car. He also suffered an unstable cervical fracture, which united leaving restriction of movement, particularly in sideways rotation and which caused persistent pain and carried a risk of osteoarthritis in the neck later in life.

42. For PSLA only, the award was £75,000 – adjusted for inflation by reference to RPI: £97,743 in today's terms.

41. There had been good physical recovery but recurrent headaches and future neck fusion procedure would be required. His pain and disability were likely to worsen in the future and he had been rendered fit for only light, undemanding work.

40. In *Houlby v Personal Representatives of Archer (Dec'd)* (2002) *Kemp and Kemp*, the claimant had suffered a severe head injury in a road traffic accident. He was then 18 years of age and 26 by time of trial. There had been multiple fractures including the skull, face, the 7th cervical vertebra and right fibula. He sustained moderate brain damage resulting in permanent cognitive impairment, profound personality change and continuing epilepsy (his use of medication for epilepsy was, however, inconsistent).

dismissal and B's inability to regain his pre-accident level of attainment led to a period of

depression, which had lifted by the date of the hearing.

45. General Damages for PSLA: £80,000 (apportioned £50,000 for the brain damage and consequential psychological problems; £15,000 for the neck injury; £8,000 for the leg injury and £2,400 for damages to teeth, discounted to £70,000 to prevent duplicity of compensation but uplifted to Heil v Rankine – with a current value of £95,118.

46. Finnis v Caulfield v James Car Hire 2002 W L 32173116: Kevin Finnis, the claimant,

was severely injured in a motor cycle accident. As a result he sustained the following injuries simply stated: swelling of brain, damage to frontal lobe, fracture skull (forehead to base); facial fracture (numerous), fracture femur, damaged right optic nerve, burst ear drum. The result of the brain damage was that memory and concentration became very poor and the claimant had become frustrated and irritable. His wife had to take the brunt of his irritability and aggression, when for any reason it is not controlled by medication – until a proper regime of medication was put in place she had to endure an extremely difficult time -; the claimant no longer had self confidence; he had to relinquish doing and enjoying many basic things.

47. General Damages for PSLA (including an enhancement of £5000 to take in account the additional head of general damages in the form of loss of congenial employment – the claimant was a highly skilled flooring craftsman who enjoyed and was very enthusiastic about his work – £100,000 (in 2002); giving an RPI present day value of £128,500.

48. I find that there are close similarities between the present case and the three examples cited. Mr. Wilson suffered severe head and brain injuries which have resulted in significant – assessed as at least moderate - - diminution of cognitive abilities. His

51. The best I think I can do is to arrive at a point within that range that reflects the degree of likelihood of permanence of the condition, having regard to the factors mentioned above and the evidence of the experts as to the prognosis: £40,000 (USD64,000).

Impotence which is likely to be permanent, in the case of a middle-aged man with children: £28,000 to £51,500.

50. Returning to the circumstances of the present case, it is agreed by both sides that I should take into account, as a distinct head of loss of amenity, impotence as a consequence of the injury. I will do so although it is described as a psychological rather than as a physiological problem, and could, over time, become resolved. The difficulty for Mr. Wilson however is that now, more than 10 years after the accident, the condition has not been resolved, with reported almost complete loss of sex drive despite the use of medication. There is no bracket of "partial impotence" suggested in the decided cases or in the Guidelines. Category 4(E)(a)(ii) of the Guidelines provide:

49. With all those factors in mind, I set the award for PSLA in respect of the brain injury at £100,000 or USD160,000 (without regard to any notion of loss of congenial employment which I do not regard as applicable here).

able to drive himself.
by his wife, is able to meet commitments such as doctors' appointments to which he is is however able to function at a basic level on his own and apart from timely prompting changed and with that his relationships with family and friends. On the positive side, he to continue to need medication. He has a low sense of self-esteem. His personality has constant state of anxiety, frustration and depression for which he must take and is likely often confused, finding it difficult to complete a task from start to finish. He lives in a memory and concentration are poor; because of this he becomes easily distracted and

Past Pecuniary Losses

SECTION B

52. The third and final head of general damages for which it is agreed an award should be made relates to the knee injury which has, notwithstanding the successful completion of surgery by Dr. Maurice Jove, resulted in chronic pain with the risk of degenerative arthritic changes in the long term. The Guidelines would place such injuries into Category 6(M)(a)(ii) with a suggested award of between £17,500 to £28,500. I set the award at £22,000 (USD35,000).
53. In assessing the appropriate award for general damages, I bear in mind that in many cases in which a claimant suffers from two or more distinct categories of injury, it may not be appropriate to simply aggregate the figures which might be awarded for each injury considered separately, as that could result in an overly generous award where the effect of the injuries are inter-related. In such cases, a discount may be appropriate in arriving at a suitable total figure. Here however, I think that a discount would be inappropriate. Here the three distinct areas of injury and loss of amenity are not in that way inter-related, each having its different physiological or psychological impact upon the plaintiff. The effect of each has, in my view, made it more difficult for Mr. Wilson to cope with the others.
54. Total award for PSLA: USD160,500 + USD64,000 + USD35,000 = USD259,000.
55. All awards are agreed to be calculated and expressed in United States dollars, the currency in which value will be received by the plaintiffs.
56. I will now turn to the assessment of pecuniary losses.

18,200.00	-	Gross Salary for 2001 (August to December)
44,990.40	-	Gross Salary for 2002
47,239.92	-	Gross Salary for 2003
49,601.92	-	Gross Salary for 2004
52,082.01	-	Gross Salary for 2005
54,686.11	-	Gross Salary for 2006
57,420.42	-	Gross Salary for 2007
60,291.44	-	Gross Salary for 2008
63,306.01	-	Gross Salary for 2009
66,471.31	-	Gross Salary for 2010

RPIs over that period. This results in the following:

The Defendants allow an increase of 3% per annum to take account of increases in salary between the date of the accident and the date of trial. I regard that allowance as quite reasonable as it reflects an increase that outstrips the historical year on year.

It is not however agreed by the Defendants as Mr. Wilson contends, that had he remained in employment his increases in salary would have been some \$3,000 income tax which would have been payable by Mr. Wilson on his salary.

calculations, it is agreed that a deduction of 20% should be applied to reflect the of the accident his gross annual salary was \$43,680. For the purposes of my Holdings in February 1997 when his salary was \$35,000 per annum. At the time Past loss of earnings: Mr. Wilson commenced employment with Solarcom

which compensation must be made have been agreed at USD228,361.47

his former employer Solarcom Holdings, the total past medical expenses for Employee Benefit Plan and, as evidenced in a letter from an attorney acting for Medical treatment: This has been paid for up to now under Mr. Wilson's

- (ii)
- (i)

Gross Salary for 2011 (May to December) - 39,937.99
 Gross Salary 2012 - 68,465.13

60. The primary calculation of the multiplicand will therefore be:
 2024 (the date of Mr. Wilson's 65th birthday.)

59. For these purposes, the Defendants also conceded that the notional salary increase of 3% per annum should be applied going forward; that is, from 1st May 2011 to 8th August age 65.

58. Future loss of earnings: Mr. Wilson is now aged 51 and it is agreed that he would likely have retired from paid employment at age 65. It is therefore also agreed that the Defendants' liability for future loss of earnings should not extend beyond age 65. After age 65 he will be eligible for pension. I therefore regard the starting point for arriving at the multiplicand for future loss of earnings to be what he notionally would have earned to

(i) Future Losses

SECTION C

Gross Salary for 2011 (to 1st May) - 23,264.96
 \$537,554.50
 Mr. Wilson has received Social Disability payments in the amount of \$1,771 and Employment Insurance benefit of \$600 per month because of his injuries. The former (but not the latter for reasons already explained) must therefore be deducted from his award for past loss of income. Hence 1,771 x 117 months
 207,207.00
 330,347.00
 Less 20% deduction to reflect taxes 66,069.00
 Net past loss of earnings - \$264,278.00

61. It is the Court's duty in assessing damages for personal injuries to arrive at a lump sum which represents as nearly as possible full compensation for the injury suffered by the plaintiff. The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured: *Wells v Wells* [1997] 1 AC 345 at 364A.

62. 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 a 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 would 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 over

61. It is the Court's duty in assessing damages for personal injuries to arrive at a lump sum

Gross Salary for 2013	-	71,888.39
Gross Salary for 2014	-	75,482.81
Gross Salary for 2015	-	79,256.95
Gross Salary for 2016	-	83,219.79
Gross Salary for 2017	-	87,380.78
Gross Salary for 2018	-	91,749.82
Gross Salary for 2019	-	96,337.31
Gross Salary for 2020	-	101,154.18
Gross Salary for 2021	-	106,211.89
Gross Salary for 2022	-	111,522.48
Gross Salary for 2023	-	117,098.61
Gross Salary for 2024 (to July 2024)	-	71,098.90
		=====
		\$1,201,429.02

compensation 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.

63. Differing approaches have been taken towards this end in this jurisdiction.

64. In *Carter v Dawson 1998 CILR 204*, the “conventional approach” which involved the application of a notional annual investment yield of 4.5% was applied (following *Cookson v Knowles [1979] A.C. 556*). That approach, however, reflected what Lord Diplock had described in that case “as multipliers used by judges based upon interest rates which were appropriate in times of a stable currency”. Such levels of interest rates have not been available for several years now, and so can no longer be regarded as a realistic annual investment yield for the average investor.

65. At the time *Carter v Dawson* was decided, the discount rates which were advised by the actuarial computations incorporated in the Ogden Tables were not yet regarded by the highest courts, and so were not in that case regarded, as a settled proposition.

66. 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* above. 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 per cent; 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 per cent. A rate of return regarded as based on ILGS could be described as wholly artificial in the Cayman Islands where no such securities are

69. I am told that that rate is now 3 per cent but rather than advocate for its adoption here, Mr. Cox for the Defendants has offered a lower and therefore more generous rate of discount of 2.5 per cent. By the application of that rate to the relevant Ogden Table 9, a

advisable. struck from time to time as a matter of the exercise of judicial discretion) was most the United Kingdom under Section 1 of the Damages Act 1996 (rather than one to be by the Lord Chancellor reflective of economic conditions prevailing from time to time in Wells (above). There, (at page 375), the final advice was that the rate to be promulgated be somewhat problematic for the Courts, including the House of Lord itself: see Wells v

68. It is, all the same, the adoption of the notional rate of investment return that has proven to application of a notional rate of investment return of 2.5 per cent.

67. A different view has however, since been taken by this Court in Archer v UBS 2009 CILR 531. There Quin J. held that in the absence of actuarial tables specific to the Cayman Islands, the Court could rely on the Ogden Tables to determine the appropriate multiplier to calculate future lost earnings – in that case determined at 10.22 years by the

for instance, Bodden v Solomon 2008 CILR 385. has been doubted, not only in Carter v Dawson (above) but in other cases as well. See, wholesale adoption of the Ogden Tables in the assessment of damages in this jurisdiction rate of discount. For those and other reasons of dissimilarities, the validity of the into account would therefore typically justify factoring in a full percentage point to the access to ILGS or other gilt edged investments, such advice can be expensive. Taking it offered. And while an informed investor would rely on professional advice leading to

multiplier of 11.4 years is provided instead of the 14 years set out above in calculating

Mr. Wilson's earnings to retirement at age 65.

70. I accept that to that extent i.e. – for the purpose of providing an appropriate multiplier

once a just rate of discount is identified – the Ogden Tables can be a useful tool. [And,

for the sake of completeness, I note that our Court of Appeal so regarded them in *Hydes v*

Ebanks 2002 CILR 242 although later, in *Eaton v Johnston* 2004-05 CILR 580, that

Court reverted to the conventional judicial discretionary assessment].

71. In this case, I adopt 2.5 per cent 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 in Mr. Wilson's position would adopt) – will probably yield for the medium to

long term; rather than the higher 3 per cent or still higher 4.5 per cent of the conventional

approach. I also have in mind the fact that Mr. Wilson will need to draw down on the

capital sum each year (in amounts greater than his reducing capital will yield by way of

interest) in order to meet his needs and commitments. A lower rate of return is indicated

for that reason also.

72. The Defendants submit that I should also however apply a further discount of .82 per cent

by reference to Ogden Table A (which involves reduction factors having regard to such

matters as employment status, disability status (at time of injury) and educational

attainment).

73. The application of those reduction factors to Mr. Wilson now aged 51, would reduce the

multiplier even further from 11.4 to 9.348.

74. This is a proposition with which I do not agree. Such reduction factors are meant to

reflect the risk that the vicissitudes of life would visit upon the employability of a given

$$\frac{95,477.76}{1,201,429.02} = \text{annum}$$

The average of the yearly earnings is reached by dividing the total of \$1,201,429.02 by 151 months which amounts to \$7,956.48 per month or per annum

Gross salary until retirement (14 years or 151 months as shown above)

77. With all the foregoing in mind, the calculation for future loss of earnings is as follows:

explained, I do not find that Mr. Wilson has that capacity. only where a plaintiff has a residual earning capacity. Here, for the reasons already that allowance should be made for any post-accident vulnerability on the labour market Ogdén Table A: the explanatory notes to the relevant Section C of the Tables explain damaged in a real and significant way. There is yet another reason for not applying considerations so as to reduce the entitlements of a person whose quality of life has been

76. A court is obliged to be very cautious about applying a given set of hypothetical

reflected by the rankings provided in Ogdén Table A. fact attested to in a letter from his former employer but one which would not be clearly have assured him a high level of employability within the United States job market – a education, his vocational training and experience as a computer analyst/technician would

75. In Mr. Wilson's case, while he did not attain higher than high school level formal

attained which, if transposed to other jurisdictions, could become of doubtful relevance. dependent upon individual circumstances such as skill levels and educational levels Kingdom job market. They take account of employment status as being particularly upon studies of how the demographic factors involved would operate within the United plaintiff over the span of remaining working life. They are therefore peculiarly based

27,340.55	-	Benefits received for 2023
26,673.71	-	Benefits received for 2022
26,023.13	-	Benefits received for 2021
25,388.42	-	Benefits received for 2020
24,769.19	-	Benefits received for 2019
24,165.06	-	Benefits received for 2018
23,575.67	-	Benefits received for 2017
23,000.65	-	Benefits received for 2016
22,439.66	-	Benefits received for 2015
22,383.70	-	Benefits received for 2014
22,327.88	-	Benefits received for 2013
21,783.30	-	Benefits received for 2012
4,168.00	-	Benefits received (May to December 2011)
USD		

as follows:

79. While I gather that potential increases in these benefits are index linked to the Consumer Price Indices in the United States (typically at 3% - 4% per annum), such increases are not necessarily paid annually. The Defendants have therefore offered to allow a lower rate of notional increase of 2.5% per annum to provide for such anomaly. This notional increase in disability benefits produces a sum calculated to July 2024 of \$320,386 shown

\$21,252 per annum.

78. The Disability Benefits must now be deducted. This is currently \$1,771 per month or

$$\begin{array}{r}
 \text{Thus the gross future loss of earnings is} \\
 \$95,477.76 \times 11.4 \\
 = \\
 1,088,446.46 \\
 \text{Less 20\% agreed reduction to reflect} \\
 \text{taxes} \\
 = \\
 \underline{217,689.29} \\
 \underline{870,757.26} \\
 1,088,446.46
 \end{array}$$

80. The expert evidence in this area is not agreed. It comes from two persons – described as “Disability and Rehabilitative Consultants” – who specialize in the field of the assessment of future medical and other rehabilitative costs.
81. In this regard, extensive written reports have been submitted by Emily Cade (on behalf of the Plaintiffs) and by Lesley Wright (on behalf of the Defendants).
82. I have found their reports to be helpful although that of Emily Cade was not allowed directly into evidence having regard to disclaimers attached by her to it, indicating that it was not produced for “court litigation” but only for the purposes of providing “an estimate for information”.
83. However, having regard to reference allowed to the Emily Cade report in the cross-examination of Lesley Wright upon her report, some aspects of the Emily Cade report acquired evidential significance. Both reports were the product of extensive examination of the medical records and of enquires of the doctors (medical and neuropsychological) made by the experts, as well as discussions with Mr. Wilson. While I regard the Emily Cade assessment to be generally exaggerated, there are some aspects which, when taken with Lesley Wright’s assessments, I find to be helpful.

(ii) FUTURE MEDICAL EXPENSES

	Benefits received for 2024 (to July 2024)
16,347.37	-
320,386.29	320,386.29
870,757.00	870,757.00
320,386.00	Less Disability benefits
550,373.00	

Physical Therapy Evaluation (10 times over life)	-	3,823.60
Psychiatric Consultation (4 times over life)	-	1,000.00
Urological Consultations (4 times over life) (related to impotence)	-	2,000.00
Group Therapy (to conclude by end 2012)	-	1,400.00
Individual therapy (to conclude by end 2012)	-	5,000.00
Family (sexual) counselling (12 sessions)	-	2,000.00

USD

rates identified by Cade and Wright, but uplifted slightly to reflect my own findings:

subheads agreed by the Defendants as appropriate for allowances adopting the current for ongoing cognitive and psychological therapy, I make the following awards based on

88. Having regard to all the evidence, including that of Dr. Godsall specifically as to the need for those same categories to be far too generous.

87. I regard that as far too conservative an estimate even while I regard the Cade estimates \$25,070 for those categories combined.

86. In all of categories (a), (b), and (c) Wright is to the other extreme – allowing only (\$432,472); (d) medication; Cade: lifetime (at \$222,754).

implementation of treatment plans (\$78,400); (c) personal care – again Cade: lifetime four sessions per year during which there would be co-ordination of care and

costs of \$143,936); (b) care co-ordination – again Cade projects a lifetime need involving and rehabilitation services for which the Emily Cade report suggests a life time need (at

85. The major areas of disagreement are (a) the need for ongoing counselling, consultations \$913,422.56, while the Lesley Wright report results in \$183,488.78.

84. Emily Cade report produces a quantum of total medical/rehabilitative projected costs of The results in the two reports could hardly, however, be more widely divergent. The

259,000.00	General Damages
228,361.00	Past Medical Expenses
264,278.00	Past loss of earnings
550,373.00	Future loss of earnings
249,212.00	Future medical and other care

Damages Summary

Total Future Medical Care and Expenses

Personal care attendance (\$252 per week for one-fifth of life expectancy or 4.28 years) - 56,085.12

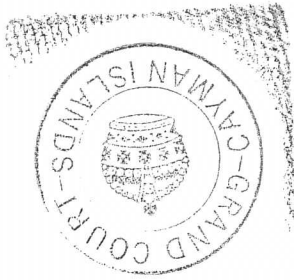
*The appropriate multiplier for pecuniary loss for life (Ogden Table 3) is 21.44 applying the 2.5% rate of return otherwise applied in this case.
 I also make the following awards having regard to the discussions above including the risk that Mrs. Wilson might not always be in attendance:

1,700.00	-	Vocational Counseling (20 hours)
2,400.00*	-	Laboratory Work for life (twice per year)
15,454.60*	-	Physiatrist for life (three times per year)
77,250.89*	-	Ongoing medication for life
77,250.89*	-	Aricept (@ \$3,603.12 per year)
11,888.91*	-	Duspar (@ \$554.52 per year)
37,665.79*	-	Depakoti (@ \$1,756.80 per year)
161,583.79	c/f	
161,515.79	b/f	
31,611.99*	-	Lexapro @ \$1,474.44 per year
193,126.78		

90. I grant the Plaintiff's costs of the application and hearing, to be taxed if not agreed.

89. The total award is accordingly made in the amount of USD1,551,225.

1,551,224.00



Released on 10th June, 2011
Delivered on 14th June, 2011

Hen. Anthony Smellie
Chief Justice