

- attained maximum medical improvement (“MMI”). The conclusion of the doctors is that he will no longer be able to employ the kind of forceful thrusting and manipulative techniques required for his kind of practice.
4. The liability of the defendant in negligence was established by judgment obtained against him on 10th September 2003. The matter now comes before me for assessment of damages.
 5. At the time of the injury, the plaintiff, a Canadian national and trained chiropractor, was an equal partner with a Dr. Mel Vance, in a practice here in Grand Cayman known as “Island Chiropractic”.
 6. The plaintiff had acquired his 50% share in the practice from a Dr. Ben Harper in May 1999 for Cayman Islands dollars (“CI\$”) 57,000.00.
 7. To be allowed to work here, the plaintiff had obtained an annual work permit for the period 5th June 1999 until 5th June 2000 with an automatic renewal to 5th June 2001, subject only to payment of the annual renewal fee.
 8. This was, however, a work permit not issued to the plaintiff in his own right as sole practitioner or to Island Chiropractic as employer, but to Island Medical Centre (whose principal was at all material times a Dr. Victor Lookloy); as employer.
 9. Those delimitations of his work permit notwithstanding, the plaintiff practiced in partnership with Dr. Vance in effect as a sole practitioner, under an arrangement by which they shared equally the income and expenditure of the Practice.

Preclusion of award on public policy grounds

10. On behalf of the defendant Mrs. Houghton now challenges the plaintiff's entitlement to recover damages in respect of his practice in the Cayman Islands. This is on the ground that this Court may not assist a party to obtain a benefit if to do so would involve condonation of illegality. The illegality is said to have arisen from the following circumstances.
11. The plaintiff never actually became employed to Island Medical Centre or to Dr. Lookloy. He became involved with them only in the following way, as described in his evidence and as supported by the evidence of Dr. Lookloy and Dr. Vance.
12. Having decided to acquire Dr. Harper's interest in Island Chiropractic, the plaintiff was advised that in order to practice in the Cayman Islands, he would need to be "sponsored" by a local doctor. Sponsorship was understood by him to mean that his application for a work permit would have to be supported by his sponsor who would be responsible for making the application as employer. That this would not, however, require an actual relationship of employment. Instead, a sponsorship fee would be paid and he would be responsible for paying the work permit fee directly to Government. That he would then be entitled to practice in his own right as a partner at Island Chiropractic.
13. Thus, his application for his work permit was submitted with Island Medical Centre shown as employer and Dr. Lookloy signing in that behalf. The work permit was granted expressly to Island Medical Centre as employer.

14. The work permit having been granted, the plaintiff paid a monthly fee of \$850 to Dr. Lookloy, while he carried on his practice entirely independently of him and at a different location at Island Chiropractic.
15. Dr. Lookloy testified, confirming in substance what the plaintiff said. He also spoke of his own knowledge of a longstanding practice of sponsorship by which doctors from overseas – whom he perceived would not otherwise be prepared to come to the Islands to practice – are allowed to work as sole practitioners in charge of their own practices, even while their work permits, as in the case of the plaintiff's, are issued to and held by local doctors as their employers. For this arrangement a “small fee” is charged as a means to ensuring that follow-up care is available to their patients, whenever the overseas doctors are not present. This was not an arrangement, Dr. Lookloy insisted – here in disagreement with Mr. Franz Manderson, the Chief Immigration Officer who had earlier testified to that effect – merely for the protection of the interests of the local doctors. Dr. Lookloy understood it to be for the protection of the patients who might require a continuum of care. That arrangement of sponsorship, as he understood it, was sufficient to render the local doctor, in this case himself, the “employer” within the meaning of the Law; especially in light of the fact that sponsorship was so well established and known to the immigration and health regulatory authorities of the Islands.
16. The notoriety of sponsorship was also confirmed by Mr. Manderson. He described it as an arrangement by which latitude was allowed to doctors in order to attract them to the Islands but which, nonetheless, implicitly required full

17. This policy is now reflected in the Immigration Law itself, in section 6(3) of the Law of 2003 in these terms:

“Unless the applicant is married to a Caymanian, the Board shall not, except in exceptional circumstances, grant a work permit to a person wishing to enter self-employment.”

18. Mrs. Shirline Henriques, Registrar of the Health Practice Councils, described the regulatory functions of the Councils as including oversight of the relationship between Caymanian and non-Caymanian doctors. She testified that the Councils in general are well aware of the sponsorship arrangement but that, in her capacity, she, of course, could not speak to whether or not that arrangement satisfies the requirements of the Immigration Board or Law.
19. She spoke, however, of the Councils’ (and their predecessor bodies’) concern to ensure that non-Caymanian doctors are overseen by local doctors for the sake of maintaining the appropriate standards of practice. As evidence of this, she

20. At the insistence of the Councils, and with the co-operation of the Immigration Board, the practice has now developed whereby work permits are not to be issued without the Councils' certification of such affiliation.
21. But "affiliation" for these purposes is not defined in the Health Practice Registration Regulations. Mr. Manderson, even while acknowledging that the notion of affiliation suggests acceptance by the Authorities of the existence of sponsorship; nonetheless insisted that such affiliation could not provide a substitute for the employer/employee relationship required by the Immigration Law. For the reasons which follow, I agree with and accept his view of the situation.
22. In summary, the challenge which has been raised involves the Court having to decide whether the plaintiff's claim for loss of earnings as a chiropractor practising in the Cayman Islands, should be disallowed on the basis that he had been practising on a work permit which was not in conformity with the Immigration Law and Directives. By reliance on the maxim of *ex turpi causa non oritur actio*, Mrs. Houghton submits that public policy demands that the Court not lend its assistance to a plaintiff who bases his cause of action upon an immoral or illegal act. This is as the principle was stated long ago by Lord Mansfield in *Holman v Johnson* (1775) 1 Comp 341, 343. Mrs. Houghton also relied upon the

Hewison v Meridian Shipping PTE

[2002] EWCA Civ. 1821. Thus stated, the principle precludes the Court from assisting a claimant who can claim only by *pleading reliance* upon his unlawful act. Here it is said that the plaintiff claims in his pleadings for loss of earnings which he could only have earned by means of an illegal permit and also relies upon his illegal permit in order to plead his claim.

23. In response, Mr. Robinson submits, that the evidence in the case shows that there was no illegality, but even if there had been, the plaintiff was unaware of it and so was not culpable. Further, that, as the plaintiff's claim for loss of earnings is founded on the defendant's negligence, to which the illegal circumstances under which he held his permit would have been merely collateral, the plaintiff does not, and does not need to, rely on the illegality to found his claim. So the exclusionary *ex turpi causa* principle does not apply.
24. For the reasons which follow and as a first step in the analysis, I find that the plaintiff was working illegally.
25. The work permit issued to the plaintiff for the period 1999 to 2000, with pre-authorised extension to 2001; was obtained for work with the named employer "Island Medical Centre", of which Dr. Lookloy was principal.
26. The permit required as a condition of it that the plaintiff work for no one else but Island Medical Centre. His employment with Island Chiropractic, either as a self-employed partner or salaried employee – the evidence reveals the former – was therefore outwith the terms of his permit and contrary to the Immigration Law.

27. Having regard to the tests laid down in the case law, in particular *Sweet v Parsley* [1970] A.C. 132; *Lim Chin Aik v The Queen* [1963] A.C. 160 and *Gammon (Hong Kong) Ltd. Et al v A.G. of Hong Kong* [1985] A.C.1 (the latter of which I explain and apply below); I conclude that that breach of the Immigration Law was one of strict liability. It follows that the illegality did not depend on whether or not the plaintiff was aware of the breach. Thus, the evidence about sponsorship and the plaintiff's state of mind as to whether he needed in actuality to be in any real relationship of employment with Island Medical Centre or Dr. Lookloy, is irrelevant to the commission of the offences; those which are specifically proscribed by sections 28 and 34 of the Immigration Law (1997 revision). These were the provisions in force at the relevant time and carried over in similar terms in the Law since then. Section 28 provided that:

“Except as otherwise provided by this Law, a person who does not possess Caymanian Status shall not carry on any gainful occupation in the Islands unless authorised to do so by a work permit.”

28. Section 34(1)

(1) “Whoever engages in any gainful occupation in contravention of this Part or fails to comply with any condition or limitation contained in any licence is guilty of an offence.”

(then follows a proviso to the effect that no offence is committed if work is undertaken while awaiting the results of renewal application).

(2) Whoever employs another person; in such circumstances that the employment of such person is in contravention of this Part or of any condition or limitation contained in any work permit, is guilty of an offence.

(Then follows a proviso to the effect that an employer will have a good defence if he can show that after reasonable enquiries he had no reasonable grounds for believing that this subsection was being contravened.)

29. This subsection (as it then appeared in subsection 30(2) of the Caymanian Protection Law 1984) was considered by this Court in ***DaCosta v Regina 1988-1989 CIRL Note 2*** (full written ruling handed down in SCA 2224 of 1985 on 12 January 1988).
30. In that case it was held that in light of the statutory defence which was available in the proviso and which shifted the burden of proof to the defendant, it was not necessary for the prosecution to exclude the reasonable possibility of the employer having an honest and reasonable belief that he had no obligation to obtain a licence in respect of the employee.
31. Thus, in effect, that subject only to the statutory defence; proof of *mens rea* was not required.
32. I can see no basis for regarding the re-stated offence under subsection 34(1) any differently now as to the issue of strict liability.
33. No statutory defence is provided to the different offence under section 28 and which I also find, for reasons which follow, to be one of strict liability.
34. The case law, in particular that of high judicial authority cited above, while establishing that there is a presumption that *mens rea* is an essential ingredient to a statutory offence, also establishes that that presumption can be displaced, not only expressly, but also by clear and necessary implication; where the statute creating the offence deals with an issue of social concern. Such social concern would include matters of public safety, public health, national security and, par

35. After a thorough review of the earlier authorities, Lord Scarman in his judgment delivered on behalf of the Board in *Gammon v A.G. Hong Kong* (above) summarized the principles thus (at p 14 B-D):

“In their Lordships’ opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellant’s counsel, which their Lordships gratefully acknowledge): (1) there is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is “truly criminal” in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; [(this case dealt with breaches of the planning law)]; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.”

36. I conclude that these immigration offences, while they carry penal sanctions, are administrative in nature in the sense that their commission involves breaches of

37. However, as to whether the plaintiff's claim in this case must be disallowed on the ground of public policy other considerations arise. As was said in the Hewison case (above); this is an area of the law in which the search for principles has been illusive. For reasons which follow from analysis of the case law; I accept Mr. Robinson's submission that not only criminal liability (illegality), but also arguably moral turpitude and certainly pleaded reliance upon the illegality; must be shown.
38. I accept on the balance of probabilities from all the evidence, that the plaintiff was unaware that the sponsorship of Dr. Lookloy/Island Medical Centre was insufficient to meet the requirements of the Law as to the obtaining of his work permit. I am also persuaded, in the circumstances of this case, that that lack of knowledge of his wrongdoing precludes the operation of the *ex turpi causa* principle.

39. Further, as it seems even more clearly that pleaded reliance upon one's own illegality is the real test; I also accept Mr. Robinson's further submission that, in any event, the illegality here is collateral to the plaintiff's action which is based in negligence and so is not necessarily relied upon by him to found his claim. Put another way, the fact that he was working illegally – as I have found for present purposes to be the case – is not germane to his claim to be restored to the position he would have been in and thus able to earn his income, had he not been injured in the first place.
40. I conclude that these findings satisfy the test in the leading case of *Tinsley v Milligan and Clunis v Gamington* [1994] AC 340.
41. There, in its interpretation of the *ex turpi causa* principle, the House of Lords finally rejected the notion which had earlier prevailed in the case law; that relief should be denied a claimant where it would be “an affront to the public conscience” for the court to entertain his claim. Instead, they adopted the test (earlier pronounced by the Privy Council in *Singh v Ali* [1960] A.C. 167) as to whether the claimant needed to rely on his illegality in pleading his claim.
42. In *Tinsley v Milligan* a majority of their Lordships concluded that the claim was not precluded because the claimant was able to establish her equitable proprietary right to the property she claimed by way of a resulting trust, without relying in her pleadings or evidence upon the relevant illegality. At page 377 B-C Lord Browne-Wilkinson stated the applicable test as follows:

“In a case where the plaintiff is not seeking to enforce an unlawful contract but founds his case on collateral rights

under the contract (such as a right to property) the Court is neither bound nor entitled to reject the claim unless the illegality of necessity forms part of the plaintiff's case."

43. This dictum and the similar earlier dictum of the Privy Council from *Singh v Ali* (above) have been adopted and applied in this jurisdiction before: see *In Re Euro Bank Corp.* 2001 CILR 517 paras 46-59.
44. Given the emphasis laid during the historical development of the principle upon there being a claim under a contract or claim to a proprietary right or other specific transaction which may be described as tainted by illegality; it is just as well also to note here, the rather limited, if not simply doubtful applicability which the principle might have to claims in tort, such as the present.
45. As the editors to *Clerk v Lindsell on Torts* say (19th edition at paragraph 3-13):
- "A strict application of Tinsley v Milligan across all forms of tort action would limit the applicability of the defence to those (probably comparatively rare) situations in which the claimant has to rely (however that term is interpreted) on the illegality as part of his claim."*
46. On the basis of the case law, there is no room for the *ex turpi causa* principle to operate in denial of damages for personal injuries in this case. An award of damages would simply seek to restore the plaintiff to the financial position he would have been in but for the injury. To the extent that that involves loss of earnings in the Cayman Islands, he does not need to plead reliance on his work permit. He only needs to prove what he would in fact have earned.

47. I find, however, on the balance of probabilities on the evidence in this case, that beyond his then extant work permit, there is in fact no basis for assuming that the plaintiff would have been allowed to continue to practice, in breach of the Law, as a self-employed practitioner in the Cayman Islands.
48. Nothing in the evidence, either of Mr. Manderson, Mrs. Henriques, Dr. Lookloy, Dr. Vance, or the plaintiff himself, persuades me to the contrary.
49. While it appears that an informal system of sponsorship has developed in deference to health practitioners and to the demands for their services; that system, as it has been described to me and as it appears to have impacted the application process for work permits, is not in conformity either with the Law or the Directives issued under the Law. Rather, it is plain that the Law requires that a local doctor applies and acts in reality as employer. Non-Caymanian practitioners are allowed to practice as sole practitioners only in exceptional circumstances. "Exceptional circumstances" cannot mean simply if, as suggested by Dr. Lookloy, the non-Caymanian practitioner would not wish to practice otherwise merely as an employee of another doctor. Such a construction would make a nonsense of the Law and the policy behind the Directives. And although Mr. Manderson did say that the plaintiff could likely have had his position with Island Chiropractic regularised despite the apparent irregularities, I understood him to mean only so as to become an employee, not so as to remain a sole practitioner and partner in his own right.
50. On the foregoing basis, my conclusion – for the present purposes of the assessment of damages – is that the plaintiff is entitled to recover for his loss of

51. Being aware of the consequences these findings might carry for those practising under what must now be seen as the impugned system of sponsorship, I think I am obliged to suggest the following. Consideration should be given to the requirement of “affiliation” not only as that might properly be required for the purposes of the Health Practice Registration Regulations, but also for the purposes of the Immigration Law and Directives as they relate to health practitioners.
52. Those responsible might wish to consider, no doubt among other things, the very considerations mentioned – albeit contradictorily – both by Dr. Lookloy and Mr. Manderson; as to the protection of the interests of patients as well as the interests of Caymanian (local) practitioners. Among these would no doubt be such matters as ensuring that there is a proper continuum of care; the qualifications and expertise of foreign doctors and requiring that they have in place appropriate professional liability insurance.
53. It is difficult to see how any of these things can be vouchsafed if the present “free-lance” system is allowed to continue in breach of the Law.

Quantum: Special Damages

Loss of Earnings to June 2001:

54. As stated above, the plaintiff will be entitled to recover for loss of earnings as a chiropractor practicing in the Islands until on 5th June 2001.
55. Thereafter his damages must be assessed on the basis of his probable earnings as a chiropractor in Canada. As he will not actually be able to practice as such, this will be subject to being appropriately discounted to the extent that he should be expected to mitigate his losses by finding other employment.
56. The plaintiff is also entitled to recover for loss of his business which he had acquired and built up in the Cayman Islands. This is to be valued by reference mainly to the goodwill which he would have been able to sell to some other practitioner, had he been able to relocate back to Canada after June 2001 (having actively maintained his practice here up to then). That goodwill is, of course, cognizable by reference to the client base which he had built up for the Practice and which could be expected to have remained with the Practice even after his departure.
57. A timely and orderly transition for those purposes was not to be afforded because of the drastic way in which his Practice was brought to an end. In other words, he must be compensated for the loss of opportunity to sell his business as a going concern.
58. The assessment of loss of earnings must proceed on the basis of the finding already reached as to the extent of the plaintiff's recovery from the injury and the extent to which he might nonetheless be hampered in the future in undertaking other employment.

59. In this regard, the evidence provided on behalf of the plaintiff by the doctors and physiotherapist who treated him for his injury is unrefuted.
60. In summary, they conclude that having undergone three separate surgical procedures and extensive physiotherapy since the date of the injury, the plaintiff reached MMI on about 7th June 2002, a year and three months after the incident.
61. At that time, clinical data was obtained for the assessment of permanent impairment, including an extensive physical examination. It was concluded that the plaintiff has a permanent partial impairment as the result of the right wrist injury. There is an increased likelihood that he will develop post-traumatic arthritis. It was recommended that he modifies his activities to avoid excessive power grips, heavy lifting, pushing and pulling. And, finally, that the restricted range of wrist motion, particularly into extension, will make it difficult or impossible for the plaintiff to do activities that require that motion.
62. As the case was presented before me, there is no dispute that the outcome is that the plaintiff is no longer able to practice the method of chiropractic for which he is trained and which he had been practising; that is: the Diversified or Motion Palpitation Technique. This would involve using both hands/wrists and arms in specific postures and applying a thrust through the shoulder area and wrist.
63. It was nonetheless submitted by Mrs. Houghton, that the plaintiff is able to practice by a different technique and that he has an obligation to re-train in order to do so in mitigation of his damages. I will come to that issue of mitigation below.
64. Here I must note my findings as to the basis upon which the plaintiff is entitled to recover his loss of earnings to date.

65. On the basis of my finding that there is no reason of public policy to preclude his recovery of loss of earnings in the Cayman Islands up to the end of his work permit, the plaintiff would be entitled to recover two month's income for April-May and May – June 2001.
66. As to how much that is, there is issue taken over the reliability of the financial records of his practice from which his earnings have been calculated by his expert witness, the accountant Mr. Ken Krys. These records comprise mainly of cheque registers for the years 2000-2001 kept for the partnership practice in the handwriting of the plaintiff and his partner Dr. Vance, as well as schedules drawn up by the plaintiff himself by reliance on the cheque registers.
67. These schedules purport to list the Revenue, Expenses and Net Profit of the Practice for April 1999 to March 2001, the time during which he actually practised in the Cayman Islands.
68. Mr. Krys, even while describing those records as unaudited and largely unverified because of the lack of underlying documentation such as cancelled cheques, receipts and invoices; nonetheless felt that he could rely on them as to the accuracy of the information which they do contain.
69. I am also prepared to rely on them, certainly the cheque registers which are obviously contemporaneous records of cheques drawn to pay disbursements from the Practice. These include the individual drawings of the plaintiff and Dr. Vance themselves, salary payments to their staff, rent (explained to be for their clinic as well as for their homes), pension contributions, insurance, work permit fees and the miscellany one would expect relative to a practice of this sort.

70. On the further basis as explained, that all takings – apart from irregular amounts in United States currency from ad hoc patients who came from the cruise ships – were paid into the Practice’s bank account; expenditure from that account can be taken to be a sound measure of the Practice’s income as well. Personal income would be the difference between the income of the Practice and all its outgoings, the difference being what the partners would be entitled to draw, including that as rent for their homes.
71. This is the basis upon which Mr. Kryz was able to arrive at the plaintiff’s annual income from the Practice and which I accept. It was this basis, in general terms also, upon which he was able to arrive at the “normal maintainable annual net profit” of Island Chiropractic as being in the range of CI\$150,000 to CI\$170,000 and thus at the plaintiff’s share of net profit as being in the range of CI\$75,000 to CI\$85,000 per annum.
72. Taking the median of that latter range as CI\$80,000, that gives monthly drawings of CI\$6,666 and thus, for the two months April-May and May-June 2001; CI\$13,332.

Loss of Practice

73. These calculations of earnings became also the basis upon which Mr. Kryz arrived at the value of the plaintiff’s practice. In this regard, he used two methodologies – the capitalization of normal maintainable fee revenue and the capitalization of normal maintainable net profit (income). The former being a measure of the gross fee revenue which the Practice could be expected to generate under normal trading conditions and the latter the net profit or income.

74. These normalized amounts are deemed respectively the amount of fee revenue or net profit the business could be expected to generate in future. A multiple is then applied to convert the projected future annual net revenue or profit, into a current capital value. A variety of risks attendant upon a business undertaking of this sort are also taken into account. The higher the risk, the greater will be the uncertainty with respect to the future generation of revenue and income and thus the lower the multiple to be applied for finding current value and thus also, the lower the value of the business. In this way a present value, deemed the intrinsic value of the business, can be found. Mr. Krys arrived at an intrinsic value – by a combination of capitalization of fee revenue and net profit (and a combined multiple of 0.5 to 2 years revenue and profit) – of between CI\$60,000 to CI\$110,000. This was after also applying a discount of 20 to 30 per cent for certain other risks which he identified as related to the peculiar nature of and circumstances of this partnership.
75. There is a third methodology – the comparable sales approach – which was not adopted by Mr. Krys. He felt that there were insufficient comparables available from within the Islands to justify using this approach. Indeed, there is known only to be the successive sales of the very practice into which the plaintiff had bought. These were the two previous occasions when he bought Dr. Harper's share in 1999 and when Dr. Vance bought in, in 1998.
76. For not taking the comparable sales approach, Mr. Krys was criticized by the defendant's expert Mr. Edwards. He is a qualified accountant but working with the different firm of Price Waterhouse Coopers.

77. First Mr. Edwards expressed his doubts about the reliance on financial information which he described as minimal, unaudited and unverified. He also expressed the view that as there was available the “luxury” of two recent sales within the same business, Mr. Krys should not have rejected the comparable sales approach.
78. It must be noted however, that Mr. Edwards was not himself content to rely only on those two comparables. He had seen the need as well, to find comparables from another jurisdiction and market and so looked to the United States.
79. In the end, I did not consider that a great deal turned on the difference of approach taken by the experts. Mr. Krys’ approach of capitalization of net profits resulted in a range of values which was significantly higher than Mr. Edward’s value only at the upper, but not at the lower end. Mr. Krys’ range, as noted above was CI\$60,000.00 – CI\$110,000; Mr. Edwards’ range, CI\$53,000 – CI\$62,000.
80. I am also comfortable with Mr. Krys’ acknowledgement that while not his preferred approach, the comparable sales method provides a useful check. When that was taken into account, Mr. Krys agreed that a discount from his upper range should be taken. He was also willing to allow a further discount for such factors as the relative paucity and unaudited nature of the financial information, the possibility that Dr. Valgardson may have been unable in a real world situation to realize the full intrinsic value of his share of the business (having regard to the “forced” circumstances under which he would, in any event, have needed to relocate to Canada); the possible inaccuracy of his (Mr. Krys’) stated assumption that Dr. Valgardson may have paid significantly less for his share of the practice than it was worth, among other factors. All in all, guided by Mr. Krys’ final

81. I emphasize however, that I am only guided by Mr. Krys' value, not entirely persuaded, for the following further reason.
82. On his own evidence the plaintiff had paid some CI\$57,000 to Dr. Harper when he bought his share of the practice in 1999 (in two payments of CI\$49,000 and CI\$8,000).
83. Mr. Krys' mid-range price of CI\$85,000 would therefore represent a 49% return on capital in only two year. That, in my mind is too optimistic. A 25% return would be more realistic and would yield a value of CI\$71,250, a sum which falls reasonably between Mr. Krys' mid-range of CI\$85,000 and the higher end of Mr. Edward's valuation (at CI\$62,000). And that would not be an unreasonable value if one were to use the yardstick (also acknowledged by the experts to be a valid check) of what would be a realistic return on capital, in the present context. For those reasons, the value I ascribe to the plaintiff's loss of his chiropractic practice is **CI\$71,250.00**.

Loss of Earnings from June 2001 to end of July 2002

84. There is no dispute that the plaintiff is entitled to recover for loss of earnings by reference to what he could have earned as a self-employed chiropractor in Canada

85. By reference to his income tax return in respect of his earnings from his practice in Canada between 1996 and 1998, this is shown to be in the order of CDN\$62,525 per annum (on average).
86. For the thirteen months under consideration, I assess his earnings at CDN\$72,800 or (at the agreed conversion rate of \$0.85 to the Cayman Islands dollar) **CI\$61,880**.

Loss of Earnings since August 2002 to the present: duty to mitigate

87. Mrs. Houghton argues on behalf of the defendant that the plaintiff, having attained MMI, has had and continues to have an obligation to take all reasonable steps to mitigate his losses. This includes, she asserts, an obligation to re-train to the highest available level to allow the plaintiff to earn at as closely as possible the amounts he had earned as a chiropractor. In this she was supported by a survey also undertaken by Mr. Edwards, and which provided information on what re-training would have been required for, as well as the expected earnings from, four other fields of endeavour described as “complementary” to the chiropractic field and for which positions seem readily available. These are:

JOB TITLE	TIME TO RE-TRAIN	AVERAGE SALARY
Dietitian/Nutritionist	5 years	CDN\$ 60,600.00
Radiological/Technologist	2 years	CDN\$ 53,100.00
Physiotherapist	6 years	CDN\$ 55,900.00
Acupuncture	4 years	CDN\$ 56,200.00

Average

4 1/2 years

CDN\$ 56,450.00

88. A fifth alternative mentioned in the survey would be to re-train to practice a different method of chiropractic; one not requiring forceful use of the hands, wrist and arms. For this Mr. Edwards' survey shows an average annual income potential of CDN\$55,500.
89. His survey did not, however, include an average cost per annum for re-training in any of the fields.
90. But that is an important factor not to be overlooked. For instance, the plaintiff in his evidence spoke of the costs of re-training for the different method of chiropractic as being in the order of US\$40,000 per annum.
91. The plaintiff also volunteered that he could have sought re-training as a medical doctor, but stated that because over the past four years this case has been so very heavily litigated (as to both liability and quantum) he has had to choose between going back to school and paying his attorney. He, of course, chose the latter. He testified that he was, moreover, unable to commit to the expenditure involved in any form of re-training given his age (now 57) and the threat (arising from the defendant's public policy challenge) of not recovering anything at all but instead having to pay his and the defendant's costs; had he been unsuccessful in the end.
92. Instead of going back to school, he reverted to occupations with which he was already familiar – truck driving and farm equipment salesman – from his early days working in his family farming business when he first graduated from college in the late 1970s.

93. Given the circumstances of the case, including the loss of his practice here, his having to relocate to Canada, his not having attained MMI until more than a year after his injury, his age, the relative costs and time involved in re-training and the uncompromising manner in which the case has been contested, including the challenges based on grounds of public policy; I am unable to regard as unreasonable the efforts made in the past and offered to be made by the plaintiff in the future, to mitigate his losses.
94. I therefore approach the assessment of loss of earnings on the basis that he will continue to earn as a truck driver (the more rewarding of that and working as a farm equipment salesman) until he retires at age 65; said to be the standard age of retirement in Canada for truck drivers, as well as for chiropractors.
95. Loss of earnings calculated on that basis from August 2002 to September 2007 (after deduction of earnings actual and deemed as truck driver and farm equipment salesman) will be (as shown in more detail in the schedule hereto) **\$177,782**. This figure includes one month's vacation for which I have allowed, even though I am told truck drivers do not get vacation pay. As a self-employed chiropractor, the plaintiff was accustomed to two months vacation each year. One month strikes me as a reasonable compromise.

Future Losses

96. Here I must arrive at the amount which reflects what the plaintiff might reasonably have been expected to earn as a self-employed chiropractor practicing in Canada until retirement age at 65, less his deemed earnings as a truck driver until the same age. This amount is to be discounted to present day value on the

97. Put more concisely, the task of the court in assessing future losses from personal injury is to arrive at a lump sum which represents as nearly as possible in monetary terms, full compensation – no more no less – for the injury which the plaintiff has suffered, so as to put him in the financial position he would have been in had he not been injured.
98. But this objective now settled by high judicial authority; has proven over the years to be a task easier stated than achieved.
99. The courts have adopted an approach by which a discount rate is applied to the lump sum which is first calculated by use of the old conventional method of applying a multiplier to a multiplicand.
100. The concern has been to apply an appropriate discount rate to the lump sum so as to reduce it to the present day value described above. The higher the rate of discount applied, the smaller will be the lump sum awarded, because of the notionally higher rate of yield which is also assumed.

101. Thus the troubling issue for the courts has been what that rate of discount should be.
102. The same question, the different social context of the United Kingdom, in the context of England and Wales has been the focus of much attention by the courts in recent years, in particular since the House of Lords decision in Cookson v Knowles [1979] A.C. 556 in which the rate of 4.5% was adopted (then considered the rate appropriate for a stable currency and therefore adequate to protect against inflation). In the Court of Appeal's decision in Wells v Wells [1997] 1 All E.R. 673 the discount rate of "4 to 5 per cent" was adopted. That rate was then regarded as reflecting the long-term average rate of return on an investment portfolio containing a substantial proportion of equities – viewed as the investment strategy which a reasonably prudent investor would take.
103. In Carter v Dawson 1998 CILR 204 this Court expressed its reservations about the adoption of such rates of discount in the particular circumstances of that case. The conventional approach of simply applying a multiplier (arrived at by reference to actuarial tables), to a multiplicand was adopted instead. In Allen v Ebanks 1998 CILR 190 the rate of 4.5% was, however, applied by this Court. Thus there appeared to be divergent approaches here.
104. In the House of Lords in Wells v Wells – [1999] 1 A.C. 345 – the Court of Appeal's adoption of the discount rate of 4% to 5% was overturned and a rate of 3% was substituted. This rate was pronounced as generally to be applied in cases of awards of damages until the Lord Chancellor specified a new rate under section 1 of the Damages Act 1996.

105. The Lord Chancellor has since, on 27 July 2001, set the discount rate at 2.5% (see Consultative Paper on the website of the Department of Constitutional Affairs).
106. Without specific reference to Wells v Wells or the Lord Chancellor’s Consultation Paper; that rate of 2.5% seems also to have been the rate adopted by this Court in Panton v Seymour 2006 CILR 91 at p. 101 paragraphs 26 and 27.
107. The question for me now is whether that rate or some other rate should be adopted in this case.
108. An important starting point is to note that the rate of 2.5% adopted by the Lord Chancellor (3% by the House of Lords in Wells v Wells) was adopted by reference to the existence of the all-important investment benchmark available in the U.K. in the form of Index-Linked Government Securities (“ILGS”).
109. In the absence of a benchmark such as ILGS which are guaranteed against inflation, a problem arises when one attempts to apply a discount rate to a lump sum award so as to arrive at the present day value of future loss. The problem arises because, contrary to the assumption underlying the rationale for applying the discount rate to prevent over-compensation, money does not retain a constant value in real terms. Unless the discount is one like that referencing ILGS, which itself contains a hedge against inflation, the discount to present day value of future loss would result in injustice to the plaintiff. That issue is clearly raised and discussed in the following excerpt from the speech of Lord Lloyd of Berwick from Wells v Wells at 364 D to 365 B:

“...to simplify the illustration one can take an average annual cost of care of £10,000 on a life expectancy of 20 years. If one assumes a constant value for money, then if the court were to award 20

times £10,000, it is obvious that the plaintiff would be over-compensated. For the £10,000 needed to purchase care in the twentieth year should have been earning interest for 19 years. The purpose of the discount is to eliminate this element of over-compensation. The objective is to arrive at a lump sum which by drawing down both interest and capital will provide exactly £10,000 for 20 years, and no more. This is known as the annuity approach. It is a simple enough matter to find the answer by reference to standard tables. The higher the assumed return on capital, net of tax, the lower the lump sum. If one assumes a net return of 5 per cent, the discounted figure would be £124,600 instead of £200,000. If one assumes a net return of 3 per cent, the figure would be £148,800.

The same point can be put the other way around. £200,000 invested at 5 per cent will produce £10,000 a year for 20 years. But there would still be £200,000 left at the end.

So far there is no problem. The difficulty arises because, contrary to the assumption made above, money does not retain [(all)] its value. How is the Court to ensure that the plaintiff receives the money he will need to purchase the care he needs as the years go by despite the impact of inflation? In the past the courts have solved this problem by assuming the plaintiff can take care of future inflation in a rough and ready way by investing the lump sum sensibly in a mixed “basket” of equities and gilts. But the advent of the index-linked government stock (“I.L.G.S.”) (they were first issued in 1981) has provided an alternative. The return on income and capital on ILGS is fully protected against inflation. Thus the purchaser of £100 of I.L.G.S. with a maturity date of 2020 knows that his investment will then be worth £100 plus x per cent of £100, where x represents the percentage increase in the retail price index between the date of issue and the date of maturity.... Of course if the plaintiff were to invest his £100 in equities it might be worth much more. But it might also be worth less. The virtue of I.L.G.S. is that it provides a risk-free investment....

The question for decision therefore is whether the judges (below) were right to assume that the plaintiff would invest in I.L.G.S. with a low average net return of 2.5 per cent, instead of a mixed portfolio of equities and gilts. The Court of Appeal has held not. They have reverted to the traditional 4 to 5 percent with the consequential reduction in the sums awarded.”

110. The House of Lords went on to hold that a typical plaintiff, suffering disability from injury, would invest conservatively; assuming the least risk possible for a guaranteed return protected against inflation and so would be inclined towards the ILGS type of investment, instead of the riskier although potentially more rewarding portfolio of equities. Hence the lower rate of discount adopted at 3% taking also into account taxation; (reduced to 2.5% by the Lord Chancellor).
111. In these Islands, where I.L.G.S. or its equivalent may not be available, and where taxation on income is not a factor, the basis for application of the Wells v Wells discount rate is easily doubted.
112. I have had insufficient evidence upon which to arrive at whether that rate or some other should be generally applicable.
113. The best I think I can do is to proceed on the agreed basis in this particular case, that a rate of discount should be applied and then decide between the two rates propounded.
114. On behalf of the plaintiff Mr. Krys came up with a discount rate of 1.06% having been instructed by Mr. Robinson (no doubt with the Wells v Wells approach in mind) to identify the Canadian equivalent to the rate of return on the U.K. Index Linked Government Securities.

115. Mr. Krys reported that by using the Government of Canada Benchmark Real Rates of Return Bonds (4% coupon maturity December 1 2031) with a current yield of 1.63% and allowing for Canadian income taxes of 35% (the rate of tax which the plaintiff will pay there on his investment income) the discount rate of 1.06% would be reached.
116. Mrs. Houghton argued for the rate of 2.5% by reference to Wells v Wells and the Lord Chancellor's Consultation Paper, but I have explained that given the different socio economic context, I am reluctant to take that approach without evidence of its suitability here or in Canada.
117. Moreover, given the obvious consideration in this case that the plaintiff is deemed notionally to be earning his income in Canada and will be living and spending his income there, the discount rate relative to the Canadian Index Linked Securities and Canadian income tax must be more appropriate.
118. Thus, the multiplicand will be CDN\$36,400 (the net earnings he would have earned as chiropractor after deducting his deemed earnings as a truck driver, plus one month's vacation pay each year). The basic multiplier would be 8 (he is now 57 years, expected to work to agreed retirement age of 65 years).
119. The approach taken by Mr. Robinson in his calculations (and it seems agreed by Mrs. Houghton) is to apply the discount rate of 1.06% to the multiplier thus reducing it to 7.29. This yields a net amount for future earnings at CDN\$265,256.
120. This approach of applying the discount rate to the multiplier, instead of to the lump sum arrived at by the combination of the multiplicand and the multiplier,

Cookson v Knowles [1979] A.C.

556 and see **McGregor on Damages** 16th Edition paragraphs 1597 and 1598.

121. The final figure for future earnings converted to Cayman Islands dollars at the agreed rate of \$0.85; becomes CI\$225,552.00.
122. The award for pain and suffering and loss of amenities is agreed at CI\$20,000.00.

Interest

123. It is also agreed that interest on general damages (for pain and suffering and loss of amenities – CI\$20,000.00) will be calculated at the rate of 2% per annum from 11 January 2002 to date of judgment. Interest on special damages is awarded at half the rate payable on judgments from 27th March 2001 to today's date (the date of judgment).
124. The following schedule sets out the heads of damages based on the foregoing assessment:

PLAINTIFF'S REVISED SCHEDULE OF DAMAGES

(Based on Plaintiff's likely earnings in Canada from June 2001)

SECTION A

Special Damages to date	CI\$	CI\$
Medical Expenses (Agreed)		423.48
Other Expenses (Agreed)		6,825.47
Loss of chiropractic practice		71,250.00

Plaintiff's loss of earnings to date

Total loss of earnings from April 2001 to June 2001 based on net sustainable earnings in Cayman - CI\$80,000 ÷ 12 x 2	13,333.00	
Total loss of earnings from June 2001 to maximum medical improvement July 2002 that is 13 months @ CDN\$5,600 per month (based on average net income prior to living in Cayman) = CDN72,800 @ \$.085	61,880.00	
Loss of earnings for period August to December 2002 based on likely earnings from chiropractic practice based on average earnings for 1997 and 1998 of CDN67210 per annum or CDN5,600 per month x 5 = (CDN28,000) less amount earned as truck driver (CDN\$11,972.40) based on 2002 Tax returns = CDN\$16,027 @ 0.85	13,623.00	
Balance c/f	88,836.00	78,498.95

Balance b/f	88,836.00	78,498.95
Loss of earnings from January 2003 to December 2003 (12 months) based on likely earnings from chiropractic practice (CDN\$5,600 per month x 12 = CDN\$67,200) less net earnings as farm equipment salesman (CDN\$13,381) = CDN\$53,819 @ 0.85	45,746.00	
Loss of earnings from January 2004 to September 2007 based on likely Earnings from chiropractic practice (CDN\$5,600 per month) less possible earnings as truck driver (CDN\$2,800) = CDN\$2,800 X 45 months = CDN\$126,000 @ 0.85	107,100.00	
Loss of one month's vacation leave per annum for 2003, 2004, 2005, 2006 @ CDN\$2,800 per annum = CDN\$11,200 @ 0.85	9,520.00	
Loss of vacation for 2007, approximately 0.75 month @ CDN\$2,800 = CDN\$2,100 @ 0.85	<u>1,785.00</u>	
		<u>252,985.00</u>
		<u>331,483.95</u>

SECTION B

Future Losses

Plaintiff is 57 years old. Loss of earnings based on likely earnings as truck driver at CDN\$2,800 per month = CDN\$33,600 per annum plus one month vacation per year of CDN\$2,800 = CDN\$36,400 until retirement at age 65 based on 1.06% discount rate.

Multiplicand = CDN\$36,400

Multiplier = 7.29

= CDN\$265,256 @ 0.85 =

225,552.00

SECTION C

Other heads of Claim

Pain and Suffering and Loss of Amenities
(Agreed) 20,000.00

CIS\$77,035.95

SECTION D

Interest

Interest on general damages
(CI\$20,000) at the rate of 2% per annum
from 11 June 2001 2,306.85

Interest on special damages at
the rate payable on judgments
from 27 March 2001 to date of judgment 45,371.59

CIS\$47,678.44

SECTION E

Total value of claim

SECTION A 331,483.95

SECTION B 225,552.00

SECTION C 20,000.00

SECTION D 47,678.44

CIS\$624,714.39

Costs

125. The fact that the defendant had partial success with his public policy objection does not, to my mind, justify any significant shift in the incidence of costs incurred in the contest over these matters. After all, it must be noted that the defendant's primary challenge was on the basis that the plaintiff was entirely disentitled to recover for loss of earnings because of his commitment to practice until he retired but on an illegal basis, in the Cayman Islands. That challenge, argued in that way, was unsuccessful. It was a challenge not raised with the plaintiff's attorneys until November 2006. It was first raised with the Court in January 2007 and leave to amend the defence was granted to plead the illegality defence.
126. Exchanges in correspondence made between the parties (without prejudice save as to costs) reveal that having become alive to the illegality point, the defendant became (through his insurers) adamant and withdrew an earlier offer made for settlement. This was done notwithstanding that it was an offer which the plaintiff had been willing to accept and in respect of which full payment had already been made into Court.
127. The plaintiff is now found entitled to recover for further loss of earnings in Canada and so not entirely disentitled as the defendant argued. But for that argument the contest would not have escalated as it did since November 2006 and significant costs would have been avoided. The plaintiff will have all his costs of these proceedings, to be taxed if not agreed.

Stay of Execution

128. Upon receiving notice of this judgment, Mrs. Houghton seeks an interim stay of execution for twenty eight (28) days to allow the defendant time to consider an appeal. Essentially her ground is that any payment to the plaintiff may be irrecoverable if the defendant succeeds on appeal because the plaintiff now resides in Canada. That however is not in itself a proper ground for appeal. The ordinary rule is that a stay can only be justified where the applicant shows grounds which will provide him with a real prospect of success on appeal. No such ground has been presented and so the application is refused.
129. The plaintiff (notwithstanding further submissions to the contrary by Mrs. Houghton) will have his costs of these proceedings, to be taxed if not agreed.

Sums paid into Court

130. The amounts paid into Court by the defendant (inclusive of principal and interest) are now to be paid to the plaintiff in partial satisfaction of this judgment.

Hon. Anthony Smellie
Chief Justice

October 17 2007