

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

SAINT VINCENT AND THE GRENADINES

SVGHCV2019/0002

BETWEEN:

**CARLUS THOMAS
SONIA THOMAS**

Claimants

and

**ALRICK DICK
ROLAND BENJAMIN**

Defendants

Appearances:

Mr. Joseph Delves for the Claimants

Mrs. Zhingia Horne Edwards with her Ms. Chelsea Alexander for the Defendants

2021: July 26, 29;
September 23.

JUDGMENT

[1] **GILL, M.** This is an assessment of damages on special damages only, general damages having been settled in mediation. Mediation also disposed of special damages for home care only. The mediation agreement was made an order of the court.

Background facts

☐ On 8th January 2016 at about 9:15 p.m. the first named claimant Carlus Thomas ('Mr. Thomas') was driving his vehicle PR647 along the Mesopotamia main road towards Kingstown with his wife, the second named claimant Sonia Thomas ('Mrs.

Thomas”) as front seat passenger. An oncoming vehicle RU199 driven by the first named defendant and owned by the second named defendant collided with the Thomas’ vehicle resulting in injuries to the couple. Their vehicle was irreparable.

- [3] The first named defendant accepted liability for the accident in writing.
- [4] The Thomases have been compensated in respect of the destroyed vehicle by the defendants’ insurers.
- [5] Mr. and Mrs. Thomas subsequently instituted legal proceedings against the defendants in negligence for damages in respect of their personal injuries.
- [6] The injuries Mr. Thomas suffered were as follows:
 - a) injuries to the frontal and temporal region of the head
 - b) headache
 - c) neck pain
 - d) mild swelling to forehead
 - e) decreased range of motion of the neck
 - f) whiplash injury.
- [7] The treatment he received included the following:
 - a) skull and cervical X-rays
 - b) analgesics
 - c) neck collar
 - d) heat therapy
 - e) physiotherapy
 - f) follow up at orthopaedic clinic.
- [8] The injuries suffered by Mrs. Thomas included the following:
 - a) mid- shaft left humerus fracture with slight displacement;
 - b) pain to neck, left arm and right leg;
 - c) deformity of left arm
 - d) haematoma to right leg;
 - e) complete displaced fracture of the left arm on X-rays;
 - f) chronic arthritic shoulder.
- [9] The treatment Mrs. Thomas received included the following:
 - a) stabilisation of fracture by splinting and casting
 - b) X-ray of left arm
 - c) analgesics
 - d) neck collar

- e) follow up at orthopaedic clinic
- f) manipulation and casting of the left arm
- g) physiotherapy

- [10] A sum for special damages for home care for six (6) months was agreed in mediation. Mr. and Mrs. Thomas pleaded housekeeper expenses for six (6) months at \$500.00 per month (total \$3,000.00).
- [11] In addition, the defendants agreed to pay general damages of \$40,000.00 to Mr. Thomas and \$55,000.00 to Mrs. Thomas.
- [12] Apart from the cost of a housekeeper, Mr. and Mrs. Thomas claimed special damages in respect of medical expenses, the cost of employing a truck driver, rental of a motor vehicle, destruction of eye glasses, and loss of income from (i) the sale of agricultural produce from a farming business, (ii) a block-making business and (iii) a trucking business.

Medical Expenses

Mr. Thomas

- [13] The defendants concede medical expenses in respect of Mr. Thomas as pleaded and proved in the sum of \$800.00. However, they challenge certain medical reports with receipts that have been exhibited to his witness statement on the basis that, although pleaded, these reports are not pleaded as special damages, but have been pleaded in a different paragraph in the claim (paragraph 10). They point out several duplications and the fact that three (3) medical reports have not been pleaded at all. Some concessions have been made accordingly.
- [14] I note that paragraph 10 in the amended statement of claim, while pleading most of the medical reports, comes after the heading 'Particulars of Special Damages'. However, the paragraph claiming interest comes before it. Further, no amounts are stated as the costs of the medical reports and other items in paragraph 10. That notwithstanding, I am inclined to accept that the challenged pleaded medical reports, have been pleaded as special damages. I will exclude the three (3) medical reports not pleaded, two (2) of which Mr. Thomas concedes were not. Therefore, there will be a deduction \$25.00 for the cost of a medical report not

pleaded. Mr. Thomas, with concessions, claims \$900.00 in addition to the sum of \$800.00 agreed to by the defendants. The award for medical expenses in relation to Mr. Thomas is therefore \$1,675.00 (\$800.00 + \$900.00 - \$25.00).

Mrs. Thomas

- [15] The defendants concede medical expenses for Mrs. Thomas in the sum of \$470.00. They launch the same challenge as for Mr. Thomas as regards paragraph 10, which receives like treatment from the court. Mrs. Thomas does not fight the point that one of her medical reports was not pleaded. I will award her the sum of \$510.00 she seeks in addition to the sum with which the defendants concur as damages for medical expenses. Mrs. Thomas' award for medical expenses is \$980.00 (\$470.00 + \$510.00).

Rental of motor vehicle

- [16] Mr. and Mrs. Thomas live in the rural village of Mesopotamia and, consequent upon their injuries, needed to move around the country for doctor visits, physiotherapy, etc. They claim \$4,500.00 (\$900.00 per week for five (5) weeks) for the rental of a jeep until their vehicle was replaced. The relevant receipt was produced. The authorities show that the cost of hiring a substitute vehicle is always recoverable.¹ The defendants do not challenge this item.

Mrs. Thomas' glasses

- [17] Mrs. Thomas avers that her prescription eye glasses were destroyed in the accident. She initially claimed the cost of replacing the glasses in the sum of \$1,901.00. In the amended claim and in her evidence, she seeks \$3,203.00, the value of the destroyed glasses. A copy of the receipt in respect of the cost of the glasses is exhibited to her witness statement. Her evidence in cross-examination is that she paid US\$653.00 (EC\$1,764.77 with a discount of 80%) online for a proper replacement.

¹ See *Martindale v Duncan* [1973] 1 WLR 574; *Malcolm Joseph & Another v Alison Charles* GDAHCV2002/0077; *McGregor on Damages*, paragraph 32-016

[18] We are dealing here with special damages. In making a distinction between special and general damages, Lord Goddard in **British Transport Commission v Gourley**² explained as follows:

“In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation....”

Therefore, Mrs. Thomas is entitled to recover the money actually expended in replacing her glasses. As a result of her glasses being destroyed in the accident, she spent US\$643.00 to replace them with a suitable pair. On the principles applicable to special damages, this is the sum to which she is entitled. In my view, Mrs. Thomas could have made a successful claim for the make-shift replacement glasses, as is evidenced she bought for \$1,900.00 after the original ones broke. Regrettably, this was not pleaded.

Loss of income

[19] Mr. and Mrs. Thomas claim that as a result of the accident and the injuries they both suffered, they sustained losses in income from Mr. Thomas' block-making, trucking and farming businesses. Mrs. Thomas' main occupation is as a civil servant but she assisted in the farming business. As a result of their injuries, Mr. and Mrs. Thomas aver that they could not do much for ourselves and needed to get someone to assist them with household work for about six (6) months. They spent a lot of time sitting around, and have exhibited a photograph showing themselves in cast and neck braces. The defendants have agreed to pay them the cost of a housekeeper for six (6) months (mediation agreement). If they could not do housework for six (6) months, it follows, they submit, that they could not perform non-domestic work for a similar period. They contend, therefore, there should be no dispute regarding the duration of time for which they were unable to carry on their produce-selling and delivery business or their block-making and trucking business. While these businesses seem to cause the defendants the most

²[1956] AC 185 at 206

concern, Mr. and Mrs. Thomas contend that they have adduced substantial and cogent evidence of their losses of income.

[20] The absence of Mr. Thomas' business records for the years 2010 to 2015 is an issue in these proceedings with respect to proving loss of earnings claimed as special damages. Mr. Thomas is unable to provide strict proof of loss of income during that period so as to allow for a reasonable estimate of loss of income during the period after the accident when he and Mrs. Thomas were incapacitated. The reason proffered for this is that Mr. Thomas' books for 2010 to 2015 have been misplaced as a result of several changes of lawyers from Marks & Marks to Jaundy Martin to Roderick Jones and finally to Mr. Delves.

[21] The court refused an application by Mr. and Mrs. Thomas for leave to call an expert witness to give evidence on their business losses. The evidence presented to substantiate their losses comprises the contents of their witness statements, invoices from outside the relevant period and their oral evidence in cross-examination. Documentation supports income obtained after the period of injury.

[22] Special damages must be pleaded, particularised and proved.³ This is a well-established principle that ought not to be departed from except where there are proper reasons for doing so.⁴ However, this is not an absolute rule.⁵ Even if receipts are not provided, the court can still award the sum claimed once there is some credible evidence of the loss and the sum is not unreasonable.⁶ In **The Proprietors, Condominium Plan No. 2/1989 v Trinity Investment Company Limited**,⁷ Michel JA put the point in these terms:

"This approach advocated by the Appellants is not however justified in law. The claim by the Respondents for special damages in a stated amount is a pleading requirement, which has been satisfied. If, however, a claimant is to be awarded the sum claimed by him, he must substantiate it

³ See *Ilkiw v Samuels* [1963] 2 All ER 879 at 890, per Lord Diplock

⁴ See *Thomas v Attorney General* (2006) Supreme Court, Jamaica, CLT 095 (unreported) per Sykes J. at paragraph 17

⁵ See *Brown's Bay Resort Ltd v Luca Pozzoni* ANUHCVP2010/0033

⁶ See *Angela Hinkson v Gibson Construction Limited* SVGHCV2007/0149; *Ann Robertson v The Attorney General* GDAHCV2009/0338; *Malcolm Joseph & Another v Alison Charles* GDAHCV2002/0077

⁷ ANUHCVP2008/0009 at paragraph 43

by evidence on which the court can rely. If he fails to do so, he does not thereby become disentitled to damages for loss suffered by him, but only that the court becomes entitled to disregard the specific amounts claimed by him and to make such award in respect of the losses suffered by the claimant as the court considers reasonable in the circumstances.”

[23] It is accepted that the courts, being pragmatic in their approach to claims for loss of earnings, will consider the degree of certainty of proof required and the sufficiency of the proof based on the facts of the case and, in appropriate cases, will use their experience to come up with a figure that will do justice to the case.⁸ The court will look at all the facts of the case, such as the sophistication/simplicity of the business, the type of business and the reasons for the absence of documentary proof, in order to determine whether to insist upon strict proof or to relax the rule.

[24] In **Sidney Binda v Juan Caliste & Another**,⁹ Master Corbin Lincoln, as she then was, after reviewing the relevant case law, stated:

“The principle I extract from these cases and bear in mind is that there will clearly be cases where a claimant who engages in informal business trade may be unable to provide documentary proof of loss of earnings given the nature of such businesses. The absence of such documentary proof does not necessarily mean that it is not a genuine claim. As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances. However, the claimant still has an obligation to provide the best evidence of which he is capable in any claim for damages.”

The court must consider what is reasonable on the evidence before it.

Farming business

[25] Mr. Thomas is a registered farmer, as evidenced by his farmer’s national identification card. His witness statement reveals that he farms about ten (10) acres of land in the Mesopotamia Valley, an area renowned as one of the biggest food baskets in the country. The farm produces a variety of crops that are sold regularly to a ‘niche market’ of several persons, businesses and/or entities including staff members of various ministries and departments, and the Milton

⁸ See *The Attorney General of Jamaica v Tanya Clarke (née Tyrell)* SCCA No. 109 of 2002 referred to in *Thomas v AG* supra at note 4 at paragraph 15

⁹ GDAHCV2014/0097 at paragraph 5

Cato General Hospital. The evidence further reveals that Mrs. Thomas assisted in the business by creating that group, given her position as a civil servant, pulling in clients from the service, and along with Mr. Thomas, sorted, bagged, labelled, (mostly at night when she came home from work) and delivered some of the produce.

[26] Although pleading net loss of income from the sale of agricultural produce in the sum of \$11,327.00, by their evidence the Thomases seek \$9,750.00 under this head. Whereas they aver that they were incapacitated for five (5) to six (6) months after the accident, they claim only for the first four (4) months of 2016. The gross sales for those months in 2016 are estimated as follows:

January - \$7,400.00 (\$1,850.00 per week)

February - \$9,600.00 (\$2,400.00 per week)

March - \$10,000 (\$2,500.00 per week)

April - \$12,000.00 (\$3,000.00 per week)

Gross - \$39,000.00.

Mr. Thomas states that this is based on sales in the years before and after the accident. Deducting costs and expenses, he estimates his net loss on agricultural sales to be \$9,750.00 for the relevant period.

[27] For the period May to November 2017, Mr. Thomas exhibited a printout of calculations based on his receipts and sales books showing gross sales of \$7,335.00 for agricultural sales (an average of \$1,047.85 per month for seven (7) months). For the year 2018, by the same method, he shows gross sales in the sum of \$55,318.00 (an average of \$4,609.83 per month).

[28] Mr. and Mrs. Thomas submit that In relation to their agricultural business, they have adduced substantial and cogent evidence in that they:

- a. showed a photo of when they were debilitated;
- b. showed receipts and delivery slips from parts of 2014, parts of 2015, 2017, and 2018;
- c. adduced their customer list;

- d. adduced a letter from one customer, the Milton Cato Memorial Hospital; stating as follows:

“Mr. Carlos Thomas is one of our regular suppliers of ground provisions and vegetables at an average cost of six hundred and eighty dollars.” [per week]

- e. adduced a receipt from another customer, the Ministry of Health, showing sales for a particular period in 2015.

[29] Mr. and Mrs. Thomas maintain that the fact that they are using estimates does not prevent the court from making the awards sought under this and other heads. They direct the court to the words of Barrow J (Ag.), as he then was, in **Malcolm Joseph & Another v Alison Charles**,¹⁰ referring to the decision in **Grant v Motilal Moonan Ltd**,¹¹ where His Lordship stated:

“This decision is clear authority for the proposition that values do not have to be proved by documentation and the decision readily lends support to the view that reasonable and informed estimations may be accepted as proof, especially in the absence of contrary evidence.”

They contend that they have been quite transparent and fulsome and have provided the court with a lot of information on the business. There really should be no doubt, they argue, that they engaged in these activities, or that they had these level of sales, or that their estimate of losses of \$9,750.00 is reasonable and not excessive.

[30] The defendants submit that the evidence of loss of earnings from farming is sketchy. They assert that even if the books for the relevant period were lost when they switched lawyers, Mr. and Mrs. Thomas still have an obligation to provide the best evidence of which they are capable. On the contrary, they observe that there is little in the way of supporting evidence such as statements or letters from the plethora of regular customers they claim patronise their business, apart from the letter from the hospital. As far as the defendants are concerned, Mr. Thomas can do better than he has in the circumstances.

¹⁰ GDAHCV2002/0077 at paragraph 8

¹¹ (1988) 43 WIR 372

[31] Further, a major plank of the defendants' submissions, under this and other heads for loss of income, is that Mrs. and Mrs. Thomas should have mitigated their losses, which the evidence shows they did not. The defendants contend that the cross-examination of Mr. Thomas showed that much more could have been done to ensure that the farming business continued and any losses sustained, minimised.

Mitigation

[32] The defendants' core position on Mr. and Mrs. Thomas' business losses is that they are not entitled to recover the damages claimed as they did not mitigate.

[33] Mr. Thomas' evidence is that he had about four (4) workers who farmed his lands for him. Once the produce was reaped, he and his wife would sort, bag and label the produce and then Mr. Thomas would deliver the produce to the customers. Mr. Thomas claims that this niche farming business suffered significant losses as a result of the injuries he sustained. Mr. Thomas states that the farming business suffered losses because he and his wife were unable to do what they would normally do, that is, sort the produce, bag them and label them. Additionally, Mr. Thomas says that his injuries prevented him from delivering the produce to the customers as he would have done otherwise.

[34] The evidence that came out in cross-examination was that Mr. and Mrs. Thomas have two adult sons, one of whom was unemployed and living at home at the time of the accident. Both sons held a driver's licence and during the period of Mr. Thomas' injury, had the use of the rental vehicle.

[35] With a team of four workers on the lands, the defendants submit that there is really no good reason why the work on the farm could not have continued and the niche market retained. They proffer that the roles that Mr. and Mrs. Thomas performed in the farming business (sorting, bagging, labelling), could have been fulfilled by their younger son who was unemployed and lived at home. That he was not into farming is no excuse, the defendants assert. Indeed, they propose, even if he refused, Mr. Thomas had the option of hiring someone to do the sorting, bagging

and labelling and thus, prevent further losses. Moreover, the defendants contend, as the condition of Mr. and Mrs. Thomas improved over time, it would seem the reasonable thing to gradually resume their involvement in their business, even by supervising the sorting, bagging and labelling of the produce instead of leaving that niche market to die during that period. They further contend that the task of delivering could similarly have been carried out by the younger son, who could have driven the rented vehicle for that purpose.

[36] The defendants submit that, through cross-examination, they have raised pertinent issues about Mr. Thomas' failure to have someone assist in his three businesses, whether in the transportation of construction materials in his trucking business, or the delivery of blocks in his block-making business or the sorting, bagging, labelling and delivery of produce for his farming business.

[37] They posit that the evidentiary burden therefore shifted to Mr. Thomas to rebut the allegation of unreasonable behaviour and to show that he had behaved in a way that would have minimised his losses. They urge upon the court that Mr. Thomas has failed to discharge that burden and therefore cannot recover damages that he could have avoided but did not avoid because of his unreasonable action or inaction. On this issue, the defendants rely on the dicta of Saunders JA, as he then was, in **International Motors Limited v Ronnie Thomas**¹² as follows:

“The law is that a person bringing a claim for damages should act reasonably in seeking to mitigate the damages. Even though you have a good, solid claim against a defendant, the law expects you to behave in a reasonable and responsible manner to ensure that the damages suffered or incurred are not greater than they reasonably ought to be. The law will not allow you to recover loss that could and should have been avoided.”

[38] The defendants submit that Mr. Thomas should be awarded only nominal damages for loss of income from his sale of agricultural produce, that is, if the court is satisfied that there has been a loss.¹³ While they concede that there is evidence that Mr. Thomas had a farming business before the accident, they

¹² Civil Appeal No. 7 of 2002 (British Virgin Islands) at paragraph 16

¹³ See *David Balcombe v Vaughn Lowman* SVGHCV2006/0375 at paragraph 14

contend that he has failed to prove the sum claimed. They submit that a broad brush approach is therefore appropriate and in such circumstances, the court should err on the side of under-compensation so as “(a) to reflect the uncertainty as to the loss actually suffered and (b) to give the defendant[s] the benefit of any doubts in the calculation”.¹⁴ In addition, the defendants state that Mr. Thomas has not shown that he took reasonable action to try to avoid any losses so that any sum awarded for this alleged loss must therefore be reduced significantly. They suggest a sum of between \$3,000.00 and \$5,000.00 as appropriate.

[39] Mr. and Mrs. Thomas submit that the defendants cannot rely on the issue of mitigation in this matter. First, they point out that the onus of proof on the issue of mitigation is on the defendants,¹⁵ and that whether loss is avoidable by reasonable action on the part of the claimants is a question of fact, not law.¹⁶ This means that there must be evidence on the issue. Further, the criterion and standard for mitigation are stated in McGregor on Damages¹⁷ as follows:

“In mitigating his loss the claimant victim of a wrong is only entitled to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer. Lord Macmillan put this point well for contract in *Banco de Portugal v Waterlow*; his remarks apply equally to tort. He said:

‘Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult position by reason of the breach of duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest

¹⁴ See *Asda Stores Ltd. V. Mastercard Inc.* [2017] EWHC 93 (Comm) at 307 per Popplewell J. referred to at paragraph 52-018 of McGregor on Damages 20th Ed.

¹⁵ See *Montserrat Utilities Limited v Mildred Kirwan* MNILTAP2013/0002; McGregor on Damages, paragraph 7-019

¹⁶ McGregor on Damages, paragraph 7-016

¹⁷ Paragraph 7-070

that other measures less burdensome to him might have been taken.” (Emphasis added).

[40] In addition, Mr. and Mrs. Thomas proffer that if the defendants purport to rely on mitigation, they ought to have raised it in their defence, or in a letter informing the claimants of their intentions. In **Montserrat Utilities Limited v Mildred Kirwan**,¹⁸ Carrington JA (Ag) put the point thus:

“It was therefore for the appellant, as the defendant before the Tribunal, to give reasonable notice to the respondent of its intention to take the point of mitigation and it was further for the appellant to discharge the burden of proof that there was unreasonable inaction on the part of the respondent, i.e. she failed to act with all convenient speed in bringing or prosecuting her claim. Mr Allen, QC’s, submission makes it clear that neither was done. The transcript of evidence does not show that any evidence was addressed to this issue. The appellant has not therefore discharged the onus on it to prove that there had been unreasonable inaction on the part of the respondent...”

[41] Carrington JA applied **Geest Plc v Lansiquot (St. Lucia)**¹⁹ where Lord Bingham said the following;

“The object is to ascertain the plaintiff’s medical history since the accident and to assess the plaintiff’s continuing symptoms and long-term prospects, with a view to putting a money value on the plaintiff’s pain and suffering, loss of amenity and financial loss. Had there been pleadings, however, it would have been the clear duty of the company to plead in its defence that the plaintiff had failed to mitigate her damage and to give appropriate particulars sufficient to alert the plaintiff to the nature of the company’s case, enable the plaintiff to direct her evidence to the real areas of dispute and avoid surprise.... It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter.” (Emphasis added).

[42] Mr. and Mrs. Thomas contend that the instant defendants did not raise mitigation as an issue in their defence, nor did they give notice of it in their notice of intention to be heard on assessment (filed on 6th May 2021). They filed no evidence on mitigation whatsoever and in fact first raised it in their submissions, after Mr. and

¹⁸ MNILTAP2013/0002 at paragraph 59; see also *Miriam Myers v Dickenson Bay Hotel Management Ltd* ANUHCV2013/0231

¹⁹ [2002] UKPC 48 at paragraph 16

Mrs. Thomas had filed and served their evidence. Mr. and Mrs. Thomas urge upon the court that this ought not to be allowed.

Court's analysis and findings on loss of income from farming

- [43] The authorities are clear that the absence of documentary evidence does not mean that Mr. and Mrs. Thomas are not entitled to recover damages for lost income for the farming business. Adequate evidence of sales and expenses for periods outside of the time frame in which they were incapacitated and unable to carry on the farming business ought to enable the court to determine an amount for the loss. On the evidence before the court, in particular, that Mr. and Mrs. Thomas, owing to their injuries, did not sort, bag, label or deliver (nor did anyone else) their produce to customers for the period is a clear indication of loss of income in respect of this part of the business. However, there is some concern as to whether they have provided the court with the best evidence they can in the circumstances.
- [44] Indeed, Mr. and Mrs. Thomas have provided the court with an impressive customer list. This notwithstanding, there is a letter from only one customer, the Milton Cato Memorial Hospital, evidencing an average income of \$680.00 per week for the supply of vegetables and ground provisions. One receipt from the Ministry of Health for \$680.00, being identified as another customer, appears to be the same customer, given the court's knowledge of the procedure for government expenditure for purchases by ministries and departments, including a government run entity as is the Milton Cato Memorial Hospital. Surely, the briefest of statements or letters from regular customers such as staff members of the House of Assembly, treasury, audit department, registry, legal and health ministries and so on, could have been easily obtained, especially since Mrs. Thomas recruited most of them, and it appears, had easy access to them. These could assist the court in, at least, calculating an approximate figure for gross weekly sales. Mr. Thomas' statement that they made as much as \$1,800.00 per month from Vee Jay's restaurant is not backed up by any confirmation from the restaurant. As it stands, it can only be determined with reasonable certainty that the Thomases

earned \$680.00 per week, adding up to \$2,720.00 per month, from the hospital/Ministry of Health. The customer list and the one invoice from the Ministry of Health do little to assist the court in coming up with an appropriate sum for weekly sales. This evidence cannot be the best that the Thomases are capable of presenting to the court.

[45] In my view, the best evidence they have provided for the court to make a reasonably informed estimate for loss of income from the farming business is the evidence to support gross sales of \$55,318.00 for the year 2018. Mr. Thomas did not work out the net loss for that period but using his method of calculation for the net loss on \$39,000 (\$9,750.00), the loss for the entire year 2018 would have been \$13,829.50 [$\$55,318.00 - \$27,659.00$ (50%) - $\$13,829.50$ (50% of \$27,659)]. The average monthly figure would have been \$1,152.45. For four (4) months, that would equate to \$4,609.80. Given the inadequacy of the evidence provided, I consider the sum of \$4,500 to be a reasonable award for loss of earnings for the farming business.

[46] In relation to the defendants' submission on mitigation, I will not make any deduction on the basis that the issue was not raised in the defence or in a letter or in the notice to be heard on assessment. The raising of the issue of mitigation in submissions and cross-examination does not suffice to shift any burden on Mr. Thomas to show that he did not behave in an unreasonable manner in not mitigating his losses. The onus of proof is on the defendants to prove by evidence that the Thomases did not take certain mitigating steps that they ought reasonably to have taken. It is not sufficient for the defendants to make such suggestions in cross-examination and/or submissions. In any event, the standard of reasonableness to be shown by Mr. and Mrs. Thomas, if required, is not burdensome. The evidence shows a hardworking couple, laid up for months as a result of a breach of a duty of care owed to them, unable to perform basic human functions, in the case of Mrs. Thomas routine hygiene activities in the bathroom, and dressing and undressing, far less to address their minds to look after business affairs. It does not augur well for the defendants with the responsibility for Mr. and

Mrs. Thomas' injuries, without notice or their own evidence, to fault Mr. and Mrs. Thomas for doing what that think could have lessened their burden in terms of their business losses. This is the court's position in respect of the farming business as well as the block-making and trucking businesses on the issue of mitigation.

Block-making business

- [47] Mr. Thomas considers himself a farmer who also does block-making. He states that he went into block-making around 2005 as the banana industry declined but still continued farming. His block-making business is operated in a shed next to their house. Photographs of the operation are exhibited. In order to facilitate delivery of the blocks, Mr. Thomas says he bought a truck that he drove before the accident but that during the time he was injured, he was not able to drive it. He seeks damages for loss of income for this business for the first four (4) months of 2016. He explains how much each block is sold for and the cost of producing a block. He estimates what would have been the gross sales for those months as follows:

January - \$4,000.00 (\$1000.00 per week)
February - \$5,000.00 (\$1,250.00 per week)
March - \$6,000.00 (\$1,500.00 per week)
April - \$6,400 (\$1,600.00 per week)
Gross - \$21,400.00

After deducting estimated expenses, Mr. Thomas seeks \$10,700.00 as his net loss of income for the block-making business.

- [48] Using periods outside of 2016, Mr. Thomas' evidence is that his receipts and sales books show gross sales for block-making amounted to \$131,511.95 for the last eight (8) months of 2017 (an average of \$16,438.99 per month), and \$160,206.00 for the year 2019 (an average of \$13,350.50 per month). Applying a 50% per cent expense ratio, the net loss for 2017 would have been \$65,000 (\$8,125.00 average loss per month for 8 months) and for 2019 the net loss would have been \$80,000.00 (\$6,666.67 average per month). Therefore, Mr. Thomas submits that a

claim for \$10,700.00 for net loss of income is not unreasonable, and was not contradicted by any evidence.

[49] The defendants argue that Mr. Thomas has failed to prove, with satisfactory evidence, that he has suffered a loss of earnings from the block-making business as a result of his injuries. They maintain that he has also failed to show that he has mitigated in any way any losses he may have sustained. They highlight the evidence of Mr. Thomas that they submit supports their contention.

[50] In cross-examination, Mr. Thomas said that he did not make any blocks for four (4) or five (5) months following the accident because of his injuries. However, he disclosed that, at that time, he had a number of workers employed with him in his block-making business, who actually performed the task of producing the blocks. The defendants submit that clearly, Mr. Thomas could, and ought to have, continued the block-making operation in spite of his injured state.

[51] According to Mr. Thomas, his role in the block-making business was primarily to deliver the blocks to customers in the truck that he had previously bought for that purpose. The defendants contend that the evidence of Mr. Thomas, however, is conflicting. On the one hand, he says in cross-examination that he did not use the driver, whom he had been paying monthly since the accident, to deliver blocks as he did not think that the driver was competent to handle the truck when loaded with blocks. On the other hand, Mr. Thomas says in his witness statement at paragraphs 39 and 40 as follows:

“39. In order to facilitate delivery of the blocks, etc, I had bought a truck many years before the accident. The truck is a 4 ton Hyno, registration number, TM588. I used to drive it before the accident but don’t anymore.

40. During the time I was injured I was not able to drive the truck as it was very painful to do; so I had to hire a gentlemen named Patrick Thomas to do so. I paid him \$400.00 per week. Receipts are attached for the following periods...”

[52] Paragraph 40 goes on to set out the significant periods between 18th January 2016 and 13th May 2016 when Mr. Thomas hired a driver for the truck. The defendants argue that the reference in paragraph 39 to the delivery of blocks as

the reason for the purchase of the truck, and to Mr. Thomas' inability to drive it after the accident, leads to the reasonable inference that the evidence which follows immediately thereafter (in paragraph 40) of the hiring of Patrick Thomas to drive the truck was for the purpose of delivering blocks.

[53] The defendants further direct the court to Mrs. Thomas' evidence, at paragraph 29 of her witness statement, which similarly suggests that the truck driver was hired to deliver blocks, and did deliver blocks, during the time that Mr. Thomas could not do so.

[54] It stands to reason then, the defendants submit, that there should be no loss in the block-making business when there were workers to carry on the operation and a driver to make deliveries. Alternatively, if there was no "competent" driver, Mr. Thomas ought to have hired one to cut any losses he may have incurred from not being able to drive the truck himself. There was an unreasonable failure to mitigate in the circumstances, they contend.

Court's findings and conclusion on the loss of income from block-making

[55] I agree with the defendants that some confusion arises in the evidence of Mr. and Mrs. Thomas as to the function of the truck driver hired after they were injured. A reading of both statements gives the impression that the driver was employed to drive the truck for the block-making business. The relevant part of Mr. Thomas' witness statement is quoted above (at paragraph 51). I also reproduce paragraph 29 of Mrs. Thomas' witness statement. It reads:

"We also have a block making business next to our home. My husband used to run this business and drive our truck to deliver blocks and pick up aggregate, etc. But as a result of the accident, he could not drive and we hired a man named Patrick Thomas and paid him \$400.00 for 15 or so periods between mid-January 2016 to mid May 2016. Even now my husband no longer drives the truck since doing so causes his pain in neck and swelling in his feet. So we lost money in that block making business."

[56] However, in cross-examination, Mr. Thomas explained that Patrick Thomas was hired to drive the workers to the farm. Paragraph 44 of his witness statement lends some support to this contention. There, he states that he paid a truck driver to

ensure continuity of his farming business and to take stuff to and from the farm. In cross-examination, he attempts to clarify that paragraph 39 of his witness statement is not related to paragraph 40. He emphasises that Patrick Thomas was not competent to deliver the blocks, which was Mr. Thomas' main function in that business. He explains that he hired Patrick Thomas as he was easily accessible as he lives not far from them.

[57] It appears, then, that although the actual block-making continued during the time Mr. Thomas was injured, there were no sales of blocks because he was unable to drive the truck to make deliveries. Notwithstanding the apparent contradiction between the witness statements and Mr. Thomas' oral evidence as to the function of the truck driver employed after they were injured, I accept his explanation in court, that the driver was hired in respect of the farming business, and not the block-making business. With Mr. Thomas being incapacitated and unable to deliver blocks to effect sales, I find that this business suffered losses as a result.

[58] For the reasons set out before, I reject the defendants' submission on the issue of mitigation for this business.

[59] Considering the evidence of sales provided for 2017 and 2019, I find that the estimated net loss of income of \$10,700.00 for the block-making business is not unreasonable and should be awarded in the circumstances of this case.

Trucking business

[60] Mr. Thomas states that he uses the same truck as for his block-making business to carry on a general trucking business, for example, to deliver sand and gravel etc. for construction sites. His evidence is that he was the person who would ordinarily drive the truck but he could not do so on account of his injuries.

[61] Mr. Thomas explains the number of loads they would have carried monthly in the January to April window, the cost of fuel, the cost of the 'Rabacca' aggregate, and the wages for the driver and the conductor. His receipts and sales books show gross sales of \$26,940.00 for the last eight (8) months of 2017, and \$7,725.00 for

the year 2018. He states that he has not driven the truck since the accident and has hired and paid persons to do so. Since his injuries, he says, he does not make the same amount of money from trucking as he did before. Based on his sales in the years before and after the accident, he estimates that his gross trucking income for the months January to April 2016 would have been \$21,600.00. Expenses, he estimates, would have been 75%, so he claims a net loss of income in the sum of \$5,400.00, as not being unreasonable in the circumstances.

[62] The defendants have serious issues with the claim under this head. They ask the court to note that Mr. Thomas has claimed the sum of \$7,600.00 in respect of wages paid to another driver during the time of his injury, yet he explains that the driver did not do any trucking. Rather, the driver was used to pick up and drop off the farm workers. The defendants assert that this cannot be considered an optimal use of a driver who, according to the amended statement of claim, was paid \$80.00 per day for a period of nineteen (19) weeks. The reason given by Mr. Thomas for not using the driver to assist in carrying on his trucking business during his period of incapacity was that he did not consider the driver to be competent to drive the truck with load on it. The defendants consider this reason, to say the least, inadequate. They question the decision to incur the considerable expense, for four (4) to five (5) months, of paying a truck driver who was unable to perform the usual duties of a truck driver. When asked why he did not hire a “competent” driver, Mr. Thomas’ response was that his injury prevented him from going out and finding one. Again, the defendants consider this reason to be unsatisfactory and unconvincing. In these modern times, they suggest, one need not physically leave home in order to handle one’s business. Moreover, they suggest, surely Mr. Thomas’ condition would have improved with time such that he could have ventured out to look for a “competent” driver if he wished to. The defendants argue that the expense of hiring a driver cannot, in the circumstances, be justified, particularly where the expense did not assist in offsetting any alleged losses in the trucking business.

[63] The defendants submit that Mr. and Mrs. Thomas have failed to prove that they suffered the losses they claim or that any loss of income from the trucking business is the responsibility of the defendants. They posit that the evidence that came out in the cross-examination of Mr. Thomas revealed that there was a manifest failure on his part to mitigate his alleged losses in his trucking business.

Court's findings and conclusion of loss of income from trucking

[64] The reason for not using Patrick Thomas as a substitute driver for the trucking business is the same reason Mr. Thomas uses as for the block-making business. If Mr. Thomas viewed Patrick Thomas as incompetent to drive the truck for these businesses, in my view, the defendants cannot mount a successful argument that the driver was underutilised, being employed only to transport farm workers. Serious questions as to safety, technicality and qualifications arise in relation to the temporary driver. Obviously, Mr. Thomas made a judgment call in the interests of his three (3) businesses. The evidence as to the trucking business satisfies the court that Mr. Thomas suffered losses in this business as a consequence of his injuries. Again, the mitigation point is not allowed.

[65] Mr. Thomas' evidence of income from the trucking business for 2017 and 2018 guide the court in concluding that his estimate for net loss of income in the sum of \$5,400.00 for the first four(4) months of 2016 is not unreasonable and he should recover this amount.

Cost of hiring a truck driver

[66] Whereas the sum of \$7,600.00 was pleaded under this head, Mr. Thomas provided evidence substantiating \$6,000.00. As stated before, he paid a truck driver to ensure continuity of his farming business, and taking stuff to and from the farm. As also stated earlier, the driver transported workers to and from the farm, but was not utilised in the trucking business.

[67] The defendants submit that given the aim of damages is to place the injured party in the position he would have been in had the injury not occurred, to award Mr. Thomas the cost of hiring a truck driver in addition to loss of income from trucking

would be to overcompensate him. They insist that to allow the full sum of \$6,000.00 in respect of hiring a driver, who has been underutilised by Mr. Thomas, would also overcompensate him for incurring an unreasonable expense. They suggest that the amount proved should therefore be reduced by 50% in the sum of \$3,000.00.

[68] I do not agree with the defendants' submissions on the truck driver in relation to overcompensation. I have already concluded to the effect that Mr. Thomas was under no obligation to use the truck driver he hired for the farming business in the other two (2) businesses. I have also determined that he should recover damages for loss of income for the trucking business. I see no reason to deprive Mr. Thomas the cost of hiring a driver to ensure the survival of, at least, some aspect of the farming business while he was incapacitated. He has proved that he paid the driver \$6,000.00 and will be so awarded.

Interest

[69] Mr. and Mrs. Thomas are entitled to interest on general damages for pain and suffering and loss of amenities at the statutory rate of 6%²⁰ per annum from the date of service of the claim, 10th January 2019 to the date of the judgment, 29th March 2021.²¹ On special damages interest should be at the rate of 3% per annum from date of the accident, 8th January 2016, to date of this assessment, 23rd September 2021.

Order

[70] Based on the foregoing, it is hereby ordered that the defendants shall pay the claimants as follows:

1) Special damages

Mr. Thomas

i.	Medical expenses	\$1,675.00
ii.	Rental of motor vehicle	\$4,500.00

²⁰ Interest Act Cap 27, section 4

²¹ See *Alphonso and others v Deodat Ramnath* (1997) 56 WIR 183, per Singh JA at page 195 G; *British Virgin Islands, Civil Appeal No. 1 of 1996* at page 18

iii.	Loss of income from farming business	\$4,500.00
iv.	Loss of income from block-making business	\$10,700.00
v.	Loss of income from trucking business	\$5,400.00
vi.	Cost of hiring a truck driver	\$6,000.00

Mrs. Thomas

i.	Medical expenses	\$980.00
ii.	Cost of eye glasses (US\$653.00)	\$1764.77
iii.	Cost of housekeeper (agreed in mediation)	\$3,000.00

Total special damages \$38,519.77

- 2) Interest on special damages at the rate 3% per annum from the date of the accident, 8th January 2016 to the date of assessment, 23rd September 2021.
- 3) Interest on general damages (\$40,000 to Mr. Thomas and \$55,000 to Mrs. Thomas agreed in mediation) at the rate of 6 % per annum from the date of service of the claim, 10th January 2019 to the date of judgment, 29th March 2021.
- 4) Interest at the rate of 6% per annum on the global sum from the date of assessment, 23rd September 2021 to the date of payment in full.
- 5) Prescribed costs on the global sum of \$133,519.77 in the sum of \$11,513.98.

[71] Finally, I thank Counsel on both sides for their useful submissions.

Tamara Gill
Master

By the Court

Registrar