BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No 1020 of 2011
Between

VERNON MARSHALL **CLAIMANT**

-AND-

ABACUS BUILDERS INC. **DEFENDANT**

Before the Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of the High Court

2015: October 31
February 05

Mr. Dale D. Marshall Q.C., with Mr. Khamaal A. Collymore of Messrs George Walton Payne & Co. for the Claimant
Mr. John F. A. Ford for the Defendant

JUDGMENT

[1] Vernon Marshall, the Claimant, is a carpenter. On the 25th January 2010, while employed by the Defendant company, he fell off some scaffolding erected around the house he was working on. He filed a claim in respect of his personal injuries loss and damage and on 23rd November 2012, Judgment was entered for the Claimant for damages to be assessed and costs. This is the assessment of damages.

THE CLAIMANT'S CASE

[2] The Claimant filed a witness statement on 20th September 2012. He deposed that he is a carpenter and mason by trade and that he was employed as a carpenter and as a mason by various companies over the years. He stated that he has also been self-employed doing principally carpentry, working as a sub-contractor. He deposed that in 2009 he accepted employment with the Defendant as a carpenter/mason and on 25th January 2010 he was working on a house which was being constructed by the Defendant at Apes Hill in the parish of St. James. Scaffolding had to be erected and after it was erected he and a co-worker climbed up the scaffolding and began to work. While he was working on one end of the scaffold, it collapsed, causing him to fall to the ground and suffer severe personal injury. He deposed that he fell from a height of about 6 to 7 feet and that when he hit the ground he felt an excruciating pain shoot straight to his head and was extremely scared. He stated that he lay on the ground in severe pain.

[3] He was later taken to Sandy Crest Clinic in Holetown where x-rays were done and he was told by the doctor that his leg was broken in three places. He was sent home with his leg in a splint and with pain medication. He stated that while he was at home the pain continued without relief. He was taken to the Queen Elizabeth Hospital (QEH) on 27th January 2010 and

taken to surgery to have his ankle reconstructed. He referred to the QEH Report concerning his treatment.

[4] He was discharged completely from the QEH in August of that same year and even though he had no problems with walking, he still had problems with swelling and pain in his ankle. He still has severe pain in his ankle and this pain is generally felt when he has to stand for any period of time longer than an hour or so. He was on sick leave up to January 2011 and received money from NIS. Subsequent to 2011 he found that standing on his feet to do work was near impossible as his right foot would begin to hurt. He deposed that as a carpenter/mason, absolutely all of his work is done standing and the pain meant that he could not get back into the job market. He tried to take work from various people but found that it was impossible to carry out the work because of the pain in my ankle. He continued to endure pain and discomfort which are not constant. The pain is not as severe as in the early stages of the injury but it is still quite painful.

[5] The Claimant is married and lives with his wife and because of the injury he has lost the ability to do many things for himself around the house that he was accustomed to doing. His wife and other individuals had to assist him with these things around the house such as cooking and gardening. He enjoyed working with his hands and had a feeling of great pride at the

finished product of his labours. The injury has robbed him of the enjoyment that he had from his trade as his recreation, vocation and career. Since the injury he has been unable to return to work and he was paid $110.00 per day by the Defendant. He claimed to be entitled to loss of earnings for the future. He deposed that he has no academic skills and given his age, there is no opportunity for him to re-tool and seek other forms of employment.

[6] On cross examination, the claimant stated that on the date of the accident he was 59 years old. He was now 64 years of age. He did not feel that he received proper attention at the QEH. In 2010, he was seen by Dr. Henry and before discharge, he was seen by different doctors but primarily Dr. Thorne. He followed up with his outside doctor after he was discharged from the QEH.

[7] The Claimant admitted that he saw Dr. Henry on 9th April; 24th June; 22nd August; 20th September; 7th March 2011 and 6th February 2012, although he had previoulsy been a patient of that doctor because of his hypertension. He said that he suffered "excruciating pain" so he sought medical attention outside the hospital as he could not be seen by Dr. Thorne as he would wish. However, he also confirmed that in the QEH report of 18th August 2010, he admitted no problem with ambulation and complained only of swelling in the ankle.

[8] There was some contradiction in his evidence of the type of pain. He said the swelling in his ankle was "normal" when Dr Thorne saw it, and that his pain was not "occasional" but, as he put it "comes and goes". He said the range of motion in his ankle was limited and disagreed with the medical report of Dr Thorne, as he told him of the pain in his foot.

[9] On another occasion he was asked about the severity of the pain between September 2010 to March 2011. He said that during that period he was limited to non-strenuous movements, and described his pain as "sometimes mild, sometimes excruciating" and said "I can only feel the way I feel. It goes and comes. I was in mild pain"

[10] He said that he did not return to the QEH for additional care because they were only giving him painkillers and he did not want to get addicted. The Court accepts this. It would be useful to note here that despite the apparent contradictions in this claimant's evidence about the nature and severity of his pain, the court does not disbelieve that he suffered quite severe paid during this injury and his recovery. On an observation of him on the stand, the court concludes that his reluctance to expand on the severity of his pain seems more to have to do with some masculine reticence to display weakness that any intention to obfuscate the issue.

[11] With regard to the domestic assistance, he gave evidence of being an active and proud houseowner who would clean around the house, cook, wash, anything that a person in a house would do, but that after the accident he could no longer do chores.

[12] He said: "I tried one day, I went to clean around the house I got a scrape on the surgical wound which turned into a sore. I had problems with standing, walking, I was able to walk better than I was able to stand. ....… I have no difficulties mopping if it is over a limited space. I swept the bedroom with no difficulty …it is a small area. I required help with chores, if I saw something to do I would try to do it."

[13] With regard to his wages he gave evidence that he was paid $110 per day but could not remember what deductions were made from those wages.

[14] It was suggested to the Claimant that after his last set of sick leave expired in 2010 he would have been well enough to return to work and he disagreed.

Written Submissions

[15] Submissions on damages were filed on behalf of the Claimant by Attorney-at-Law, Khamaal Collymore on 21st March 2014. Mr. Collymore presented the Claimant's claim for damages under the following heads:

General Damages:

- Pain, Suffering and Loss of Amenity

- Loss of Congenial Employment
- Future Loss of Earnings
- Future Medical Care

Special Damages:

- Domestic Assistance
- Past Loss of Earnings
- Medical Expenses

General Damages

[16] With regard to pan, suffering and loss of amenities, Counsel referred to the circumstances surrounding the fall from the scaffold that resulted in the Claimant's injuries. Counsel submitted that in cases where the Claimant has suffered several injuries, Courts have generally been reluctant to award the aggregate of the various figures simpliciter. He also submitted that the usual approach is therefore to discount the aggregate figure for the various injuries by a factor that takes account of the perceived overlap between the injuries: **Butterworths Personal Injury Litigation Service (BIPLS), Issue 65, Binder 1, Para [736]**. Counsel further submitted that the level of the discount to be applied depends upon the degree of overlap between the distinct injuries, so that where the injuries are of a similar nature the discount will be higher than where the injuries are more distinct. He referred to paragraphs **[739]-[745]** of **BIPLS, Issue 65, Binder 1** and averred that

those paragraphs also indicate that the normal range for discounts is perhaps 10%-20%, although discounts of 25% or more are not uncommon.

[17] Counsel submitted that the sum of $89,100.00 was a reasonable global aggregate figure for the Claimant's pain, suffering and loss of amenities. He averred that any overlap in the pain, suffering and loss of amenities must have been minimal because the injuries impacted two different sides of the Claimant's body and whereas the soft-tissue injury resolved in 6-8 months, the Claimant will suffer from the effects of the fractures to his right leg for the remainder of his life. Counsel submitted that a discount factor of 10% was used at arriving at the figure and presented his calculations in the following table:

Fractures to Right Leg	$90,000
Soft Tissue Injury to Left Ankle	$9,000
Subtotal:	**$99,000**
Less 10% Discount for overlap	$9,900
Global Aggregate Figure for PSLA	**$89,100**

[18] Mr. Collymore relied on the following authorities in support of the Claimant's claim of pain, suffering and loss of amenities:

a) Judicial College Guidelines Chapter 7 (12th Edition)

b) *Purkis v Rehman* (1997) Kemp

c) *Batram v Chapman* (2004) Lawtel

d) ***Layland v Creative Print & Design Ltd*** **(2005) Kemp**

e) ***Davis v Patel*** **(2008) Kemp**

[19] Counsel for the Claimant claimed the sum of $10,000.00 for the loss of congenial employment. He relied on paragraphs 26 and 27 of the Claimant's witness statement. Counsel filed **Supplemental Submissions on Loss of Earnings** on 6 February 2015 and submitted that the past loss of earnings up to the date of hearing were $56,466.53 with a continuing daily rate of $96.12 between hearing and judgment and future loss of earnings of $74,974.20 ($24,991.40 x 3). The net annual earnings were submitted as $24,991.40 and the multiplier as 3 with a retirement age of 67.

[20] Mr. Collymore submitted that the appropriate multiplicand for future medical care is $500.00. He referred to Dr. Henry's opinion that it is likely that the Claimant will develop arthritis in both ankles and may require as many as 4 medical consultations and at least one course of physiotherapy annually. He averred that it is reasonable to anticipate that each of those visits would cost approximately BDS$100.00. He further submitted a multiplier of 10 is reasonable and claimed the sum of $5,000.00 as damages for the Claimant's future medical care.

[21] With regard to special damages, Counsel claimed the sum of $9,720.00 as domestic assistance at the average commercial rate of $45.00 per day, 3 days per week for the duration that the Claimant was on leave from work.

Counsel referred to paragraph 25 of the Claimant's witness statement. Mr. Collymore averred that at the date of filing, approximately 163 weeks elapsed since the date of the incident and claimed the sum of $87,674.44 (163*$537.88) as the Claimant's loss of earnings together with loss of earning accruing between the date of filing and the assessment of damages at the rate of $537.88 weekly. Under the head of medical expenses, Counsel claimed the sum of $1,535.00 for the costs of visits to Dr. Henry, the cost of the QEH Report and the cost of Dr. Henry's Report.

THE DEFENDANT'S CASE

Written Submissions

[22] Submissions were filed on behalf of the Defendant by John Forde, Attorney-at-Law on 25th June 2014. Counsel for the Defendant reviewed the Report of the QEH and the Report of Dr. Henry and compared them. He submitted that the medical reports run perpendicular to one another insofar as the QEH Report was authored by the consultant Orthopaedic specialist Dr.Thorne and that Dr. Henry is not a specialist in Orthopaedic medicine and he invited the Court to give greater weight to the findings of Dr. Thorne.

[23] Furthermore Counsel averred that there were lengthy gaps in the visits to Dr. Henry's Clinic (20th September 2010 – 7th March 2011 and 7th March 2011 – 6th February 2012). He submitted that the Claimant produced no evidence

that he sought other medical attention during those gaps. He further submitted that the Claimant has not produced a physiotherapy report that would have outlined the Claimant's course of treatment and the efficacy (or otherwise) of the treatment to assist the court in a bid to assess damages.

[24] Mr. Forde contended that the Claimant did not fully mitigate his losses. He further contended that the prolongation of the Claimant's symptoms was triggered to a large extent, by his failure to fully mitigate and called on the Claimant to strictly prove his losses. Counsel relied on the following in support of his submissions:

a) ***Damages in Tort*** (**Allen, Hartshorne and Martin, 2000) at paragraph 4-067;**

b) ***Payzu Ltd v Saunders*** **[1919] 2 KB 581;**

c) Clark and Lindsell on ***Torts (*****18th edition, 2000) at paragraph 29-08;**

d) ***McAuley v London Transport Executive*** **[1957] 2 Lloyd's Rep 500**

[16] Counsel for the Defendant averred that Dr. Thorne made no mention of any injuries apart from the right ankle fracture and therefore the Defendant does not acknowledge the existence of the alleged soft tissue injury of the left ankle. He further averred that the cases on quantum cited by the Claimant are easily distinguishable from the instant case. With regard to loss of congenial employment, Counsel contended that the Claimant was fit and

physically able to resume his employment upon discharge from Dr. Thorne, or, at least, at the expiry of his sick leave certified by Dr. Thorne on 20th September 2010. He referred to paragraph 10-070 of Kemp and Kemp, the quantum of damages, Vol.1.

[17] With regard to the loss of future earnings, Mr. Forde relied on the QEH Report and submitted that the Claimant was/is able to work and that no offer should be made under that head. He further submitted that the QEH Report does not allude to the need for future medical care.

[18] Counsel submitted that damages for past domestic assistance should not be awarded after 20th September 2010, the expiry of the QEH sick leave and that the period that the Claimant was hospitalized (25th January – 29th January 2010) should be excluded from our consideration. Counsel also submitted that the requisite commercial rate is $40.00 and not $45.00 and that an award of $2,840.00 would achieve justice in the circumstances ($40.00 per day x 3 days x 16 weeks and $40.00 per day x 2 days x 11.5 weeks). It was further submitted that a discount of 25% should be applied and therefore an appropriate award should be $2,130.00. Counsel relied on the following authorities:

a) Paragraph 13-008 of Kemp and Kemp Vol. 1;
b) *Nash v Southmead HA* [1993] PIQR Q156;
c) *Fairhurst v St. Helens HA* [1995] PIQR Q1;

d) ***Burns v Davies* [1999] Lloyd's Rep. Med. 215**

e) ***Evans v Pontypidd Roofing Limited* [2002] PIQR Q5**

[19] Mr. Forde averred that approximately 33 weeks elapsed between the date of the accident and the expiry of sick leave and submitted that the Claimant should be awarded 33 weeks loss of earnings and that the Claimant must produce written evidence from the National insurance Department as to the amount of injury benefits that he received as a result of the accident, so that such a sum can be deducted from the loss of earnings claim.

[20] The Claimant submitted two Medical Reports in support of his claim, namely the Report of the Queen Elizabeth Hospital dated 3rd August 2011 and the Report of Dr. Damien Henry dated 8th August 2013.

The Q.E.H. Medical Report

[21] The Medical Report on the medical management of the Claimant's injuries was prepared by Dr. Melissa Branford, Senior House Officer of the Orthopaedic Department and Dr. Jerry Thorne, Consultant in the Orthopaedic Department. The information in the Report was gathered from the Claimant's medical files compiled at the Queen Elizabeth Hospital only. The Report stated that the Claimant fell from a height on 27th January 2010 and injured the right lower limb. It provided information on the Claimant's

pre-hospital care, the hospital stay, the surgery, the post-operative care and the Claimant's treatment in the Orthopaedic Outpatients Clinic.

[22] The report revealed that upon examination at the Sandy Crest Medical Centre on the day of the injury, there was swelling over the medial and lateral malleoli of the right ankle. There was also associated tenderness over the right calcaneus and tenderness of the left first metatarsal bone. The Claimant was x-rayed and fractures of the distal right tibia and fibula were revealed. After the Claimant was referred to the Orthopaedic Outpatients clinic, further x-rays showed a four-part plafond fracture of the right tibia with involvement of the articular surface.

[23] The Report stated that the Claimant was admitted to the Hospital and it was ascertained by the Senior House Officer that he had a history of hypertension, gastroesophageal reflux disease, sinusitis and possible cardiac disease. The Report further stated that a below-knee half-cast was seen applied to the right lower limb and that the Claimant demonstrated normal movement of all toes and normal sensation of the same. Routine pre-operative blood tests, chest x-ray and echocardiogram were all normal. The Claimant underwent surgery to the right ankle fracture. The Report outlined that the comminuted tibial plafond fracture was reduced then fixed with an interfragmentary screw, followed by stabilization with a clover-leaf shaped

plate that was secured with screws. The fracture to the right fibula was stabilized with a six-holed semitubular plate and secured with screws and a below-knee half cast was applied to the right leg and foot.

[24] After the operation the Claimant was reviewed the following day and found to be doing well after experiencing urinary retention which resolved spontaneously. Also on that day the Claimant was discharged and was instructed to ambulate with crutches, non-weight-bearing on the right lower limb for eight weeks. On 10th February 2010, two weeks after surgery, the Claimant was reviewed at the Orthopaedic Outpatients Clinic. The wound over the lateral malleolus was healing but appeared macerated so a betadine dressing as applied to the wound and the half-cast was replaced. On 7th April 2010, ten weeks post-op, the plaster was removed and plans were made for the patient to commence physiotherapy to the right ankle.

[25] The Report indicated that the Claimant was reviewed four months after surgery and he demonstrated good range of motion (ROM) of the right ankle and x-rays showed union of the fracture. The Claimant's final outpatient visit occurred on 18th August, 2010. The Report stated that the Claimant admitted no problems with ambulation, but complained only of swelling to the ankle and occasional pain to the same. Furthermore, the Claimant was seen to be walking normally, with mild swelling, no tenderness, and ROM at

the right ankle. He was then discharged from the clinic with advice to elevate the right lower limb and with further NIS forms dated to 20th September 2010.

Report of Dr. Henry

[26] The Report was prepared by Dr. Damien Henry of the Bridge Cot Wellness Centre. It revealed that on 9th April 2010, almost three months after his initial injury the Claimant was seen for his routine appointment for his hypertension. The Report indicated that the Claimant was unable to weight bear on the right leg and he had limited mobility at the right ankle and that there was tenderness in the epigastric region of his abdomen. It further indicated that the remainder of the Claimant's physical and neurological examination was normal with no disturbance of muscle tone, no loss of power and no alteration of tendon reflexes. The conclusion of the physical examination was that as a result of the accident, the Claimant sustained the following injuries:

1. Comminuted fracture to right ankle
2. GERD as result of heavy NSAID use post accident.

[27] The Report further stated that the Claimant was treated with Pantecta 20mg twice daily to address his GERD symptoms. The Claimant was seen by Dr. Henry on 24th June 2010 and was ambulating without his crutches but was complaining of pain and swelling of both ankles over the past three weeks.

He was examined and found to be tender over the medial and lateral aspects of the right ankle and there was limited mobility and the right ankle was still swollen. The Claimant's left ankle was also swollen, there was tenderness along the Achilles tendon and he was able to plantar flex his left foot. The Report indicated that the Claimant continued to experience epigastric tenderness in his abdomen and was assessed as having tendonitis of his left ankle, GERD and healing fracture to his right ankle.

[28] On the 22nd August 2010 the Claimant was examined and there was a small 1cm by 1cm on medial aspect of the right ankle which had not healed after his last surgery. On 20th September 2010 the Claimant was reviewed and was complaining of moderate pain on most days and swelling in the right ankle after prolong standing. The Claimant was still tender over the right ankle and his range of movement at the right ankle was restricted. He was unable to invert or evert his right ankle. When the Claimant was seen on 7th March 2011 he was complaining of pain to his right ankle. He stated that he was afraid of climbing up on a chair to change a light bulb at his home and his sick leave was extended to the 10th June 2011.

[29] The Report indicated that on his final visit on 6th February 2012 the Claimant opted not to return to work since he did not have the physical dexterity to return to his original position as a carpenter and that his morbid

fear of heights was also a significant factor in him opting to retire. The prognosis given was that the injury limited the Claimant's ability to climb and to function in safety boots due to the persistent swelling of his right ankle. The Report further indicated that the Claimant has developed a serious phobia to heights. Furthermore, it is unlikely that he will be able to return to his vocation following the injury and that given his age it is likely that both ankles will suffer from arthritis in the future which will require medical attention. The Report indicated that depending on the degree of his physical exertion, he may require as many as four visits per year and at least one course of physiotherapy annually.

What weight should the Court place on the Medical Report of Dr. Henry?

[30] Mr. Forde submitted that the medical reports submitted by the Claimant run perpendicular to each other. He noted that Dr. Henry continued to review the Claimant after he was discharged from the Orthopedic Outpatient's Clinic on 18th August 2010 and that Dr. Henry was not a specialist in orthopedic medicine. Upon cross examination the Claimant stated that he decided to go to his outside doctor for follow up after he was discharged from the QEH. He revealed that he was an outpatient of Dr. Henry for hypertension. The

Court notes that there are conflicts between the QEH Report and the Report of Dr. Henry.

[31] On 19th May 2010 the Claimant's condition was reviewed at the Orthopaedic Outpatients Clinic and it was found that the Claimant demonstrated good range of motion (ROM) of the right ankle and x-rays showed union of the fracture. The QEH Report does not reveal any swelling to the Claimant's left ankle or any complaints from the Claimant concerning his left ankle. The Report of Dr. Henry tells a different story. On 24th June 2010, the examination revealed that the Claimant's left ankle was swollen and he was tender especially along the Achilles tendon. Dr. Henry assessed him as having tendonitis of his left ankle.

[32] Therefore, there are conflicts between the QEH Report and the Report of Dr. Henry regarding the condition of the Claimant's left ankle. In **Kemp & Kemp, The Quantum of Damages, Law and Practice, Special Edition, Vol 1, 1986**, the Authors note at pages **15003-15004:**

> "Even in a case where the medical reports are agreed the medical prognosis may be uncertain and so medical witnesses should be available to give oral evidence to assist the trial judge. Sometimes the Court is presented with so-called agreed medical reports…However, where the damages will in any event be comparatively small, the judge may decide to make up his mind on the available material rather

than incur the expense and inconvenience of adjourning the trial to enable the specialists to give oral evidence."

[33] The Court did not have the benefit of hearing oral evidence from Dr. Seale or Dr. Henry. Nevertheless, the Court will make an assessment of damages based on the material before it. When the Claimant was first examined by the QEH no injuries were found to the left ankle. On the Claimant's visit to Dr. Henry on 9th April 2010 the Claimant's main complaint was for intermittent pain in his right ankle. There were no complaints concerning the left ankle. Therefore, the Court will place greater weight on the QEH Report and disregard a claim for injuries to the left ankle.

The duty to mitigate

[34] There is no strict duty to mitigate*: **Sotiros Shipping Inc v Sameiet Solholt*** **[1983] 1 Lloyd's Rep. 605 at 608**. In ***Payzu v Saunders*** **[1919] 2 K.B. 581 at 588**, **Bankes L.J** stated:

"It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law, but must be one of fact in the circumstances of each particular case."

[35] Counsel for the Defendant averred that there is no suggestion that the Claimant sought to avail himself of public health care services (either at any of the island's polyclinics or by returning, after his discharge, to the

Orthopaedics Outpatients' Clinic and to the physiotherapy department at the hospital). Under cross examination the Claimant stated that he did not return to the QEH because he would just be getting pain killers and he did not want to get addicted to them every time the pain came on. When asked about returning to physiotherapy he did not feel that he would be accepted there.

[36] The onus is on the Defendant to prove that the Claimant failed to mitigate his damage. In **McGregor on Damages (18th edn)** at p.242 it states:

> "The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the claimant ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has long been settled, ever since the decision in Roper v Johnson and was confirmed by the House of Lords in Garnac Grain Co v Faure & Fairclough."

[37] In the present matter the Claimant did not return to work. The Claimant stated that he was unable to return to work because of his injuries. In ***McKeown v Ford Motor Co Ltd*** **(2006) EWCA Civ. 336** the Claimant developed occupational asthma as a result of exposure to fumes during the course of his employment. The Claimant opted to retire early based on a scheme that his employers provided instead of taking another job. After receiving benefits under the early retirement scheme, the Claimant brought a claim against the employers. The employers contended that the Claimant

should have remained an employee doing a different job instead of taking early retirement and that by not getting another job he had failed to mitigate his loss. Judgment was found for the Claimant and the Defendant appealed.

[38] **Pill LJ**, giving the judgment of the Court of Appeal, held that the employers had not offered alternative employment to the Claimant and that the Claimant could not be criticized for seeking early retirement. The Court also found that the trial judge was entitled to take into account the Claimant's age, health and the fact that he had only ever worked for one employer in his life.

[39] The Claimant was 59 years old when he was injured in the course of his employment. As a carpenter and mason the Claimant would be required to stand for long hours. He still continues to experience pain and swelling in his right foot. The QEH Report confirms that before the Claimant was discharged there was swelling and he was complaining of pain. The Court takes into account the Claimant's age, health and his employment. The Defendant has not proven that the Claimant failed to mitigate his loss. Thus, the Claimant can recover the full sum for his loss of earnings.

Pain and Suffering and loss of amenities

[40] The Court relies on the observations of **Wooding CJ** in ***Cornilliac v. St. Louis*** **(1965) 7 W.I.R. 491** concerning the approach to assessing General

Damages. The Court must therefore assess the damage and arrive at a global figure. In ***Cornilliac***, **Wooding CJ** outlined the following heads of damage that a Court must look at:

a) the nature and extent of the injuries sustained;
b) the nature and gravity of the resulting physical disability;
c) the pain and suffering which had to be endured;
d) the loss of amenities suffered; and
e) the extent to which, consequentially, pecuniary prospects have been materially affected.

[41] The Claimant suffered fractures to the tibia and fibula of his right foot. X-rays at the Orthopaedic Outpatients Clinic showed a four-part plafond fracture of the right tibia with involvement of the articular surface. When the Claimant was first attended to at the Sandy Crest Medical Centre there was found be tenderness in first metatarsal bone of the left foot but the QEH Report suggests that the Claimant's injuries were concentrated in the right foot.

[42] After surgery to his right foot, a below-knee half-cast was applied to the Claimant's right foot and leg and he was instructed to ambulate with crutches, non-weight bearing on the right lower limb for eight weeks. Therefore his mobility was restricted. Under cross examination the Claimant

stated that he had problems with standing and walking and could not engage in activities in the home such as cleaning, cooking and washing.

[43] There is no doubt that the Claimant's unfortunate experience that resulted in his injuries was painful. According to the QEH Report the Claimant stated that he fell from a height and he landed on his right foot, then the left, and fell on his buttocks. He complained of painful swelling to the right ankle and some pain to the left. The Claimant described the pain as excruciating. Under cross examination concerning the period 11 months after the accident, the Claimant stated that his pain was sometimes mild and sometimes excruciating.

[44] The Claimant is a carpenter/mason. His job required him to stand for long periods and work with his hands. After the accident on 27th January 2010 the Claimant was on sick leave until 20th September 2010. Dr. Henry extended his sick leave up to 10th June 2011. The Claimant was 59 years old on the date of his accident. In his witness statement the Claimant stated that he wanted to get back into the work market but found that standing on his feet to do work was near impossible because his right foot would begin to hurt.

[45] Counsel for the Claimant, Mr. Collymore submitted that that the Claimant's injuries fell under the **Moderate Leg Injuries** according to the **Judicial College Guidelines (JCG)**, **Chapter 7, 12th ed.** The aggravating factors

associated with moderate leg injuries include complicated or multiple fractures or severe crushing injuries, generally to a single limb. There is evidence that the Claimant suffered from fractures to the tibia and fibula of the right leg. It also referred to the tibial fracture as 'comminuted'. Dr. Henry's Report also confirms the comminuted fracture. However, there is no evidence which suggests that the fractures to the Claimant were complicated. Therefore, there is no evidence presented which shows that the Claimant's injuries are equivalent to moderate leg injuries as stated in the **JCG**.

[46] The Claimant's injuries are commensurate to the bracket of **'Less Serious Leg Injuries**' found in the **JCG**. That bracket states:

> In the case of fracture injuries, the injured person will have made a reasonable recovery but will be left with a metal implant and/or defective gait, a limp, impaired mobility, sensory loss, discomfort or an exacerbation of a pre-existing disability. This bracket will also involve serious soft tissue injuries to one or both legs causing significant deficit, functional restriction and/or some nerve damage in the lower limbs.

[47] The Claimant was left with a metal plate and complained of pain and swelling to his ankles. Dr. Henry's Report revealed that on 9th April 2010 the Claimant suffered from limited mobility of his right ankle. An examination on 24th June 2010 further revealed tenderness over the medial and lateral

aspects of the right ankle, swelling over the right ankle, limited mobility of the right ankle, swelling over the left ankle, tenderness along the left Achilles tendon and epigastric tenderness in his abdomen. Mr. Collymore also submitted that the Claimant now walks with an altered gait as a result of the injury. Thus, the Claimant's injuries are similar to those listed under **'Less Serious Leg Injuries'** in **Chapter 7** of the **Judicial Studies Board Guidelines**. That guideline states that:

> "In the case of fracture injuries, the injured person will have made a reasonable recovery but will be left with a metal implant and/or defective gait, a limp, impaired mobility, sensory loss, discomfort or an exacerbation of a pre-existing disability. This bracket will also involve serious soft tissue injuries to one or both legs causing significant deficit, functional restriction and/or some nerve damage in the lower limbs."

[48] Therefore, the Claimant's injuries will be assessed under the bracket of **'Less Serious Leg Injuries'** which attract awards of **£14,520 - £22,440**.

[49] Counsel for the Claimant relied on the case of ***Batram v Chapman***. In that case, the Claimant suffered from a fracture of the left tibia and fibula when he fell off the back of the tractor unit. The nature of injuries in that case is similar to those in the present case. Moreover, in the present case the Claimant continues to experience pain as a result of his injury.

[50] However, it is noted that in ***Batram***, the Claimant's condition was likely to be permanent with no improvement or deterioration. That is not the case in the present matter. There is no medical evidence before the Court that suggests that the Claimant's injuries will not improve. The Claimant was discharged from the Orthopaedic Outpatient's Clinic on the basis that his condition was satisfactory. Though Dr. Henry's Report states that the Claimant complained of pain to his right ankle, there is no evidence that the Claimant is in constant pain. The Claimant admitted that his pain comes and goes.

[51] Therefore a sum of $60,000.00 would be appropriate for pain and suffering and loss of amenities.

Loss of Congenial Employment

[52] The sum of $10,000.00 was claimed under this head. A claim for loss of congenial employment must be specifically pleaded. It was not pleaded in the Claim Form and Statement of Claim and therefore the Court will not award any damages under this head **(*Cheryl Alleyne v The Attorney General*, Suit No.358 of 2000, High Court of Barbados).**

Future Loss of Earnings

[53] By a Memorandum filed on 6th February 2015 Counsel for the respective parties agreed that the Claimant's net earnings at the date of the incident

were $96.12 daily with a net annual of $24,991.40. Counsel for the Claimant used a multiplier of 3 and claimed the sum of $74,974.20. Counsel for the Defendant, however, relied on the findings in the QEH Medical Report and contended that the Claimant was able to work. Counsel submitted that no offer should be made under this head.

[54] The QEH Report revealed that the Claimant was seen to be walking normally, with mild swelling, no tenderness, and range of motion at the right ankle. Based on these findings the Claimant was discharged on 19th August 2010 with NIS forms to 20th September 2010. However, the QEH Report did not give a prognosis for the Claimant. It did not state when it was likely that the Claimant would be able to return to work. Moreover, the Defendant has not proved that the Claimant failed to mitigate his loss by deciding not to return to work. Thus, the claim of $74,974.20 for future loss of earnings is reasonable in the circumstances.

Future Medical Care

[55] The Claimant relies on the Report of Dr. Henry to claim damages under this head. Dr. Henry stated that as a result of the Claimant's age he will likely develop arthritis in both ankles and may require as many as 4 medical consultations and at least one course of physiotherapy annually. Counsel for the Defendant relies on the QEH Report which does not allude to the need

for future medical care. As stated before the QEH Report does not give a conclusive prognosis. The Court accepts that after the Claimant was discharged from the QEH he continued to experience pain and problems with his right leg which would have prevented him from working. However, given the uncertainty as to the effect of the Claimant's injuries, the claim for future medical care is not reasonable in the circumstances.

Past Domestic Assistance

[56] The Defendant does not dispute that damages should be awarded under this head. However, he disputes the commercial rate used and duration of the period submitted by the Claimant for calculating the damages. The commercial rate submitted by the Claimant was $45.00 per day at 3 days per week and the duration of the period of domestic assistance was from 25th January 2010 – 10th June 2011 (72 weeks). Counsel for the Defendant submitted that no damages should be awarded after 20th September 2010, the expiry of the QEH sick leave. He also contended that the requisite commercial rate was $40.00 instead of $45.00 and submitted the sum of $2,840.00.

[57] Counsel for the Defendant relied on the QEH Report in his submissions. However, the Court will take into account both medical reports. Even though the QEH Report would have revealed favorable results concerning the

recovery of the Claimant, the Claimant was still suffering from pain. As a result of this continued pain and complaints concerning his injuries the Claimant received sick leave which ended in June, 2011. Mr. Forde's submission that the time that the Claimant spent in the hospital should not be taken into account is reasonable. Therefore, the period of 71 weeks and two days is reasonable in the circumstances.

[58] With regard to the commercial rate, $40.00 per day for 3 days per week is reasonable and therefore the sum of $8,600.00 is awarded for past domestic assistance.

Past Loss of Earnings

[59] It is agreed that the Claimant earns a net wage of $480.60 per week. Counsel for the Claimant calculated past loss of earnings from the date of filing to the date of hearing (5 years, 1 week). Counsel for the Defendant contended that the Claimant was able to work after his sick leave ended. However, when factors such as the age, type of job and the effects of the injuries sustained are taken into account, it is reasonable to hold that the Claimant should not be penalized for seeking early retirement. The sum which represents the NIS benefits the Claimant received was deducted from those earnings and the sum of $56,446.53 was claimed under this head. The sum claimed is reasonable.

Medical Expenses

[60] An examination of the Claimant's Claim and Statement of Claim reveals that damages for medical expenses were not pleaded. In ***Bonham-Carter v. Hyde Park Hotel Ltd.*** **(1948) 64 T.L.R. 177 at p. 178**, **Lord Goddard CJ** stated:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it."

[61] Therefore expenses claimed under this head are disallowed.

Disposal

[62] The following damages are awarded to the Claimant:

General Damages

a) Pain, Suffering and Loss of Amenities	$60,000.00
b) Future Loss of Earnings-	$74,974.20
c) Past Domestic Assistance-	$8,600.00

Special Damages

a) Past Loss of Earnings	$56,446.53
TOTAL	**$200,020.73**

[63] Special damages shall bear interest at a rate of 4% per annum from the date of the issue of the writ until today and 8% per annum thereafter until payment. General damages shall bear interest at a rate of 6% from today until payment. Costs to be agreed or assessed for two counsel are awarded to the claimant.

Jacqueline A.R. Cornelius

Judge of the High Court