

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

No. 972 of 2015

BETWEEN:

TYRELL ONEAL MCCOLLIN

CLAIMANT

AND

SHERADON HOLDER

FIRST DEFENDANT

DARRIE HOYTE

SECOND DEFENDANT

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 30 August 2018

**Mr. Junior O. Allsopp Q.C. in association with Mrs. Makala K. Broome and
Mr. Alphonza McD. Carew for the Claimant**

**Ms. Jessica R. Ashby in association with Ms. Stephna A. Greenidge for the
Defendants**

DECISION

INTRODUCTION

[1] Before me is an application for an interim payment of \$500,000.00 filed by the Claimant on 27 February 2018. The grounds on which he seeks the order are:

- “(i) The Claimant suffered severe injuries as a result of an accident on 8th May 2014. His injuries include, C4 ASIA A complete Spinal cord injury.
- (ii) The Defendants, through their insurer, Sun General Insurance Company Limited, have accepted liability for the accident which caused the Claimant’s injury.
- (iii) The Claimant will recover a substantial sum of money by way of damages. The interim payment sought will not exhaust the likely award of damages in this case and represents a reasonable proportion of the likely amount of the final settlement or judgement on damages.
- (iv) The Claimant’s condition due to his injuries continues to require care and any further delay can be detrimental to his recovery.”

[2] The Defendants object to the application. They argue that there is insufficient evidence to support it. Alternatively, they urge that if the Court is minded to make an award, it should not exceed \$40,000.00. This represents six months’ living expenses as outlined in the Claimant’s evidence.

[3] Having considered the evidence and Counsels’ submissions, the Court has decided to allow the application and to order a payment in the amount of \$350,000.00. The reasons for this decision are set out below.

BACKGROUND

[4] Born on 23 June 1997, the Claimant is now 21 years old. On 8 May 2014, he was struck by a motor vehicle while walking on a sidewalk at Sargeant’s Village, Christ Church. That vehicle was owned by the First Defendant and

driven by the Second Defendant. On 10 July 2015, the Claimant commenced proceedings against them in negligence. Along with special damages, he claims damages for pain and suffering, loss of amenities, domestic assistance, past and future medical expenses, and loss of earning capacity. The Defendants have admitted liability.

- [5] The Defendants have made previous interim payments. They paid \$200,000.00 to the Claimant pursuant to an order made by Worrell J on 24 January 2017. Additionally, US\$243,000.00 and other payments totalling \$416,500.71 were made pursuant to various consent orders. These covered related expenses including the cost of local nursing care and rehabilitative treatment in the United States of America. The parties agree that the total amount paid by the Claimant thus far is approximately \$1,112,220.61.

THE EVIDENCE: AN OVERVIEW

- [6] The Claimant's application is supported by the affidavit of his mother, Ms. Gloria McCollin. I will refer to its contents later.
- [7] Ms. Jessica Ashby filed an affidavit on the Defendants' behalf. She appeared for them in association with Ms. Stephna Greenidge. She exhibited a letter from Dr. Harley Moseley 111 dated 16 December 2015 and addressed to one of the Claimant's Counsel which she identified as a copy of "the document referred to as the medical report" of Dr. Moseley by Ms. McCollin at

paragraph 8 of her affidavit. In fact, Ms. McCollin deposed that Dr. Moseley was the Claimant's attending physician and that "[a] copy the medical reports (*sic*) of Dr. Moseley 11 have been produced to the Defendants (*sic*)". Ms. Ashby also verified the expenses paid for nursing care for the Claimant to be \$262,536.72 and exhibited a supporting spreadsheet.

[8] During the hearing of the application, Mrs. Makala Broome who appeared for the Claimant in association with Mr. Alphonso Carew and Mr. Junior Allsopp Q.C., referred me to a medical report from Dr. Moseley dated 2 December 2014 and a letter from him to Mr. Allsopp Q.C. dated 8 May 2015. Ms. McCollin exhibited those items with an affidavit filed on 10 July 2015 in support of an earlier application. Ms. Ashby took no objection to the use of these documents. Indeed, she referred to them in her submissions.

THE LAW: SOME GENERAL PRINCIPLES

[9] *Part 17* of the *Supreme Court (Civil Procedure) Rules, 2008 (the CPR)* provides generally for interim remedies. *CPR 17.5* to *17.9* relate specifically to applications for interim payments. *CPR 17.6(1)* to *(3)* set out various conditions which must be satisfied for the grant of an order. There is no dispute that those relevant to this application have been met. The Defendants have admitted liability to pay damages to the Claimant (*CPR 17.6(1)(a)*); they are insured in respect of the claim (*CPR 17.6(2)(a)* and *(3)(b)*); and if the

claim went to trial, he would obtain judgment for substantial damages against at least one of them (*CPR 17.6(3)(a)*).

[10] However, the grant of an order is not automatic. It lies in the Court's discretion. In exercising that discretion, the Court is required by *CPR 1.2* to seek to give effect to the overriding objective of *the CPR*. That objective as expressed in *CPR 1.1(1)* is to enable the Court to deal with cases justly.

[11] *CPR 1.2* sets out a non-exhaustive list of goals that are included so far as practicable in the notion of dealing with cases justly. This comprises (i) ensuring that the parties are on equal footing; (ii) saving expense; (iii) dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party; (iv) ensuring that the case is dealt with expeditiously and fairly; and (v) allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[12] In respect of other relevant factors, I have found the comments of Auld LJ in *Campbell v Mylchreest [1998] EWCA Civ 60* to be helpful. He stated in the first three paragraphs of his judgment:

A judge, when considering an application for an interim payment, has a discretion in the matter. This court's decision in Stringman v McArdle [1994] 1 WLR 1653, has not changed that, as Lady Justice Butler-Sloss emphasised at p. 1656D. It is true

that, as a guide to the exercise of that discretion, it indicates that the court should normally order sought interim payments within the amount of the likely recoverable damages without investigation or consideration of the plaintiff's intended use of the money.

However, there may be instances where there may be another matter, or other matters relevant to the exercise of the discretion. Mr. Mackay has helpfully suggested possible examples in other circumstances: first, that the payment is sought too close to the trial to justify ordering it; second, that the sought payment may be too small for it to be worthwhile as an exercise of the power; and third, where a plaintiff is not getting on with the claim and simply putting off the day of trial by repeated applications for interim payments.

... where the use to which a plaintiff intends to put money received by way of interim payment might prejudice the fair conduct of the trial in some way, it is, in my view, a relevant factor for consideration by the judge, along with the Stringman v. McArdle starting point, when exercising his discretion whether to order a payment. More particularly, where the use to which the plaintiff intends to put the money might pre-empt in some way the outcome of an important issue in the trial, that is a matter relevant to the exercise of the discretion.

[13] *CPR 17.6(4)* provides that “[t]he court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.”

Evidently, this requires the Court to consider the likely amount of the final judgment and what would be a reasonable proportion of that amount. It must then ensure that any payment ordered falls within that barrier.

[14] The terms “the likely amount of the final judgment” and “a reasonable proportion” are readily understandable. They require no engagement in sterile

definitional analysis. However, guidance as to their practical application is useful and consideration as to the yardstick of “a reasonable proportion” necessary. A helpful passage in this regard is found at *paragraph 3* of the judgment of Lady Justice Smith in *Cobham Hire Services Limited v Eeles [2009] EWCA Civ 204*. With reference to the former practice in England and Wales, which generally is observed here, she stated at *paragraph 3*:

... the judge would usually make a conservative preliminary estimate of the likely final award. For that he would need both sides’ schedule of loss, in so far as they could be provided at that stage. He would have to make a broad assessment of the merits of each side’s contention and would err on the side of caution. He would order an interim payment which allowed a comfortable margin (or headroom) in case his preliminary estimate turned out to be too generous.

[15] The purpose of the reasonable proportionality requirement was stated with her usual clarity and succinctness by Cornelius J in *Hoyte v Electric Sales and Services Ltd, High Court Suit No. 1156 of 2002, date of decision 28 May 2011*. She was speaking in the context of an identical requirement contained in *Order 29, Rule 11 of the Rules of the Supreme Court, 1982*. Citing *Spillman v. Bradfield Riding Centre [2007] EWHC 89*, she stated at *paragraph 11*:

There the court emphasized that the amount payable as an interim award should not be such as to expose the defendant to the risk that the eventual damages will be less than the sum or sums paid out as interim awards. If it turns out that the plaintiff has been

over-paid, the circumstances may be such that a final adjustment made to rectify the matter will be ineffective.

- [16] Cornelius J went on to comment, in the same *paragraph*, that the claimant's ability to repay is a relevant factor in fixing the sum; and that though impecuniosity is not a barrier, the amount ordered should reflect the possibility that a claimant may be unable to repay any excess.
- [17] The question of what constitutes "a reasonable proportion" must depend on the circumstances of each particular case. It cannot be the subject of any pre-determined mathematical formula. As Langley J put it at *paragraph 18* in *Spillman* "[t]here is no rule (of law or thumb) as to what is a reasonable proportion." Though made in the context of the modified regime that now exists in the United Kingdom, the court's comment at *paragraph 37* in *Eeles* is apposite. That court noted that a reasonable proportion may be a high proportion, provided that the estimate of the claim is a conservative one.
- [18] Finally, citing the *White Book Service 2010 volume 2, at paragraph 15-111* and *Kemp & Kemp, Volume 1, paras 24-010 and 24-011*, Counsel for the Claimant submitted it to be the law that (i) a claimant does not have to demonstrate that a certain sum is required to cover any particular need; (ii) he is entitled to have his damages paid as soon as reasonably practicable; (iii) the purpose for which he will use the money is irrelevant; and (iv) it matters not

if he has dissipated past payments or is likely to waste the one being sought.

These principles are not in doubt.

HOW SHOULD THE DISCRETION BE EXERCISED?

[19] I will now consider the basic submission made against the application. The Defendants' Counsel expressed it in their written submissions in this way:

... given the course of this matter to date and the Defendant's insurer having advanced a sum in excess of \$1 million, the Court should not exercise its discretion in making any further interim payments in the absence of cogent medical evidence while the Claimant drags out the litigation process. The emphasis should rather be on accelerating and not delaying the litigation process with a speedy trial.

[20] On hearing an application for an interim payment, the Court is empowered by *CPR 17.8* to make an order for an early trial. However, I do not consider that to be a prudent alternative, or one that would be fair to the Claimant. He has suffered a significant injury, and as his mother has deposed, he is not yet in possession of all the expert reports necessary to properly prosecute his claim.

[21] Counsel did not specify what concerns, if any, arose from "the course of the matter to date". The fact that the Defendants have already advanced in excess of \$1,000,000.00 is no bar to the application unless to exceed that sum will violate the reasonable proportionality threshold. That evaluation must be deferred until I arrive at a conservative estimate of the claim as must

Counsel's submission that the amount sought by the Claimant creates a risk of overpayment.

[22] I understand that delay in prosecuting a claim may result in the refusal of an application for an interim payment. However, nothing before me suggests that the Claimant is unnecessarily protracting these proceedings. He filed his Claim Form on 10 July 2015. It was served on 21 July 2015 and it was not until 16 February 2017 that the Defendants filed their defence. More fundamentally, it is unreasonable to expect him to prosecute his claim without the expert reports he awaits.

[23] Counsel also submitted that if the application succeeds, it does not incentivise the Claimant to bring the matter to trial. This Court cannot speculate as to how any award might impact on his zealotry to prosecute his claim. However, if evidence of tardiness surfaces, there are remedies open to the Defendants.

[24] I turn to Counsel's submission relating to the medical evidence. They submitted that in setting out his estimated claim, the Claimant relied on medical reports which preceded his exposure to rehabilitation; and that it would be misleading to rely on those reports now. They also contended that more evidence would be required to support some of the claimed heads of loss.

[25] In his 2 December 2014 medical report, Dr. Moseley opined that the Claimant “is highly unlikely to recover fully from his tetraplegia, and that he is likely to be dependent on others for the rest of his life”. In his report of 18 May 2015, he opined that the Claimant’s injury was classified as “a C4 ASIA A Complete Spinal Cord Injury”. In that report, he stated that spinal cord injuries can be divided into two phases: (i) acute and (ii) rehabilitation. The acute phase is said to last until the patient is stabilised. Dr. Moseley also stated that during that phase it is difficult to determine an exact prognosis “as some function beyond what is currently being seen may occur, such as recovery of up to two spinal cord levels below the actual injury.” According to him, the goal during the rehabilitative stage is to return as much function as possible to the person. In his 16 December 2015 letter, Dr. Moseley stated that the Claimant “has a spinal cord injury” and described it as “a very severe and life-threatening state”.

[26] The Defendants accept that the Claimant has suffered a severe injury. At page 1 of their written submissions, their Counsel described it as “a catastrophic spinal cord injury resulting in quadriplegia”. Ms. Ashby accepted that if the Claimant were to go to trial based on the existing medical reports and without adducing any evidence as to his post-rehabilitative status, he would, at least, be entitled to general damages for pain and suffering and loss of amenities

(“PSLA”) at the starting point of the *Judicial College Guidelines* for quadriplegic injuries (“the Guidelines”).

[27] Ms. Ashby was correct to make that concession. The Guidelines for 2017 provide a range of £246,750 to £307,000 for tetraplegia. It is obvious from the related commentary, that the bottom figure is a starting point and a variety of factors determine where along the range an award may fall. The commentary reads:

The typical case of tetraplegia attracting an award in the mid-range of this bracket is appropriate for cases in which the injured person is not in physical pain, has full awareness of their disability, has an expectation of life of 25 years, or more, has retained powers of speech, sight and hearing but needs help with bodily functions. At the top end of the bracket will be cases where physical pain is present or where there is a significant effect on the senses or ability to communicate. Such cases often involve significant brain damage where degree of insight is a relevant factor ... Lack of awareness/significantly reduced life expectancy will justify a below average award. Other factors bearing on the award include age, the extent of any residual movement, the degree of independence (if any) whether through the provisions of aids/equipment or otherwise, the presence of respiratory issues and depression.

[28] Hence, I am in a position to make some assessment for PSLA. However, the unavailability of post-rehabilitative reports will inevitably impact on the amount that may be awarded under that head and may also affect other aspects of the assessment. I will come back to the evidential considerations. It suffices

to note that I will have to exclude any heads for which there is insufficient evidence, medical or otherwise, to ground an assessment.

[29] There is a further submission which I also ought to consider at this stage. The Defendants' Counsel submitted that when regard is had to the evidence of the Claimant's annualized expenses, the sum asked for by him would not be exhausted for six years. I find no merit in this. An interim payment need not be tailored to any particular need of the Claimant. He is entitled to his damages as early as possible. How he allocates them or how long he takes to use them is of no moment.

[30] Consequently, the Court is not persuaded that any of the matters raised militates against the grant of a further order. Rather, there are factors which support a different outcome. The accident occurred just over four years ago. The evidence is that a substantial portion of the \$200,000.00 paid to the Claimant has gone, or is required, to meet disputed expenses. Ms. McCollin states \$75,000.00 remains but that will dwindle rapidly given the monthly expenses. Her evidence is that the Claimant had to stop attending university because of the recurrent transportation costs. In any event, he does not have to demonstrate need. Therefore, I will move on to make a conservative assessment of the claim.

THE CONSERVATIVE ASSESSMENT

[31] The Claimant's Counsel submitted that I ought to take account of several identified heads in carrying out the required assessment. For various reasons that will emerge, I have decided to limit any award to those of (i) PSLA; (ii) past domestic earnings; and (iii) a single component of future medical expenses.

[32] I will deal first with the excluded heads but as a precursor, I must make some comments in respect of the Claimant's life expectancy.

Evidence of life expectancy

[33] The Defendants' Counsel referred me to *Burton v Kingsbury [2007] EWHC 2091* in support of their submission that the application is beset by an evidential deficit. In that case, Faux J underscored the importance of life expectancy in assessing various future loss claims. At *paragraph 18*, he commented that the determination of a claimant's life expectancy and the appropriate multiplier to be applied is "[t]he necessary starting point".

[34] At *paragraph 11* in *Burton*, Faux J acknowledged the importance of life expectancy in assessing general damages in claims involving quadriplegia. He cited the *8th edition* of the *Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injuries*. It can be gleaned from the Guidelines which I reproduced at paragraph [27] that life expectancy is a

factor in determining the level of an award for PSLA. Specifically, the commentary lists a life expectancy of 25 years or more among the factors that constitute a “typical case” falling within the mid-range of the bracket. It goes on to note that reduced life expectancy will justify a below average award.

- [35] There is a rebuttable presumption of normal life expectancy: *Rowley v London and Northwestern Railway (1873) LR 8 Exch 221*. Severe injuries like quadriplegia may shorten life expectancy. In *Burton*, Faux J went on, at *paragraph 19*, to highlight the critical role of medical evidence in assessing life expectancy in cases of this nature. He stated:

The medical experts were agreed as to the methodology to be used in assessing the life expectancy of the Claimant. The starting point is to look at the epidemiological research and literature in relation to quadriplegics and then at the medical history and prognosis for the Claimant, assessing positive and negative factors, to see where he fits in the cohorts of quadriplegics, in order to form an appropriate clinical judgment as to the reduction in his life expectancy as a consequence of the accident. That reduction is then applied to the average life expectancy ...”

- [36] In his letter of 8 May 2015, Dr. Moseley listed a variety of conditions and complications that the Claimant is at risk of developing. He counselled as to what is necessary to “minimize mortality risk”. However, there is no medical evidence as to the Claimant’s current state or his post rehabilitative prognosis; and nothing on which this Court can determine how life expectancy varies

from what is normal for a young man of his age, if at all. In such circumstances, it would be imprudent for this Court to speculate.

[37] Consequently, I have determined that the Court ought not make any entries in respect of heads of future loss that are calculable by reference to the Claimant's lifespan. The Court also acknowledges the limiting effect that must inevitably occur in respect of any amount for PSLA.

[38] I will now go on to the heads which I consider must be excluded on this or any other account.

Loss of guidance, care and companionship

[39] Counsel for the Claimant submitted that an amount of \$75,000.00 ought to be included for each of their client's parents under the head of "loss of guidance, care and control". They cited section 3 of the *Accident Compensation (Reform) Act Cap 193A* ("the *ACRA*") as the basis for this claim.

[40] As stated in the long title, the *ACRA* deals with "the recovery of compensation for injury caused by accident". The statutory right of action is set out in *section 3* which is in these terms:

Where, after 22nd January, 1981, injury or death is caused by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled to recover if not killed, the dependants of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been so entitled if not killed,

and to maintain an action for the purpose in a court of competent jurisdiction.

[41] The term “dependant” is defined in *section 2(1)* of the *ACRA* as including “any person who is a parent of the deceased”. This is curious since **section 3** claims may arise in both fatal and non-fatal accidents. *Section 5* prescribes certain procedural requirements in respect of claims under *the ACRA*. It reads:

5. A person who commences an action under this Act shall
 - (a) file with the statement of claim an affidavit stating that the to best of his knowledge, information and belief the persons named in the statement of claim are the only persons who are entitled or claimed to be entitled to damages under this Act; and
 - (b) in the statement of claim, name and join the claim of any other person who is entitled to maintain an action under this Act in respect of the same injury or death and thereupon such person becomes a party to the action.

[42] Ms. Ashby submitted that the Claimant has no cause of action under *section 3* of the *ACRA*. She is correct. The right of action is that of the “dependants” of the injured person. The Claimant’s statements of case contain nothing to show that he was purporting to institute proceedings under the *ACRA* on his parents’ behalf. This head is demonstrably unsustainable.

Future domestic assistance and future medical care

[43] Counsel for the Claimant sought inclusion of sums totalling \$883,475.66 for future domestic assistance and future medical care. In each case, they arrived

at the proposed figure by applying a multiplier of 29 to an annualised amount. From the multiplier used, it appears that Counsel assumed a normal life expectancy. Be that as it may, these heads must await a proper determination of life expectancy for assessment.

[44] In addition, the Court had other evidential concerns in respect of the claim for future medical expenses. Ms. McCollin deposed that the guide for the Claimant's future medical care is contained in a "Life Care Plan" created and authored by Ms. Hilary Bethel, an Occupational Therapist. She did not exhibit that document with her affidavit, though it appears that it was produced in support of an earlier application. It appears that the amount advanced by Counsel was based on various annualised costs contained in that document, the contents of which were not explained to the Court. I was unable to assess the appropriateness of Counsel's figure.

[45] However, there is one rider in respect of the medical expenses. Ms. McCollin deposed that the Claimant had consulted a dental surgeon and a plastic surgeon. She exhibited a report from a dental surgeon showing estimated costs of \$5,900.00 for the repair of four molars and the removal of a "plat". The Defendants have not suggested that this work is not required neither did they take issue with the amount. Hence, I will include it in my assessment.

[46] Ms. McCollin also deposed that the consultation with the plastic surgeon related to possible surgery for facial scarring. However, she did not provide a related statement of costs and I can give that no further consideration.

Housing

[47] The Claimant's Counsel made submissions in respect of the head of "Housing". The Claimant elected to specify the various heads of loss which he claims in his Claim Form. He did not include "Housing". Given the style of his pleadings, I am hesitant to consider any alleged loss which cannot be subsumed under any of his pleaded heads. Nonetheless, there are other good reasons why I will not include this head in my assessment.

[48] In respect of this aspect, Ms. McCollin deposed as follows:

The Claimant and I currently reside in a rented accommodation. My home where the Claimant and I resided prior to the accident was not suited for the long term needs of the Claimant. The claimant requires appropriate housing to allow him to comfortably access all portions of his home without aid to further allow him daily independence. ...

Plan (sic) have been drafted for a new home and valued by a quantity surveyor. The Claimant has also continued to explore other options relative to a long term housing solution. Any claim under this head will also include the costs incidental to the purchase of the property and its upkeep and maintenance including but not limited to, legal fees for purchase, land taxes, insurance, utilities and gardening of the exterior of the home.

[49] The Claimant's Counsel submitted \$900,000.00 to be a conservative claim under this head. However, they appeared to base this figure on various reports

on acquisition and construction costs which were not before the Court. This evidential deficit coupled with the absence of expert evidence in respect of the Claimant's future housing needs is enough to defer this head from consideration. However, that is not the only reason.

[50] In arriving at the proposed sum, Counsel deployed a methodology derived from *Roberts v Johnstone [1989] QB 878*, a decision of the Court of Appeal of England and Wales. In that case, the court held that a claimant was not entitled to the capital costs of providing new housing; but that he should be compensated for the loss of investment income on that part of his award that he would be forced to utilise to acquire housing. It sought to provide for that loss by applying a net rate of return of 2% to the capital outlay over a period of years represented by a multiplier based on life expectancy. Additional conversion costs were then added to that amount.

[51] Counsel advocated the application of a rate of 2.5% and a multiplier of 29 to one or the other of two capital sums they reported as being quoted in the professional reports. They urged further that amounts had to be added for land taxes, insurance and legal fees. They explained that they arrived at the multiplier by adopting and modifying upwards a rate shown in the Ogden Tables to be applicable for a 16-year-old male to a pensionable age of 65 with a rate of return of 2.5%.

[52] The Ogden Tables are a set of statistical tables used in the United Kingdom in calculating future losses in personal injury claims. They are based on the experience of mortality from those lands. In *Walters v Morris, High Court Suit No. 488 of 2006, date of decision 12 November 2010*, at *paragraph 63*, Goodridge J, as she then was, held them not to be applicable in our jurisdiction.

[53] In *Eaton v Johnston [2008] UKPC 1*, an appeal from the Court of Appeal of the Cayman Islands, and *George v Eagle Air Services Ltd [2009] UKPC 35*, an appeal from the Court of Appeal of the Eastern Caribbean (St. Lucia), the Privy Council applied the Ogden Tables without argument from either side. However, more recently, in *Simon v Helmot (Guernsey) [2012] UKPC 5*, an appeal from the Court of Appeal of Guernsey, the Board upheld their non-application in that jurisdiction.

[54] It may well be that *Walters* is good law and so I must view any calculations arrived at by reference to the Ogden Tables with a jaundiced eye. Further, the methodology employed in *Roberts v Johnstone* requires that the multiplier be based on the period of the anticipated loss. It is calculable by reference to the lifespan of the Claimant. Hence, a determination of life expectancy is crucial and for that reason also I must disregard this head.

[55] I will make two further comments. The first is that there is no evidential basis for the application of an investment rate of 2.5%, neither did Counsel seek to justify it by reference to local conditions. The rate applied in *Roberts v Johnstone* was 2%. In 2001, it was increased to 2.5% by the Lord Chancellor pursuant to powers under the **Damages Act 1996 (UK)**. More recently, it has been revised downwards to -0.75% with the result that in *JR v Sheffield Teaching Hospitals NHS Trust [2017] 1 WLR 4847*, the award was limited to the conversion costs.

[56] The second comment invites caution. *Roberts v Johnstone* has not received universal acclaim in England and Wales; and the criticism against it has intensified with the lowering of the rate. Alternative compensatory mechanisms have been articulated by practitioners and scholars in that jurisdiction. I have found no cases in which its application in Barbados has been considered; and I would hesitate to assume that the law is to be determined by uncritical adoption of it.

Future loss of earnings

[57] At paragraph 21(vii) of her affidavit, Ms. McCollin deposed that further information will be required in order to assess quantum for future loss of earnings. However, her affidavit contained evidence at paragraph 21(viii) under the caption “Disadvantage on the labour market” that is relevant to a

claim for future loss of earnings. She deposed that the Claimant aspired to be an architect; and that at the time of the accident, he was studying Land Surveying at the Barbados Community College and architecture at the Samuel Jackman Prescod Polytechnic. She deposed further that he is currently majoring in Social Sciences at the University of the West Indies.

[58] The Claimant's Counsel submitted that \$1,650,000.00 is a conservative award under this head. They referred me to *Whiten v St George's Healthcare NHS Trust [2011] EWHC 2066 (QB)* and *Herring v Ministry of Defence [2003] EWCA Civ 528* for guidance as to the approaches that might be taken in claims involving young claimants who were still in school at the date of the accident.

[59] In *Herring*, the court stated at *paragraph 23* that in assessing a fair figure for future loss of earnings it was necessary to form "a view as to the most likely future working career ('the career model') for the claimant had he not been injured." It continued at *paragraph 24*:

In the situation of a young claimant who has not yet been in employment at the time of injury but is still in education or has otherwise not embarked on his career, ... it may or may not be appropriate to select a specific career model in his chosen field. In this connection the court will have regard to the claimant's previous performance, expressed intentions and ambitions, the opportunities reasonably open to him and any steps he has already taken to pursue a particular path. In many cases it will not be possible to identify a specific career model and it may be necessary simply to resort to national average earnings figures for persons of the claimant's ability and qualifications in his likely field(s) of activity. In other cases, however, it may be

possible with confidence to select a career model appropriate to be used as the multiplicand for calculating loss. In either case, the purpose and function of the exercise is simply to select an appropriate ‘baseline’ for calculation of the claimant’s probable future earnings whatever his future occupation may in fact turn out to be. Thus if the career model chosen is based on a specific occupation ..., the chance or possibility that the claimant will not in any event enter that occupation or, having done so, may leave it, will not be significant if the likelihood is that he will find alternative employment at a similar level of remuneration.”

[60] In *Whiten*, the claimant was injured at birth. Given his age and disabilities, Swift J determined, at *paragraph 113*, that his employment prospects had to be considered “by reference to the educational and employment attainments of his parents and other family members”. He went on to consider the evidence relating to those factors in arriving at an annual amount.

[61] It is clear that evidence is required to support any assessment for future loss of earnings, whether one adopts the career model advocated in *Herring* or what might be called ‘the family attainment model’ articulated in *Whiten*. In this respect, the Claimant’s evidence was lacunar. His Counsel made representations about the educational attainments and earning capacities of the Claimant’s parents; and opined that he had exceeded them educationally and was well on his way to out-earning them. They pontificated on the monthly earnings of an architect. However, this was all bar table “evidence” and “evidence” from that location is no evidence at all. I must therefore exclude this head.

Disadvantage on the labour market

- [62] I turn to the assessment in relation to “disadvantage on the labour market” in respect of which the Claimant’s Counsel proposed \$30,000.00. They did so despite their indication that the Claimant is seeking to ascertain further supporting information. Citing *Smith v Manchester Corporation (1974) 17 KIR 1*, they submitted that a claimant is entitled to an award under this head, if he or she is put at a disadvantage, vis-à-vis able-bodied competitors on the labour force as a result of his injuries.
- [63] In *Smith*, Scarman LJ indicated that for this head to apply there must be “a real risk that, at some time between now and the end of her working life, the plaintiff would find herself having to compete, disabled as she is, in the open market”. That principle, as explained in *Moeliker v A. Reyrolle and Co., Ltd. [1977] 1 WLR 132*, was acknowledged by the Court of Appeal in *Corbin v Beckles Civ App No 23 of 1988, date of decision 1 February 1991*.
- [64] In *Moeliker*, Browne LJ explained that “... what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will at some future time suffer financial damage because of his disadvantage in the labour market.” He identified the factors to be considered as: (i) the magnitude of the risk; (ii) when the risk is likely to materialise; (iii) the extent to which the claimant would be handicapped by his disability

on the labour market; and (iv) the claimant's chances of getting an equally-well paid job.

[65] In *Corbin*, the Court of Appeal also cited a passage from the judgment of Lord Fraser in *Chan Wai Tong v. Li Ping Sum [1985] 1 AC 446* at 460 which further explains the head and underscores the need for supporting evidence. It reads in part:

A claim for loss of future earning capacity usually arises when a claimant is in employment at the time when the claim falls to be evaluated. The claim is to cover the risk that, at some future date during the claimant's working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The court has to evaluate the present value of the future risk ... Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. ... Evidence will also be generally required to show how far the claimant's earning capacity would be adversely affected by his disability.

[66] In *Cook v Consolidated Fisheries Ltd. [1977] ICR 635*, Browne LJ subsequently acknowledged that an award under this head may equally be available where the claimant is not working at the date of trial. That may be so whether the claimant is an adult who has worked before, as in *Cook*, or whether he is very young and has never worked. In *Dhaliwal et al v Personal Representatives of Hunt (Deceased) et al [1995] Lexis Citation 2619 (citation)* the Court of Appeal of England and Wales increased the trial judge's award of £5000 to £12,500 on a claim under this head made on behalf

of a minor who was five years old at the date of the accident and eleven at the date of trial.

[67] The English authorities suggest that there is no set formula for assessing an award under this head. In *Smith*, the court considered that it was not appropriate “to attempt to calculate any annual sum or to apply to any annual sum so many years’ purchase”. It stated that a court “has to look at the weakness in the round, take a note of the various contingencies, and do its best to reach an assessment which will do justice to the plaintiff”.

[68] However, in *Moeliker*, Browne LJ considered the multiplier/multiplicand approach to be a useful starting point, though not one on which the final award would be based. In *Dhaliwal*, noting that both approaches were in their different ways equally speculative, the court opined that “[a] multiplier/multiplicand approach may be an appropriate method, but so may the method of assessing a lump sum”. The court cited the following passage from Lloyd LJ in *Foster v Tyne and Wear County Court [1986] 1 All ER 567* at *570A-B*, apparently with approval:

... when it comes to estimating loss of earning capacity, there is no such thing as a conventional approach; there is no rule of thumb which can be applied. ... In each case the trial judge has to do his best to assess the plaintiff’s handicap, as an existing disability, by reference to what may happen in the future. ... that is necessarily a matter of speculation; it is necessarily a matter of weighing up risks and chances in all the circumstances of the particular case.

[69] Whatever be the role for speculation, some evidence is still required. There is nothing on which this Court can carry out the types of assessments and evaluations suggested by the authorities. There is nothing from which it can conclude as to whether the Claimant is likely to be able to work at all; or if so, in what type of job or for what salary. There is nothing to put the Court in a position to assess future risks. To the extent that it may form part of the assessment, life expectancy is undetermined. It follows that I should disregard this head.

Loss of do-it-yourself abilities

[70] I come next to “loss of do-it-yourself abilities”. Ms. McCollin deposed that the Claimant was very active around the home prior to the accident; and that he “assisted with all the household chores along with seeing to the general maintenance of the environs of the house”. Citing *Layne v Foursquare Estates Ltd (1989) 24 Barb. L. R. 335*, the Claimant’s Counsel applied a rate of \$50.00 per week to a period of 520 weeks in suggesting a figure of \$26,000.00.

[71] *Layne* involved an adult plaintiff whom the trial judge described as “an active do-it-yourselfer around the house”. He repaired and painted it and fitted windows and partitions. He could no longer do those things nor could he wash,

clean and weed, as he used to. King J (Ag), as he then was, reasoned that the loss of those benefits was costly and awarded \$6,000.00 for it.

[72] I have viewed this particular head with some scepticism. In the “Particulars of claim” set out on the Claim Form, the Claimant asserts a likely inability to perform domestic chores. Beyond that, there is no reference to any particular do-it-yourself activity. Later, I will consider the head of “past domestic assistance”. To the extent that Ms. McCollin’s evidence refers to household chores, I must take care to avoid any duplication.

[73] In any event, projected as it is over a period of 520 weeks, the claim as presented involves some element of future loss. That being so, it is stymied by the life expectancy difficulty. Additionally, unlike in *Layne*, the evidence is not specific as to the particular skills the Claimant is said to have applied around the home. I am unsure as to what “seeing to the general maintenance of the environs” entails. Prudence dictates that I exclude consideration of this head.

The included heads

[74] I will now turn to the heads of (i) PSLA; and (ii) past domestic assistance. For the reasons which I set out at paragraphs [84] to [87], I have determined that I will consider whether I should uplift any amount assessed under the former

head to reflect a positive consideration of the head of loss of marriage prospects or loss of sexual function.

PSLA

[75] Counsel for the Claimant submitted that damages for PSLA may well exceed \$1,000,000.00. Citing *Burton*, Ms. Ashby submitted that the specific features of the Claimant's injury must be ascertained in order to determine his likely award under this head. However, as noted at paragraph [26], she accepted that the starting point in the Guidelines represents a minimum position.

[76] I must come back to the Guidelines' commentary for guidance as to where to pitch the assessment. I reproduced it at paragraph [27]. It starts by identifying the features of the "typical case" which attracts an award in the middle of the bracket. The bracket ranges from £246,750 to £307,000. Those features are (i) an absence of physical pain; (ii) full awareness of the disability; (iii) an expectation of life of 25 years or more; and (iv) functioning organs of speech, sight and hearing but some deficit with bodily functions.

[77] Staying with the explication of the Guidelines, physical pain or significantly impacted senses or ability to communicate points towards the top end of the bracket while a lack of awareness or significantly reduced life expectancy justifies a below average award. Age, the extent of any residual movement, the degree of independence whether achieved by means of aids, equipment or

otherwise; the presence of respiratory issues; and depression are among the other relevant factors that may influence the level of an award.

[78] The Claimant is a university student. There is no evidence as to whether all his senses are in-tact but I must take it that he is aware of his disability. The evidence is that he needs help with bodily functions, and personal and domestic chores. I cannot determine his life expectancy. I do not know if he is in physical pain. Indeed, there is no evidence from which I can form a view on any of the other factors mentioned in the Guidelines.

[79] These deficits make it impossible for me to determine where exactly this case will fall within the bracket. In the absence of evidence as to physical pain, safety requires me to act as if there is none since that factor may justify an award in the higher half of the bracket. The absence of knowledge as to whether life expectancy is 25 years or more precludes me from treating this as a “typical case”.

[80] Therefore, a conservative approach must place the assessment under this head nearer to the starting point, due consideration being given to the fact that four years have transpired since the accident. Given the recency of the Guidelines relied on, I will ignore any inflationary factors. Expressed in sterling, a figure of £250,000 seems appropriate.

[81] That leads to the issue of the conversion rate to bring that figure to Barbados currency. The Claimants' Counsel employed a conversion rate of 3.5. However, those for the Defendant submitted the applicable rate was 2.72 which they represented to be the current exchange rate.

[82] This issue is not devoid of authority. In *Transport Board et al v Penniston*, *Civ App No. 9 of 2010, date of decision 20 February 2012*, the Court of Appeal made a helpful though not decisive comment. It stated at *paragraph 45*:

We are of the opinion that in the circumstances of this case it is unnecessary for us to make a definitive statement on the correct approach that the court should adopt to the conversion rate of the Barbados dollar in relation to awards in pounds sterling made in the English cases. Suffice it to say that the rate of Bds \$3.50 to the pound has proved a convenient benchmark in view of the fact that the pound has fluctuated around that rate for a number of years.

[83] In *Scott v The Attorney General and another [2017] UKPC 15*, at *paragraph 48*, the Privy Council made a conversion to Bahamian currency "at current rates". The appropriateness of that approach was not in issue in that case. However, I am not persuaded that personal injury awards in this jurisdiction should rise and fall from period to period depending on the fluctuations of an exchange rate. It is necessary to avoid the injustice of different levels of awards being made for the same types of injuries where that difference is explainable only by reference to a fluctuation in conversion rates.

[84] A review of awards in this jurisdiction since *Penniston* has revealed that rates have varied from 3.5 as in *Ellis v Reid, High Court Suit No. 370 of 2011, date of decision 25 November 2014* to 3.0 as in *Cumberbatch v Atkins, High Court Suit No. 815 of 2011, date of decision 8 June 2015*. Erring on the side of caution, I will apply the lower rate of 3.0. This leads to a minimum sum under this head of \$750,000.00.

Separate heads?

[85] The Claimant's Counsel submitted that separate assessments ought to be made under the heads of loss of marriage prospects and loss of sexual functions. On behalf of the Defendants, Ms. Ashby submitted that any loss in these respects is subsumed under the rubric loss of amenities.

[86] I am satisfied of two things from the authorities. First, the subject matter of both these heads are among the variety of things that are considered part of the amenities of life: (see generally *McGregor on Damages 15th edition, paragraph 35-263*; *Kemp & Kemp, The Quantum of Damages Vol 1, para 3-011*). Secondly, the modern approach generally is to take those heads into account in making a global award for PSLA: (see *Kemp & Kemp, The Quantum of Damages Vol 1, para 3-011*; *Personal Injury Schedules: Calculating Damages 3rd ed. at paragraph D145*; *Heil v Rankin [2000] PIQR Q187 at 199*).

[87] However, the real issue for this Court is whether it ought to include in this assessment an amount to reflect that the heads of loss of marriage prospects and loss of sexual functions have been taken account of. It can do so only if the Court is satisfied that (i) there is a case for consideration of those heads; and (ii) account has not already been taken of them in the amount I have arrived at for PSLA.

[88] Taking the second limb first, given that I have pitched the PSLA amount at the very start of the Guidelines, it must be taken that no account has been taken of any loss of marriage prospects or loss of sexual function. These are factors which influence where within the bracket an award might fall. If there is a case for their inclusion, it must be reflected in an uplift to that basic amount. I will now consider the case in respect of both heads.

Loss of marriage prospects

[89] Citing *St. Juste v. Brathwaite, High Court Suit No. 123 of 1987*, the Claimant's Counsel submitted that \$55,000.00 is appropriate for loss of marriage prospects. They urged that his prospects of marriage have been significantly diminished due to his injuries.

[90] In *St. Juste*, Rocheford J rejected the notion that in this jurisdiction there is a loss of amenity of financial support from a prospective husband during periods following childbirth. However, he awarded the young female plaintiff

\$5,400.00 for “the likely delay and damage to her marriage prospects”. In reaching his decision, Rocheford J commented that she might not have been able “to marry a man as well off financially as she might otherwise have”. He expressed himself to be acting on the authority of *Graham v. Fogarty* [1970] 92 W.N. (NSW) 452 (C.A.) in which he considered that there was an award for the plaintiff’s “diminished chance of gaining the economic benefits of marriage”.

[91] The legal parameters of this head of claim in this jurisdiction await judicial clarification. Is it confined to considerations of marriage prospects or, as opined in *Reekie v Messervey* 59 DLR (4th) 481, does it extend to permanent interdependency relationships outside of marriage? Is it accepted that claims under this head may cover financial loss where this is established, and a non-pecuniary loss for the loss of emotional benefits associated with a loving relationship as suggested in that case?

[92] The areas for inquiry continue. Is a claim under this head available to male claimants and if so, is it limited to non-pecuniary loss? The editors of *Kemp & Kemp volume 1*, at *paras 3-012* state that they know of no modern case in which a female has succeeded in establishing a pecuniary claim “as a measurable head” rather than as a loss of amenity; and no case in which a male claimant was able to pursue a similar claim.

- [93] In *Best v Jensen and Market Place Ltd. Suit No. 328 of 2010, High Court of Bermuda, date of decision 28 August 2012*, at *paragraph 34*, Kawaley CJ doubted whether an award under this head is open to male claimants. It is unclear, though, whether his comment was limited to pecuniary claims. At *footnote 1172, McGregor* cites *Edwards v Team Roofing January 17 2000 (Unreported)* as a case in which a non-pecuniary award was made to a male claimant, as he does *Assinder v Griffin, May 25, 2001, unreported* in respect of a female.
- [94] These rich jurisprudential questions must await later judicial pronouncements after full argument. I am satisfied, though, that whatever be the scope of this head, I ought not to include it in this assessment. It may well be that the Claimant's prospects are diminished significantly, if not lost. However, there is no evidence to support a claim for pecuniary loss, so it is immaterial whether such a claim is available to him as a matter of law.
- [95] In respect of any non-pecuniary claim, I am unable to determine the period over which the claimant would be deprived of this amenity. In *West v Shephard [1964] AC 326* at *page 349*, Lord Morris confirmed that "the length of the period of life during which the deprivations will continue will be a relevant factor" in assessing general damages. The Court's inability to make a finding as to life expectancy presents a challenge to any proper assessment.

Loss of sexual function

[96] In respect of loss of sexual function. Ms. McCollin deposed that the Claimant was not dating at the time of the accident but that it was expected that he would develop a lasting sexual relationship. Somewhat boldly, she stated that “[l]oss of impairment of sexual function is a symptom of quadriplegia” and that, given his age, “[the Claimant’s] loss of sexual function constitutes a major loss of amenity”. I understand her to be asserting that the Claimant has suffered a loss of sexual function.

[97] The Claimants’ Counsel submitted that a separate award of \$55,000.00 is merited. In response to the Court’s expression of concern as to the adequacy of the evidential foundation, Mrs. Broome submitted that I can take judicial notice that there is a causal relationship between quadriplegia and loss of sexual function. Ms. Ashby submitted that medical evidence was required to establish that the Claimant has suffered a loss of sexual function and that such loss is a consequence of the quadriplegia.

[98] I agree with Ms. Ashby. There is no medical evidence that the Claimant has suffered a loss or impairment of sexual function as a result of his injury. I do not know the nature or extent of any impairment suffered by him, if he has suffered any at all; or the period of time over which he would likely endure any such loss or impairment.

[99] Mrs. Broome’s recourse to the concept of judicial notice is of no avail. The Court’s capacity to accept some facts without the formality of hearing related evidence is not in doubt. In *Leacock v Griffith [2017] CCJ 1 (AJ)* the concept was acknowledged at *paragraph 18* in this way:

It is trite law that a court is entitled to take judicial notice of facts from accepted sources of authority without the formality of taking evidence. This entitlement, forms the crux of the concept of judicial notice, which Lord Sumner observed in *Commonwealth Shipping Representative v P and O Branch Service* [[1923] AC 191, p 212.]: “Judicial notice refers to facts which a judge can be called upon to receive and to act upon either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.

[100] However, in this jurisdiction, the concept is now rooted in statute. Particularly relevant is *section 118* of the *Evidence Act, Cap. 121* which provides:

118. (1) Proof shall not be required about knowledge that is not reasonably open to question and is

(a) common knowledge; or

(b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The Judge may acquire knowledge of that kind in any manner that the Judge thinks fit.

(3) ...

(4) The Judge shall give a party such opportunity to make submissions and to refer to relevant information, in relation to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

[101] At *paragraph [3020]* of *Cross on Evidence 8th Australian Edition*, Heydon states that a Court may take judicial notice of elementary medical, anatomical and scientific facts. Citing supporting authorities, he provides a list of circumstances in which the concept is employed. He states:

Judicial notice is taken of the fact that a fortnight is too short a period for human gestation, that there is individuality in the corrugations of the skin on the fingers of the human hand; that cancer is a major health problem and that, despite research, little progress has been made in controlling it; that there is a close relationship between bodily disorders and chronic anxiety, emotional disturbances and neurotic conditions; and that HIV is a life threatening disease.

[102] I do not suggest that this list is exhaustive. In *Scott*, at *paragraph 41*, the Board made the following statement which appears to me to equally applicable for the invocation of the concept encapsulated in *section 118* of the *Evidence Act*:

Moreover, the party seeking judicial notice of a fact “has the burden of convincing the judge (a) that the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy” - *Morgan, Some Problems of Proof under the Anglo-American System of Litigation* 36.

[103] The Claimant has not convinced me that it is common knowledge that quadriplegia inevitably results in a complete loss of sexual function. I have not been referred to any documentary sources from which I can verify any such assertion and I have heard no submissions from the parties in respect of

any such sources. That coupled with the lack of evidence as indicated at paragraph [97] require that I do not uplift the damages for PSLA on this account.

Past Domestic Assistance

[104] Finally, I come to “Past Domestic Assistance”. Ms. McCollin’s evidence is that since the accident, the Claimant cannot perform domestic chores or personal chores. He has professional nursing care. However, she attends to all requirements not performed by the nurses. She deposed that these include “the preparation of all his meals; ironing; laundry; cleaning his bedroom and bathroom; and grocery shopping.”

[105] The Claimant’s Counsel referred me to *Mills v British Rail Engineering Ltd [1992] PIQR Q130*; *Cunningham v Harrison [1973] Q.B. 942* and *Donnelly v Joyce [1974] QB 454* for guidance in respect of the applicable principles. These are all decisions of the Court of Appeal of England and Wales.

[106] Counsel also cited *Veronique v The Attorney General, High Court Suit No. 791 of 2005, date of decision 15 April 2009* in which a daily rate of \$40.00 was applied for past and future domestic assistance. They applied that rate to a period of 182 weeks and urged that a conservative claim under this head is \$50,960.00.

[107] In *Veronique*, the plaintiff was awarded past domestic assistance for the period over which she had employed someone to perform household services. Neither *Mills*, *Cunningham* nor *Donnelly* involved a claim for past domestic assistance. Those cases establish that a claimant is entitled to recover the value of gratuitous care, even if the caregiver gave up no employment to provide the service. However, some doubt exists in England and Wales as to the application of that principle to claims for pre-trial gratuitous domestic assistance. This was brought about by the decision of the Court of Appeal in *Daly v General Steam Navigation Co Ltd [1980] 3 ALL ER 696*.

[108] In *Daly*, the court held that, unlike the case with future loss, a claimant could not recover for past domestic loss unless he had engaged paid help; or the helper had given up employment in order to assist. It opined that outside of those instances, the award for PSLA should be adjusted to reflect the claimant's difficulties in performing the tasks.

[109] *Daly* lacks significant persuasive force. As has been noted by Rix LJ in *Lowe v Guise [2002] EWCA Civ 197* at *paragraph 29*, “[t]he distinction between the pre-trial and post-trial period has been criticised as being illogical” and the English Law Commission has proposed that the distinction should be obliterated. Further, that Commission noted that it may be that *Daly* may only remain relevant in cases where the claimant carries on the work himself; and

that where the claimant receives gratuitous assistance from others, “it appears that the courts outflank *Daly* by applying the same principles as apply to other forms of gratuitous care” (“Damages for Personal Injury: Medical, Nursing and Other Expenses”, Consultation Paper No 144, 1996 at paragraph 3.76). *Roberts v Johnstone* is illustrative.

[110] In *Hunt v Severs [1994] 2 AC 350* Lord Bridge, with whom the other Law Lords agreed, stated at *page 355 letter G*, that a plaintiff is entitled to recover the reasonable value of services rendered to him gratuitously by a friend or relative “in the provision of nursing care or domestic assistance” rendered necessary by his injuries. Lord Bridge went on at *page 363 letter C* to underscore that the underlying rationale of the law is to enable the volunteer to be compensated and to stipulate that the plaintiff should hold any damages recovered under this head on trust for that person. The court made no reference to *Daly*.

[111] *Housecroft, Cunningham, Donnelly* and *Hunt* have been relied on in this jurisdiction to support awards for past gratuitous domestic service without regard to *Daly* (see, for example, *Alleyne v The Attorney General, High Court Suit No 358 of 2000, date of decision 28 March 2008 (paragraph 130)*; *Harmon v Elliot et al, High Court Suit no. 441 of 1998, date of decision 27*

October 2000; and *Cumberbatch v Atkins, High Court Suit No 816 of 2011, date of decision 8 June 2015 (paragraphs 41 to 45)*.

[112] In *Harmon*, Blackman J (Ag), as he then was, stated:

It is now well settled that a plaintiff is entitled to recover the reasonable value of housekeeping, nursing and other domestic services rendered him. *Donnelly v. Joyce [1973] All E. R. 475* and *Housecroft v. Burnett [1986] 1 All. E. R. 322* establish that one must have regard to the full commercial rate required to satisfy the requirement of employing someone to attend to the plaintiff's work and needs arising out of, and being directly attributable to the accident.

[113] The proposed rate of \$40.00 per day has been the standard in this jurisdiction for some time. In *Marshall v Abacus Builders, High Court Suit No. 1020 of 2011, date of decision 5 February 2015* the court preferred it over a rate of \$45.00 in respect of services rendered in 2010. Some consideration is required as to whether that rate still accords with contemporary commercial realities but the foundation for such an inquiry has not been laid in this application.

[114] In her affidavit, Ms. McCollin suggested that the award be based on 5 days per week. Her Counsel submitted a calculation based on 7 days per week. There was no explanation for this discrepancy. I appreciate that Ms. McCollin might be called upon to assist her son in some way every day. However, I am not sure that the duties she has deposed to performing would consume her every day to the extent that the related compensation should be at the full daily rate. A proper assessment in this respect is only possible after she has given

her evidence more fully at trial. Erring on the side of caution, I will do my calculations on the basis of a weekly rate of \$125.00.

[115] The Claimant was hospitalised at the Queen Elizabeth Hospital following the accident and sometime after his release, he went to the United States of America for rehabilitative treatment. Ms. McCollin's affidavit does not indicate when he was released from the hospital, the dates of his departure from and return to Barbados, or the extent to which she provided domestic services while he was hospitalised or in treatment overseas.

[116] At paragraph 6 of her affidavit, Ms. Ashby deposed that the exhibited spreadsheet relating to nursing care was for a period commencing 14 May 2015. From that I have deduced that the Claimant was out of hospital by that date. An examination of the spreadsheet also suggests that by 2016 the Claimant was back in Barbados. What remains unclear is the period of his absence from Barbados in 2015.

[117] This Court cannot rummage through affidavits filed in support of previous applications and not expressly relied on by the Claimant in support of this application to fill these evidential voids. In the circumstances, I will limit my award under this head to the period 1 January 2016 to 21 March 2018, the date of the hearing. I make that period 115 weeks to which I have applied the rate of \$125.00 and arrived at a figure of \$14,375.00.

THE INTERIM AWARD

[118] Based on the above, I have determined that a conservative assessment of the claim in so far as I am able to quantify it at this stage would be \$1,682,495.61. This comprises damages for PSLA in the sum of \$750,000.00; past domestic assistance of \$14,375.00; future medical expenses of \$5,900.00; and special damages of \$912,220.61, being the amount already paid by the Defendants' insurer for expenses.

[119] I must now determine what sum, if any, to award the Claimant as an interim payment bearing in mind that the amount must not exceed a reasonable proportion of \$1,682,495.61. In making that determination, I must take account of the payments that were ordered previously. The amount of \$912,220.61 has already been applied to meet specific undisputed expenditure. There is therefore no risk of overpayment in respect of that portion of the assessment. That leaves the balance of \$770,275.00. I must treat the \$200,000.00 that was paid to the Claimant differently since this was paid into his hands for general purposes. I can see no risk of overpayment if the sum of what I am prepared to allow when added to the \$200,000.00 is a substantial percentage of \$770,275.00.

[120] The Defendants have suggested that any award ought to be in the amount of \$40,000.00. I disagree. It requires no arithmetic exertion to realise that figure

to be so miniscule as not to constitute a reasonable proportion of the likely award. Conversely, I consider the amount sought by the Claimant to be too high. When \$500,000.00 is added to the \$200,000.00 the sum comes perilously close to \$770,275.00. I consider the figure of \$350,000.00 to be reasonable in all the circumstances. It leaves enough headroom to cause no discomfort.

[121] Accordingly, I order the Defendants to pay the sum of \$350,000.00 to the claimant by way of an interim payment. That money is to be paid by a date which I shall prescribe by order after hearing the parties on that question. I shall also hear them on the question of costs.

**OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT**