

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
(Civil Division)**

Claim No. 164 of 2014

BETWEEN:

EDWARD FORTE

CLAIMANT

AND

**THE ATTORNEY GENERAL
OF BARBADOS**

DEFENDANT

Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court

Date of Decision: 2020 March 06

**Mrs. Shontelle N. Murrell-Hinkson of George Walton Payne & Co. for the
Claimant**

**Ms. Sandra A. J. Rawlins in association with Ms. Ann-Marie Coombes for the
Defendant**

DECISION

INTRODUCTION

[1] On September 14, 2007 the claimant in this matter, Edward Forte (Mr. Forte) was walking along Pinfold Street, Bridgetown when he fell into an unattended manhole along the said road.

- [2] As a result of the accident, Mr. Forte sustained personal injury, loss and damage.
- [3] Having failed to elicit a favourable response to his request made to the Ministry of Public Works to discuss liability, Mr. Forte through his attorneys-at-law, commenced proceedings on 9 April 2014 against the defendant for damages for personal injury and loss suffered by him.
- [4] On 15 May 2017 **Worrell J.** ordered that the defence filed in the proceedings be struck out and judgment be entered for the claimant with damages to be assessed and/or agreed.
- [5] The matter first came before me on 15 November 2018 and following various orders in the proceedings, and discussion between the parties, the hearing for assessment of damages took place on 31 May 2019.
- [6] Liability having been decided, the sole issue for my consideration is the assessment of damages.
- [7] Counsel for the respective parties informed the Court that the medical evidence was agreed. However, the defendant had a significantly different view of the evidence from the claimant and there appeared not to be any serious attempt to reach a consensus. In the result, not even the quantum for special damages has been agreed.

[8] I feel constrained to comment on the failure to agree to special damages, which has had the effect of my having to go through over two hundred receipts to assess the quantum to be allowed under this head. Especially with the new litigation culture promoted by the Civil Procedure Rules, 2008 (“CPR”) it is disappointing that counsel for the parties did not see it as their duty to attempt to save judicial time on this tedious exercise.

THE EVIDENCE

[9] Mr. Forte was the sole witness to give oral testimony, having filed a witness statement on 5 June 2015 which was duly admitted into evidence, along with further evidence permitted by me in light of the issue of mitigation of damages raised by counsel for the defendant in the proceedings.

[10] Mr. Forte was 66 years old at the date of trial, having been born on 23 May 1953. He explained that immediately after he fell into the manhole, he felt pain in his right lower limb, right hip, right upper limb and his back.

[11] Such was the pain experienced by Mr. Forte that he immediately sought medical treatment at the office of Dr. Lennbert Brathwaite, on the date of the accident, 14 September 2007.

[12] Mr. Forte deposed that he was diagnosed as having “soft tissue injury to the right upper limb, soft tissue injury to the right hip and ankle,

musculoskeletal injury to the right knee and musculoligamentous injury to the lower back with neuropathy”.

[13] As a result of the injury Mr. Forte saw Dr. Brathwaite on forty-nine further occasions between 14 September 2007 and 28 January 2014.

[14] During those visits Mr. Forte swore that he continued to experience pain about his back and lower limbs. According to Mr. Forte, he suffered intermittent pain throughout the period but he only attended the doctor when the pain was so severe that he had to have medical intervention and treatment.

[15] Mr. Forte testified that he was in good health prior to the incident. He said he was employed by the Ministry of Public Works and Transport for 19 years prior to the accident and that he acted in the capacity of supervisor and truly “enjoyed and took pride in his employment”.

[16] At the time of the accident he earned a net salary of \$1,110.61 bi-weekly. As a result of the accident, Mr. Forte said that he required extensive medical leave which led to his retirement from the Public Service on medical grounds on 8 December 2010.

[17] Mr. Forte describes the effect of the injury as:

- (1) disabling him from working as supervisor or at all;
- (2) suffering the indignity of being without a salary;

- (3) causing him to default on his mortgage with the threat of foreclosure proceedings;
- (4) curtailing his social activities such as dancing;
- (5) preventing him from performing routine maintenance or do-it-yourself work at home such as general renovations and maintenance, plumbing and gardening.

[18] In his oral testimony Mr. Forte sought to explain why he never saw orthopaedic surgeon, Dr. Carrington of the Queen Elizabeth Hospital to whom he was referred by Dr. Gill in 2010.

[19] Mr. Forte blames this failure on the hospital authorities who failed to contact him about an appointment, even though he was given an appointment card. In his oral testimony Mr. Forte said:

“I had to make an appointment to see Dr. Carrington but no appointments were available so they were supposed to call me and give an appointment date. They were to call me and give me an appointment date. I have the appointment card but they never give me an appointment date.”

[20] Mr. Forte is claiming damages for:

- (1) pain and suffering and loss of amenities;
- (2) future medical attention;
- (3) past and future domestic care;

- (4) loss of do-it-yourself services;
- (5) past and future loss of earnings;
- (6) loss of congenial employment;
- (7) special damages.

[21] The following medical reports were agreed

1. Medical Report of Dr. Lennbert Brathwaite dated 7 April 2008;
2. Medical Report of Dr. Jerry A. W. Thorne dated 25 February 2019.
3. Medical Report of Dr. Lennbert Brathwaite dated 9 September 2009;
4. MRI Report of Dr. Okella Ward dated 20 August 2009.
5. Medical Report Supplement of Dr. Lennbert Brathwaite dated 19 February 2014.

Dr. Brathwaite's Medical Report of 7 April 2008

[22] Mr. Forte first saw Dr. Brathwaite on 14 September 2007 (the date of the accident).

[23] In that report Dr. Brathwaite made certain observations concerning the incident experienced by Mr. Forte:

- “▪ *He was a pedestrian who fell into a manhole at Pinfold Street;*
- *His right lower limb went into the manhole down to his right knee;*
- *The rest of his body fell into the road on his right side;*
- *He recalled the entire event.”*

Dr. Brathwaite's medical report dated 9 September, 2009

[24] In this report Dr. Brathwaite noted that Mr. Forte had the following complaints:

- “▪ *Pain in the right lower limb especially the right knee;*
- *Pain to the right hip;*
- *Pain in the right upper limb;*
- *Pain in the lower back.”*

[25] Mr. Forte was assessed as having:

*“soft tissue injury to right upper limb;
soft tissue injury to right hip and ankle;
musculoskeletal injury to right knee;
musculoligamentous injury to the lower back with neuropathy.”*

[26] Dr. Brathwaite's report included a summary which I now set out below:

- “▪ *Mr. Forte had Soft Tissue Injuries to the Right Upper Limb, Soft Tissue Injuries to the Right Lower Limb. He continues to have Musculoligamentous Pain to the Lower Back and Musculoskeletal Pain to the Right Knee.*
- *These injuries are consistent with the injuries that could be received by a man falling into a hole.*
- *I determine that these injuries are a direct result of the accident on 14 September 2007.*
- *The soft tissue injuries to the right upper limbs healed completely within 3 months of the accident.*

- *The right knee was still painful.*
- *The lower back pain is a permanent condition. Many damaged anatomical structures such as ligaments, tendons, discs, and muscles with the sensory components within them together with the nerves are all suspected to play a part.*
- *This back pain is characterized by recurrent pain of unpredictable onset, duration and severity.*
- *This will affect him for the rest of his life.*
- *Musculoligamentous injuries of the back are considered permanent injuries.*
- *Physiotherapy helps the initial repair process of the damaged tissue alleviating much of the initial pain.*
- *Continued therapy at appropriate times helps to alleviate any significant recurrent pain. His back goes into spasm regularly now.*
- *Mr. Forte was unable to benefit from physiotherapy because he did not afford it.*
- *Symptomatic osteoarthritis will manifest in the back earlier now due to the injury. I cannot say how long this arthritis has been accelerated.*
- *A Magnetic Resonance Imaging (MRI) study was done to his lower back on August 20, 2009. This showed multiple bulges from the L1/2 down to the L4/5 intervertebral spaces. Moderate central spine canal stenosis is noted at L4/5. Facet degenerative changes are noted from L2/3 down to L5/S1.*
- *All of these findings will cause this patient's lower limb neuropathy.*
- *The bulging discs and canal stenosis are a direct result of his injury on September 7, 2007.*

- *The facet degeneration is mostly due to pre-existing Lumbar Spondylosis but this does not cause pain.*
- *He has to restrict his exercise regime so as not to affect his lower back. He is unable to run or squat.*
- *Certain sexual positions he now finds very painful and he cannot participate in sex as often as he would desire any more.*
- *These are restrictions that will affect him for the rest of his life.”*

Medical Report Supplement dated 19 February 2014

[27] In this report Dr. Brathwaite observed that Mr. Forte continued to see him for pain relative to the injuries received “in the incident on 14 September 2007”.

[28] He itemized 26 visits commencing 7 October 2009 and ending 28 January 2014.

[29] Some of the significant notes were those made on 3 September 2010; 8 October 2010; November 2010 and 18 November 2010.

[30] Those notes revealed that the pain in the right knee was worse than the back pain, and that there was crepitus in both knees, the right side being worse than the left.

[31] Dr. Brathwaite concluded his report in these words:

“Mr. Forte continues to this date to have significant intermittent pain to the lower back and lower limbs. There are times when the pain is so severe that

he requires medical visits and pain interventions including intravenous analgesic. There are other times when the pain is present and significant but he does not attend the doctor for relief. His is one of the most persistent cases of back pain that I have seen in my 20 years practicing.”

[32] On the 16 October 2017 Dr. Prasad Chode wrote:

“having seen Mr Forte, gave an assessment of the fees required for total knee replacement of the right knee. The estimated cost was just over \$38,000.00”.

[33] Dr. Lennbert Brathwaite died subsequent to the reports referred to herein and prior to the assessment of damages. Partly because of this, there were some matters that were unclear and it was felt by the parties that the lack of clarity could be elucidated by a report from an orthopaedic surgeon.

Medical Report of Dr. Jerry A. W. Thorne dated 25 February 2019

[34] With the consent of the parties I made an order on the 7 February 2019 that the claimant be examined by an orthopaedic surgeon of the defendant’s choosing on or before March 2019 and a report be provided to the Court.

[35] The defendant chose Dr. Jerry A. W. Thorne who on 25 February 2019 provided a comprehensive report.

[36] Dr. Thorne saw Mr. Forte on 9 February 2019 and detailed his findings in his report of 25 February 2019.

[37] Having reviewed Mr. Forte's x-ray results dated 27 September 2017

Dr. Thorne noted that they confirmed:

"...severe tri compartmental osteoarthritis in the right knee, the medial femoral tibial compartment being more impaired than the lateral."

[38] Dr. Thorne, on examination of the knee noted among other things:

"[t]here was a moderate effusion with painful patella femoral crepitus and the quadriceps were wasted on the right significantly more than the left. The left knee showed evidence of early tri compartmental arthritis. In the right elbow, there was a fixed flexion contracture of 10°, his range of movement was otherwise normal."

[39] Dr. Thorne observed that, *"given the clinical findings ... noted by Dr. Lemberg Brathwaite, given the clinical findings as he recalls noted by [the several doctors who had examined Mr. Forte] and given the clinical findings noted in my clinic, that this gentlemen did indeed, on the 14th day of September 2007 suffer a significant injury to his musculoskeletal system. The collage of clinical signs and symptoms, the character of this injury in its totality and the cadence of his post injury course, are all largely consistent with his description of the cause."*

[40] Dr. Thorne opined that Mr. Forte's injury could be divided into:

- 1. an injury to the right knee:*
- 2. an injury to his right elbow; and*
- 3. an injury to his lumbosacral spine."*

[41] In respect of the injury to the right knee, Dr. Thorne explained that Mr. Forte's right lower limb descended into the manhole as far as the knee

and with his forward movement, he opined that: “the front of his knee came into contact with the edge of the manhole, that such was the force associated with the consequent deceleration, such was the energy absorbed by his knee, as to precipitate an acute ligamentous deconstruction over the posterior medial aspect of the knee, with a posterior medial dehiscence and instability, this, inclusive of, a rupture of his medial collateral ligament and the posterior cruciate ligament, probably with an additional injury to his medial gastrocnemius and perhaps his medial hamstrings. It is the musculoligamentous dehiscence that accounted for his early physical impairment, it is that that accounted for his disability, him having to hobble his way to the general practitioner ... he have been denied early definitive probable surgical intervention, developed a chronic instability about the right knee, and it is the instability, coupled with his pre injury genu varus or bow leg at the knee, that has provoked significant early degenerative changes in the right knee.”

- [42] Dr. Thorne concludes that “were it not for this accident, this gentleman would have a right knee no more degenerate than his left knee, and as such, there is a clear cause and effect nexus between the current state of the right knee and the accident as it is understood.”

[43] Moreover, he is of the view that the injury to the right knee *“would have attracted a severe degree of pain and suffering, exacerbated by the rigors of rehabilitation, further exacerbated by the early consequent onset of degenerative changes in the right knee, and when seen in my clinic he had residual significant degenerative changes in the knee, with severe pain at the knee, provoked by any form of activity and further pain occurring at rest, and plain radiological examination did indeed confirm severe compartmental osteoarthritis.”*

[44] Dr. Thorne contends that the level of degenerative change to the right knee was caused by the injury and it has resulted in **at least, a 15% permanent physical impairment of the whole person.** He opines that level of degenerative change attracts a complete disability with regard to the further participation in any of the recreational activities previously enjoyed”.

[45] Dr. Thorne recommends the placement of a cemented right total knee replacement, which is estimated to cost \$35,000.00. He opines that this will relieve Mr. Forte’s pain; ensure that he does not deteriorate further than the 15%; and would allow for future employability.

[46] In respect of the injury to his right elbow, Dr. Thorne observed that this injury would have caused a moderate degree of pain and suffering.

With respect to the injury to the lumbosacral spine, Dr. Thorne noted that Mr. Forte “bore a degenerative lumbosacral spine to the site of the accident”, and he assesses him to have “suffered a moderately severe

musculoligamentous injury to the lumbosacral spine, attracting a moderate degree of pain and suffering”.

[47] Dr. Thorne concludes his medical report in this way:

“..... this gentleman has suffered a severe injury to his right knee, a moderately severe injury to his right elbow and a moderately severe injury to his lumbosacral spine and as a consequence is disabled [from] further employment in a conventional job but can have sufficient correction to allow for employment in his alternative areas of training and endeavor.”

THE SUBMISSIONS

The Claimant’s Submission

[48] Counsel for the claimant, Mrs. Shontelle L. Murrell-Hinkson filed submissions with respect to quantum of damages which were amended to take into account the medical report of Dr. Thorne. The amended submissions were filed on 9 April 2019. In her detailed submissions, counsel referred the court to Dr. Thorne’s opinion that Mr. Forte did indeed, on the 14 of September 2007 suffer a significant injury to his musculoskeletal system.

[49] Counsel highlighted the fact that Dr. Thorne observed that the injury could be divided into “an injury to the right knee; an injury to the right elbow; and an injury to the lumbosacral spine”.

[50] Counsel referred to several other sections of Dr. Thorne's report. She referred to Dr. Thorne's conclusion that having regard to the level of degenerative change in the claimant's right knee there is at least a 15% permanent physical impairment of the whole person. Counsel also highlighted Dr. Thorne's view that in respect of his participation in recreational activities "he is completely disabled".

Counsel also cited Dr. Thorne's characterization of the injury and referred the Court to the following extract from his report, in which he said:

"this gentleman (the Claimant) has suffered a severe injury to his right knee, a moderately severe injury to his lumbosacral spine and as a consequence is disabled for further employment in a conventional job but can have sufficient correction to allow for employment in his alternative areas of training and endeavor".

[51] Counsel also drew attention to the fact that the claimant required medical leave constantly from the date of the accident until present and has been unable to perform household and other domestic chores and requires assistance with domestic chores. Counsel also mentioned that the injury totally curtailed his hobbies such as gardening and his participation in sports and his do-it-yourself activities such as maintenance and general upkeep of the home and plumbing.

Particulars of Claim

[52] The claimant claims \$200,000.00 for general damages. Counsel placed the injury in the severe category of the JSB Guidelines Chapter 7(M): orthopaedic injuries (4th Edn.) which refer to:

“Serious knee injury where there has been disruption of the joint, the development of osteoarthritis, gross ligamentous damage, lengthy treatment, considerable pain and loss of function”.

£55,590 to £61,140

£76,690 to £84,360

[53] Counsel referred the Court to the two Lawtel unreported cases: namely, **Mohammed Yusuf Mubarak v NSK Bearings Ltd (2007)** and **Lewis v Honda of the UK Manufacturing Ltd (2008)** and to **Barbara Weekes v Chief Medical Officer and The Attorney-General (B’dos High Court # 207 of 1998)**.

Mohammed Yusuf v Nsk Bearings Ltd (2007)

[54] In **Mubarak**, the claimant was injured at work when a forklift truck reversed into him and knocked him over. He sustained a back injury which developed into a chronic pain syndrome. He was unable to return to his previous work and it was thought that his condition was not permanent. After attending a pain management course, it was determined that he would

be able to be employed to do some clerical work in the future. He was awarded **£29,779.11 RPI**. Counsel points out that it is important to distinguish that the Claimant in this case, did not have the good fortune to be able to return to his previous work and, unlike the claimant in the aforementioned case, his back condition was deemed permanent.

Lewis v Honda of the UK Manufacturing Ltd (2008)

[55] In **Lewis v Honda**, the claimant injured his knee in an accident at work. A wheeled stillage carrying rear axle assemblies collided with the back of his right lower leg from behind causing him to fall to the ground and strike his right knee. The claimant was taken to the hospital where X-rays showed no fractures and he was discharged. It was initially thought he had suffered no more than a painful soft tissue injury and he returned to work after one day. He was not, however, fit enough to work and his right knee continued to trouble him.

[56] Two months after the accident the claimant had an arthroscopy, 11 months after the accident he underwent a repair procedure and 23 months after the accident he had a major operation to replace the patella-femoral joint. The claimant made two further attempts to return to work but he was unable to do the heavy work he had done previously, and three years after the accident

his employment was terminated. At the time of trial the claimant was left with a weak and unstable knee.

[57] Medical experts instructed by the claimant and the defendant both accepted at the time of trial that there had been some pre-existing changes to his knee affecting the patellofemoral joint; that the signs and symptoms of patellofemoral dysfunction followed the accident, and that his treatment, including the joint replacement, was appropriate and that within three months of the joint replacement operation he had reached his current state. The judge accepted the claimant's medical evidence that whilst at the time of the accident there were changes to the back of the claimant's kneecap, he would have remained asymptomatic if the accident had not happened.

[58] The claimant gave evidence that at the time of trial he was still experiencing significant symptoms. He experienced aching using stairs or going over uneven ground. He had a constant sensation that his knee might give way at any stage and that the knee joint was grinding. His knee kept him awake at night and had affected sexual relations with his partner. Prior to the accident the claimant had been extremely active, participating in activities such as motorcycle scrambling, playing golf, attending the gym and gardening. Since the accident his mobility, self-confidence and independence had all been drastically affected. The judge found that the claimant's injuries fell

towards the top end of the bracket identified in the JSB Guidelines Chapter 6M(a)(ii).

He was awarded **£49,468.82 RPI**.

**Barbara Weekes v Chief Medical Officer and The Attorney General,
Barbados High Court, supra**

[59] In **Barbara Weekes**, the claimant was found to be suffering with chronic pain which developed from soft tissue injuries to her neck, lower back and limbs sustained as a direct result of an attack. The claimant was awarded **BDS\$87,500.00** for her chronic pain (falling short of chronic pain syndrome or fibromyalgia but arising from initial soft tissue injuries).

Future Medical Attention

[60] Counsel claims \$50,000.00 for future medical attention. In support of this she refers the Court to Dr. Prasad Chode's estimate for a total knee replacement in the sum of \$38,360.00.

[61] She highlights the fact that Dr. Brathwaite had described the case as "one of the most persistent cases of back pain that (he has) seen in [his] 20 years of practicing". On the basis of this she proposes a global figure of \$50,000.00 under this head.

Past Domestic Care

[62] For past domestic care the claimant claims \$84,240.00 which covers 12 years post accident at the rate of \$45.00 per day for 624 weeks.

Counsel cites the cases of **Cunningham v Harrison 1973 ALL ER 463** and **Housecroft v Burnette (1986) 1ALL ER 332**.

Future Domestic Care

[63] For future domestic care the claimant claims \$35,100.00. This figure is based on a multiplier of five (5) and a multiplicand of \$7,020.00 based on assistance at the commercial rate of \$45.00 per day three days per week.

Loss of Do-It-Yourself Service

[64] Counsel for the claimant advances a claim of \$20,000.00.

Damages for Loss of Earnings

[65] Counsel for the claimant claims the sum of \$229,342.32 representing the claimant's loss of earning from 6 December 2010 to 2019 for a period of 9 years

$\$1,061.77 \times 2 \times 12 \times 9$.

[66] The claimant also claimed the sum of \$17,714.46 on the grounds that the claimant's salary was stopped since he was receiving full salary in excess of 18 months whilst in certified medical leave in breach of the general rules.

Future Loss of Earnings

[67] Counsel for the claimant claims the sum of \$50,964.96 under this head representing two years salary.

Damages for Loss of Congenial Employment

[68] This sum has been claimed by counsel based on the authority of **Hale v Underground Limited [1993] PIQR Q30**. Counsel argues that the claimant was well loved and took pride in his position as Supervisor and thoroughly enjoyed the camaraderie of his workmates; and has been deprived of this.

Special Damages

[69] Counsel claimed the sum of \$32,228.35 based on the documents appended to the claimant's witness statement reflecting receipts for monies spent relating to expenditures incurred as a result of the injury.

The Defendant's Submissions

[70] In both her written and oral submissions counsel for the defendant, Ms. Sandra A. Rawlins sought to distinguish the cases relied on by the claimant.

Counsel commented on the cases as follows:

Lewis v Honda of the UK Manufacturing Ltd (2008)

[71] Counsel submitted that the injury sustained by **Lewis** was more severe than that suffered by the claimant at the time of the incident.

She submitted that he had to undergo an arthroscopy which identified patellofemoral damage. Then over the following two years he underwent two major surgical procedures, the first being a mosaicplasty, the second operation being a patellofemoral joint replacement and there was a further likelihood that he would require a further joint replacement.

Counsel contended that the injury sustained by Mr. Forte was not as severe as that suffered by the claimant in **Lewis v Honda**.

Barbara Weekes v Chief Medical Officer and The Attorney General

[72] Counsel observed that in the case of **Barbara Weekes**, she was severely assaulted by a patient of the psychiatric hospital. It was noted in the case of Weekes the MRI results were reviewed by a consultant neurosurgeon [Dr. Marquez] and that the findings of the MRI, though abnormal, were unlikely to be the cause of her symptoms...

Dr. Marquez diagnosed the Plaintiff with the following, i) Post Traumatic Disorder ii) Somatization symptoms in the setting of a Post-Traumatic Stress Disorder and manifesting as chronic pain in the neck, lower back and other

various parts of her body; and iii) Depression as a component of Post Traumatic Stress Disorder.

Counsel submitted that **Barbara Weekes** can therefore be distinguished from that of the claimant's case because it turned more on Post Traumatic Stress Disorder manifesting itself in chronic pain in the neck.

Counsel contends that no such issue of Post Traumatic Stress Disorder or depression as a component of Post Traumatic Stress Disorder has been raised as an issue in the claimant's case.

Mohammed Yusuf Mubarak v NSK Bearings Ltd (2007)

[73] Counsel submitted that in this case **Mr. Mubarack** sustained a back injury whereas in this case it appears the claimant sustained a soft tissue injury to the knee. Moreover, the claimant was known to have recurrent lower back pain prior to the incident. Counsel recalled the fact that the claimant was instructed to see an orthopaedic surgeon, Dr. Carrington at the Queen Elizabeth Hospital in the Orthopaedic Outpatient Clinic. She blamed the claimant for the failure to obtain an appointment. Counsel contends that **Mubarak** is not relevant to the claimant's matter as there is no medical evidence to indicate that there was a back injury caused by the incident.

[74] Counsel for the defendant contests the amount claimed for domestic care though she submits that it is reasonable to consider that the claimant would

have required some domestic care and attention subsequent to the incident. She contended that there was no medical evidence that this was required on a daily basis. She relies on **Newton v The Transport Board No. 1292 of 2001** (Barbados High Court) and **Veronique v the Attorney General No. 791 of 2005** (Barbados High Court).

[75] In **Newton v The Transport Board No. 1292 of 2001** the brief facts were that on 14 May 1997, Wendy Newton, the plaintiff, was three months pregnant. She was employed as a customs and purchasing clerk at the defendant's offices. On that day she sat in a chair which broke and collapsed under her. She fell and was seriously injured. Domestic assistance for the first three years of her claim was calculated at \$40.00 per day of 3 ½ days per week.

[76] In **Veronique v the Attorney General No. 791 of 2005** the claimant slipped on the bathroom floor of her workplace. The claimant was awarded just over two years payment at the rate of \$40 per week for domestic care. Counsel proposed a sum of \$3,120.00 representing 52 weeks payment at the rate of \$40 per week for 26 months and \$80 per week for the other 26 months.

[77] Counsel objects to the payment of a sum for congenial employment on the basis that the claimant has not established that he has suffered "real loss

.....” not mitigated by any employment from his present work/retirement.

Counsel cited **Cheryl Alleyne v Attorney-General (Suit #358 of 2000 B'dos High Court)** where Crane-Scott J. declined to make such an award.

[78] Counsel submitted that no sum should be awarded for future domestic care because the claimant was unreasonable in not mitigating his damages by attending an appointment with Dr. Carrington. She contends that had the claimant seen Dr. Carrington there would be no need for future domestic care.

[79] For similar reasons as stated above with respect to future domestic care the claimant submitted that there has been no loss to the claimant under the head of future loss of earnings.

Mitigation of Damages

[80] Counsel for the defendant is of the view that a significant part of the claimant's loss has come about because of his failure to mitigate damages by refusing to act on medical advice to see orthopaedic surgeon, Dr. Carrington.

[81] It is common ground between the parties that Mr. Forte was referred to Dr. Carrington because of the persistent pain in his right knee. Counsel for the defendant points to Dr. Brathwaite's Medical Report Supplement dated 19 February 2014 where Dr. Brathwaite documents that Mr. Forte was referred to Dr. Gill, neurosurgeon, at the hospital. Dr. Gill concluded that

the knee pathology was causing the back pain and referred Mr. Forte to Orthopaedics.

[82] Dr. Brathwaite noted on November 18, 2010: “patient given appointment to see Dr. Carrington in Orthopaedic Outpatient Department at Queen Elizabeth Hospital”.

[83] It is because of the above facts that counsel for the defendant contends that the claimant should be disallowed all sums claimed for future care and future loss of earnings.

[84] In relation to Special Damages, counsel for the defendant was only prepared to accept the sum of \$5,272.70. However, counsel specially noted that she was prepared to accept further sums for the medical reports of Dr. Brathwaite if the receipts could be produced.

Claimant’s Duty to Mitigate

[85] Before I consider the various heads of damage I must resolve a preliminary issue: namely, whether the damages which the claimant would otherwise receive should be reduced because he has failed to mitigate the damage he has suffered by not actively seeking treatment from an orthopaedic surgeon when it was identified in October 2010 that the cause of his back pain was the injury to his knee.

- [86] Although counsel for the defendant raised the issue of mitigation of damage she has not adduced any evidence on the matter, instead she has relied on the medical evidence that has been accepted by the parties and a very limited cross-examination of the claimant.
- [87] Having carefully examined the medical evidence I have concluded that initially the severity of the injury to the knee was missed and it was only after three years post accident that X-rays of the knee were done.
- [88] Based on the X-rays and the persistent pain in the back and the knee it was recommended that Mr. Forte see an orthopaedic surgeon.
- [89] The explanation given by Mr. Forte for not seeing Dr. Carrington, orthopaedic surgeon, was that he could not get an appointment with Dr. Carrington. He said that no appointment was available and the hospital authorities were to contact him but they never did.
- [90] Dr. Brathwaite made very detailed notes. On 3 September 2018 his notes read: *“Pain in the right knee at this time worse than the back pain...Crepitus was noted in both knees. The right side was much worse than the left.”*
- [91] On 8 October 2010 Dr. Brathwaite wrote:
“Had the right knee lock off and the patient fell down” Patient to see Dr. Gill October 19, 2010. X-ray of the right knee done.”
- [92] On 1 November 2010 Dr. Brathwaite noted:

“Patient given appointment to see Dr. Carrington in orthopaedics outpatient department of the Queen Elizabeth Hospital”.

- [93] The claimant blamed his failure to obtain an appointment to see Dr. Carrington on the administration of the Queen Elizabeth Hospital who failed to contact him about an appointment after he had initially tried to get one with Dr. Carrington and there were no available appointments.
- [94] While I accept the evidence of the claimant that he experienced difficulty in getting an appointment, this does not explain why it took him a further five to seven years to see an orthopaedic specialist.
- [95] The claimant saw Dr. Prasad Chode who on the 16 October 2017 gave an estimate for total knee replacement surgery.
- [96] The circumstances which led to his attending Dr. Chode have not been revealed in the evidence.
- [97] The defendant could have assisted the Court by putting before the Court the records from the Queen Elizabeth Hospital concerning this matter, as well as having Dr. Thorne explain what intervention would have been required in 2010 to correct the problems at the site of the right knee.
- [98] Counsel for the defendant seemed more concerned with not permitting Mr. Forte to explain why he did not see Dr. Carrington than attempting to find out what occurred.

[99] As a result she was only prepared to have Mr. Forte admit that he was referred to Dr. Carrington and that he did not see him. Of course Mr. Forte had already made the two admissions in his oral testimony.

[100] Having carefully reviewed the documentary evidence available, I find the following facts noteworthy:

1. Mr. Forte was assessed by the Medical Board which examined him on 17 July 2010 to be unfit for further employment in the Public Service, the medical reasons given being:

“back pain” suffers from degenerative spine disease which is age related. MRI: “Degenerative changes of lumbar spine.”
2. Dr. Brathwaite saw Mr. Forte on 15 occasions between May 2011 and 28 January 2014 and only on two of those occasions mention is made of pain in the right knee.

Those occasions were 22 September 2011 and 1 October 2011.

3. There is no evidence that Mr. Forte was ever informed that he required surgery to the right knee before 2019 when he saw Dr. Thorne.
4. If Mr. Forte’s knee was so painful that he required surgery in 2010 as is the conclusion made by counsel for the defendant, why then is there

no manifestation of the pain in the knee or no record of it for over two years between October 2011 and February 2014?

[101] But what does the law say about the claimant's duty to mitigate.

[102] In **Geest plc v Monica Lansiquot [2002] UKPC 48** Lord Bingham in delivering the judgment of the Board quoted with approval the following statement of Sir John Donaldson MR in **Sotiros Shipping Inc. v Sameiet Solholt [1983] 1 Lloyd's Rep 605 at 608**, where he stated:

"A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendants' breach of duty."

[103] Having closely examined the detailed medical reports of Dr. Brathwaite and Dr. Thorne and having read and heard the evidence of the claimant, I am unable to conclude that the defendant has established on a balance of probabilities that the claimant has acted unreasonably in not obtaining an appointment to see Dr. Carrington. Additionally, since there is no evidence in the case that demonstrates that the claimant was advised to undergo surgery, far less advised of the risks associated with the surgery, I have

concluded that the defendant has not established that the claimant has acted unreasonably in all the circumstances.

[104] Moreover, it is settled law that if the defendant wishes to assert that the claimant has failed to mitigate his damages, then the defendant must plead in its defence that the claimant has failed to mitigate his damage and disclose sufficient particulars to alert the claimant of the case that is being advanced against him.

[105] This matter was addressed in **Geest Plc v Lansiquot, supra** when Lord Bingham dealt with the issue of mitigation in the context of an assessment of damages hearing. Lord Bingham said at paragraph 16 of the judgment of the court:

“This assessment proceeded without any pleading and without any evidence beyond the plaintiff’s affidavit and oral evidence. This is not unusual. Many such assessments proceed in a relatively informal manner.

The object is to ascertain the plaintiff’s medical history since the accident to assess the plaintiff’s continuing symptoms and long-term prospects, with a view to putting a money value on the plaintiff’s pain and suffering, loss of amenity and financial loss. Had there been pleadings, however, it would have been the clear duty of the company to plead in its defence that the plaintiff had failed to mitigate her damage and to give appropriate particulars sufficient to alert the plaintiff to the nature of the company’s case, enable the plaintiff to direct her evidence to the real areas of dispute and avoid surprise (see Bullen

& Leake & Jacob's Precedents of Pleadings, 14th ed (2001) vol 2, page 1103, paragraph 71-13; Rules of the Supreme Court, Order 18 rule 12(1)(c), Order 18 rule 8(1)(b); The Supreme Court Practice 1999 (published September 1998), vol 1, paragraphs 18/7/4, 18/7/11, 18/8/2, 18/8/2, 18/12/2, 18/12/13). In this instance, no complaint was made by the plaintiff's leading counsel when counsel for the company advanced this argument, perhaps because he had been warned in advance, and no point was taken in the Court of Appeal or before the Board on the procedure adopted. It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter."

[106] Apart from my doubts based on the evidence, I am satisfied that based on the strict application of the law the claimant should not be permitted to rely on the defence of mitigation.

[107] For completeness it should be pointed out that when the claimant filed his claim in this matter on 19 April 2014, the medical report supplement was appended to the pleadings. That report revealed that Dr. Gill was of the view that the claimant's knee pathology was causing the back pain. It also revealed that the claimant was referred to Dr. Carrington in the orthopaedics department of the Queen Elizabeth Hospital.

[108] The defendant filed his defence on 25 July 2014 and instead of confronting the facts the defence consisted of a series of denials and non-admissions without any reasons being advanced, completely in violation of Part 10 of the CPR.

[109] The defendant would have had ample time to fully obtain any information it required concerning the referral of the claimant to the Queen Elizabeth Hospital since the defence was only struck out on 15 May 2017.

[110] I now turn to the assessment of damages.

GENERAL DAMAGES

Pain and Suffering and Loss of Amenities

[111] Wooding C.J. in his seminal judgment in **Corniliac v St. Louis (1968)** 7.W.I.R sets out the factors which need to be considered in arriving at the quantum of compensation that ought to be awarded under this head. These factors are:

- “(a) the nature and extent of the injuries sustained;*
- (b) the nature and gravity of the resulting disability;*
- (c) the pain and suffering endured;*
- (d) the loss of amenities suffered: and*
- (e) the effect on pecuniary prospects.”*

[112] Dr. Thorne in his medical report observed that Mr. Forte suffered:

*“an injury to his right knee;
an injury to the right elbow; and
an injury to the lumbosacral spine.”*

[113] In respect of the injury to the right knee he mentioned that it would have caused “a severe degree of pain and suffering”. This was exacerbated by the early onset of degenerative changes in the right knee. The pain would be further exacerbated with any form of physical activity and pain would also occur during periods of rest.

[114] In respect of the injury to the right elbow Dr. Thorne considered that this injury would have caused a moderate degree of pain and suffering.

[115] With respect to the injury to the lumbosacral spine Dr. Thorne observed that Mr. Forte *“bore a degenerative lumbosacral spine to the site of the accident”*. He classified the injury as *“a moderately severe musculoligamentous injury which would have caused a moderate degree of pain and suffering”*.

[116] Dr. Thorne’s view is that the injury to the knee was the major injury and the overall impact of the claimant’s injury is that there is a 15% permanent physical impairment of the whole person.

[117] The impact of the injury on the claimant was that he was unable to work, to participate in gardening and other do-it-yourself work at home and any recreational activities.

[118] In both his written and oral testimony Mr. Forte underlined the debilitating effect of the injury and considered himself “finished”. The injury so hindered him in the pursuit of his daily activities that he was unable to resume his job as a supervisor and could not participate in sport or other recreational activity.

[119] However, I should point out that Dr. Thorne did not regard the injury as impacting his sexual function and to the extent that this occurred Dr. Thorne opined that the diagnosis should be found elsewhere.

[120] I have considered the reports of Dr. Brathwaite and Dr. Thorne and I have also considered the cases cited by counsel for the claimant and defendant.

[121] I also looked at Judicial College guidelines for October 2017 under the various categories of injury but examined more intensely the guidelines for knee injuries which I set out in part below:

JCG – 068

(M) Knee injuries

(a) Severe

- (i) Serious knee injury where there has been disruption of the joint, the development of osteoarthritis, gross ligamentous damage, lengthy treatment, considerable pain and loss of function and an arthroplasty or arthrodesis has taken place or is evitable.

BEFORE UPLIFT	WITH 10% UPLIFT
£55,590 to £76,690	£61,140 to £84,360

- (ii) Leg fracture extending into the knee joint causing pain which is constant, permanent, limiting movement or impairing agility and rendering the injured person prone to osteoarthritis and at risk of arthroplasty.

BEFORE UPLIFT	WITH 10% UPLIFT
£41,550 to £55,590	£45,700 to £61,140

- (iii) Less severe injuries than those in (a)(ii) above and/or injuries which result in less severe disability. There may be continuing symptoms by way of pain and discomfort and limitation of movement or instability or deformity with the risk that degenerative changes and the need for remedial surgery may occur in the long term as a result of damage to the kneecap, ligamentous or meniscus injury or muscular wasting.

BEFORE UPLIFT	WITH 10% UPLIFT
£20,880 to £34,660	£22,960 to £38,120

(b) **Moderate**

- (i) Injuries involving dislocation, torn cartilage or meniscus which results in minor instability, wasting, weakness, or other mild future disability.

This bracket also includes injuries which accelerate symptoms from a pre-existing condition over a prolonged period of years.

BEFORE UPLIFT	WITH 10% UPLIFT
£11,820 to £20,880	£13,010 to £22,960

[122] I have considered the cases that were recommended to me by counsel and I have found none of them to be sufficiently analogous to use as a fair comparison with the instant case.

[123] I have therefore decided to use the Judicial College Guidelines and applying those guidelines I consider that the claimant's injury is in the top category.

[124] I have considered, however, that there has been some degenerative deterioration in the knee not attributable to the incident and for this reason I have assessed the claim to be just above £50,000 which I have converted to \$160,000.00 using a conversion rate of \$3.00 to £1.

[125] I therefore award the sum of \$160,000.00 for pain and suffering and loss of amenities under this head.

Future Medical Attention

[126] The claimant bases his claim for future medical care on the assessment of Dr. Chode in 2017 of the cost of knee replacement surgery. Dr. Thorne also recommends knee replacement surgery. Dr. Thorne assesses the cost of the surgery at \$35,000.00. Based on the medical reports and the evidence of the claimant I think the sum of \$35,000.00 is justified under this head.

Past Domestic Care

[127] The defendant has accepted that there should be a claim under this head:

In Cheryl Alleyne v The Attorney General (Suit #358 Of 2000, B'dos High Court Date of Decision, March 28, 2008) Crane-Scott J. awarded a sum from the start of proceedings until trial at the rate of \$35.00 for three days each week where the plaintiff's husband had assisted her with domestic assistance.

[128] The rate most commonly used in this jurisdiction for domestic care is \$40.00 per day. I propose to allow the sum of \$40.00 for two days per week for 12 years post accident. I calculate this sum to be \$49,920.00.

Future Domestic Care

[129] In view of the fact that the claimant is now 66 years and also the prospect that surgery will improve his mobility and his health I think a sum equivalent to a further three years assistance at the same rate as for past

domestic care is adequate. I therefore award the sum \$4160.00 x 3 = \$12,480.00 under this head.

Damages for Loss of Do-It-Yourself Services

[130] The claimant has deposed that because of his injuries he has been unable to perform routine maintenance or do-it-yourself work at home. Counsel for the claimant recommended a global award of **\$20,000.00**. Having considered this matter, I think a sum of \$12,000.00 is adequate under this head. I therefore, award \$12,000.00 under this head.

Loss of Earnings

Past Loss of Earnings

[131] Prior to the incident, the claimant was paid the bi-weekly net sum of **\$1,061.77**. However, his salary was stopped with effect from the 1st day of October 2010 to recover the sum of \$17,714.46 which was said to be over paid on the grounds that the claimant was receiving his full salary for a period in excess of eighteen (18) months whilst on certified medical leave in breach of General Order 5.25.5. Monies were deducted solely due to the fact that he was on certified medical leave as a consequence of the incident of 14 September 2007.

Moreover, the claimant was retired on medical grounds with effect from 6 December 2010 at the age of 57 years.

Counsel for the claimant made a claim under the head of Past Loss of Earnings, in the sum of **\$229,342.32** representing the claimant's loss of earnings from 3 December 2010 to December 2019 (i.e. a period of nine years) broken down as follows:

\$1,061.77 x 2 x 12 x 9

Combined with the sum of \$17,714.46 the claimant claims the total sum of **\$247,056.78** (\$17,714.46 + \$229,342.32) for past loss of earnings.

The court accepts that the above sum is appropriately claimed as special damages and awards the said sum of \$247,056.78 under this head.

Future Loss of Earnings

[132] The claimant urged the Court to award a sum of \$50,964.96 under this head.

However, having regard to the fact that the claimant has almost reached retirement age, I award a global sum of \$25,000.00 under this head.

Claim for Loss of Congenial Employment

[133] I have determined that the evidence supporting this head is too scant. In any event the effect of the injury on Mr. Forte's job has been considered under the claim for General damages for Pain and Suffering and Loss of Amenities.

Special Damages

[134] It is trite law that special damages must be pleaded and proved. I have examined the pleadings, and reviewed the receipts submitted along with the claimant's witness statement and I award the sum of \$32,228.30.

SUMMARY OF THE AWARDS

[135] The sums which the defendant shall pay to the claimant are as follows:

General Damages

Special Damages

(i)	Pain, Suffering and Loss of Amenities	\$160,000.00
(ii)	Future Loss of Earnings	\$ 25,000.00
(iii)	Future Domestic Care	\$ 12,480.00
(iv)	Future Medical Attention	\$ 35,000.00
	Special Damages	\$ 32,228.30
(a)	Past domestic care	\$ 49,920.00
(b)	Past loss of earnings	\$247,056.78
(c)	Loss of Do-It-Yourself Services	\$ 12,000.00

INTEREST:

[136] The above awards will bear interest on the Special Damages at the rate of 4% per annum from the date of the filing of the Claim until today and thereafter at 6% per annum until payment, and on the General Damages at the rate of 6% per annum from today until payment.

COSTS:

[137] The claimant is entitled to his legal costs, certified fit for one attorney-at-law to be agreed or assessed.

INTERIM PAYMENT

[138] The claimant has received an interim payment on account of damages. This payment must be deducted from the total award herein.

Cecil N. McCarthy
Judge of the High Court