

BARBADOS

CV. 1090 of 2007

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

TIMOTHY GIBSON

APPLICANT

AND

MILTON KING

ADALINE KING

RYAN JEAN-BAPTISTE

DEFENDANTS

DECISION

**Before: The Honourable Mr. Justice William J. Chandler, High Court
Judge**

2020: May 19th

**Mr. Rudolph Greenidge with Ms. Eleanor Clarke, Attorneys-at-law for
the Claimant**

**Mr. Elliot Mottley QC of Mottley & Co, with Finisterre Attorneys,
Attorneys-at-Law for the Defendants**

Decision

Introduction

[1] This decision arises from an application filed 20 April 2011 by the Claimant for an assessment of damages for personal injuries, loss and damage allegedly sustained as a result of a motor vehicle accident on 23 July 2004 involving the Claimant and the First and Second Defendants.

Background

[2] On 23 July 2004, the Claimant was driving motorcar registration number P-2017 along Brereton Road in the parish of St. Philip when motorcar P-2422, driven by the Third Defendants, the servant and/or agent of the First and Second Defendants collided with the Claimant's vehicle. It was raining and, as a result, the road was wet and slippery. The motorcar P-2422 was also travelling along the same road in the opposite direction and veered into the path of the Claimant's vehicle causing damage to the Claimant's motor vehicle. The Claimant sustained personal injuries and his vehicle was written off.

[3] The Defendants' liability for the accident is not in dispute.

The Pleadings

[4] On 24 August 2007 the Claimant commenced proceedings against the Defendants claiming damages for personal injuries, loss and damage in respect of the accident, claiming:

- “1. General damages for pain, suffering and loss of amenities.
2. Special damages in the sum of \$28,664.04 and continuing.
3. Interest pursuant to s 35(1) of the Supreme Court of Judicature Act Cap 117 of the Laws of Barbados.
4. Costs; and
5. Any mother relief which this Honourable Court deems just.”

The particulars of negligence alleged are as follows:

1. “Failing to keep the said motor vehicle P-2422 under control.
2. Driving the said motor vehicle P-2422 at a speed, which was too fast in the circumstances.
3. Failing to keep any or any proper lookout for traffic on the road particularly on-coming traffic.
4. Failing to apply brakes in time or at all.”

The Amended Defence

[5] An amended Defence was filed 14 October 2016 in which the Defendants admitted that the accident was caused by the negligence of the Third Defendant. With respect to the personal injuries, loss and damage allegedly suffered by the Claimant, the Defendants admitted that the Claimant suffered some injury, loss or damage but disputed the injuries sustained by the Claimant and the items of loss for which the Claimant claimed and the causation or continuation thereof. The following matters were contained in the particulars:

“Particulars

The claimant suffered from back pain prior to the accident and the back pain complained of in the statement of claim is s [sic] pre-existing condition;

- (i) The claimant's back pain was as a result of degenerative changes in the Claimant's spine;
- (ii) The claimant was at all material times an overweight man;
- (iii) Any symptoms of pain in the claimant's right shoulder had resolved by October 5, 2004, less than 3 months post-accident;
- (iv) The claimant failed to lose weight and/or exercise as advised to do by a medical practitioner;
- (v) The claimant failed to consistently attend physical therapy sessions;
- (vi) The claimant's lower back pain responded well to

physical therapy and after 16 sessions, by November 15, 2004, less than 4 months post-accident, the claimant only experienced occasional low back pain after long period of activity;

- (vii) The claimant's job predisposed him to suffering low back pain.
- (viii) On or about October 31, 2006 the Claimant informed Dr. Browne that on the previous day (October 30, 2006) he was moving a very large and/or heavy object on his own and injured his back.
- (ix) On January 30, 2007 the Claimant complained of pain radiating to the buttocks and into his leg. This was the first time he complained to the doctor of pain radiating down the leg. He never complained of pain radiation down his leg in relation to the index accident.”

The Reply

[6] The Claimant filed a reply on 20 October 2016 in which he:

1. Joined issue with the Defendants on their Amended Defence.
2. Denied that he or any other witness had ever attributed the reason for his long-lasting or residual back pain to the lifting of an object on 31st October 2016.
3. Maintained that the pain and suffering which he continued to endure was the result of the motor vehicle accident on 23rd July 2004.
4. Further stated that no evidence was ever presented to the court sufficient to justify a finding that he sustained a

serious back injury as a result of lifting an object on 31st October 2016.

The Claimant's Evidence

[7] The Claimant was 44 years old at the time of the accident and was an Operator IV (Driver) with the Ministry of Transport and Works. His work entailed driving heavy-duty vehicles. The Claimant alleges that as a result of the Third Defendant's negligent conduct of the vehicle registration number P-2422 as servant and/or agent of the First and Second Defendants which caused the accident, he sustained soft tissue injury to his back, right side and right shoulder. He suffered intense and excruciating pain as a result of these injuries. Over time the pain intensified and his condition deteriorated and became chronic. He underwent physiotherapy and later surgery in an attempt to alleviate his pain. The Claimant was retired from the Public Service as a result of his injuries on 01 July 2010.

[8] In his witness statement, the Claimant stated that he was first attended to by Dr. Ramhendar and then by Dr. Browne. He attended physiotherapy with Ms. King and was later advised by Mr. Gill to have surgery on his back, which he did in 2009. He stated that the operation helped but did not alleviate all of the pain.

- [9] The Claimant stated that, at times he screams out loud due to the pain, which is mostly felt in his back and leg. Pain is felt in his left hip and “behind” (buttocks) especially when he sits for extended periods of time. Due to the pain, which he still felt after surgery, the Claimant returned to Dr. Gill who advised that he should take medication.
- [10] The Claimant, who is married, claimed that back pains which he suffers as a result of the injury have significantly limited his sex life. Having ceased work, he would like to earn his own money again. He is unable to sit for prolonged periods of time which limits his ability to engage in activities such as playing dominoes, one of his past-times.
- [11] The Claimant also stated that driving was one of his hobbies and that, since 2007, he has not driven any vehicle. As a result of his inability to drive, the Claimant said that he has had to rely on other persons to take him around at a cost. Since the accident, he is unable to leave the house often and seldom socializes.
- [12] It is his evidence that he also reared rabbits for sale but has had to discontinue this activity due to his inability to provide regular care for them as a result of his injuries.

[13] The Claimant stated that he is now unable to assist with the domestic chores around the home and his wife now has to do everything for him, as a result, he feels like less than a man.

[14] The Claimant further claims that he continues to suffer pain and financial loss as a result of the accident.

Evidence of Phyllis Browne-Gibson

[15] Ms. Browne-Gibson, in a witness statement filed 03 December 2013, gave evidence that she was 49 years old and is the wife of the Claimant. She is the mother of their three children, one of whom is deceased. The witness stated that, prior to the accident, the Claimant never complained of back pain, but since the accident his pain has been severe and persistent. For the first nine months after the accident she had to bathe him, help him dress and feed him, as he was unable to do these tasks on his own. The pain impacts his sleep. He has suffered many sleepless nights and, at times, he cries out in pain during the night. Over the years his condition worsened.

[16] She also stated that the Claimant had undergone surgery in 2009, which gave him some relief but he continued to experience pain in his back. He was still unable to bend and stretch and required considerable

assistance with everyday life. His legs were often numb and the witness had to rub them. He was afraid to lift anything heavy or to do anything strenuous to aggravate his back injury. Prior to the accident, the Claimant was a very active independent man who looked after his family well, assisting with cooking, washing and other household chores. Since the accident, the Claimant has not been able to have fun with his children as he did previously. Their grandson, who was born in 2005, lives at their home; the Claimant was unable to play with him as he did with his own children.

[17] Mrs. Browne-Gibson stated that the Claimant loved driving and used to take her to visit friends, to town (Bridgetown) and the supermarket but was now unable to do so.

[18] Prior to the accident Mrs. Browne-Gibson stated that she and her husband had an active sex life but, as a result of the pain he now experiences, they are now hardly able to have sexual intercourse. They had attempted to have sexual intercourse but had to abandon it due to his back pain. He is now unable to take care of her physical needs. The Claimant's social activities have also been impacted, as he does not socialize any longer. The Claimant, she opined, has also become withdrawn and sad.

The Medical Report of Dr. Sonia Browne MB, BS

[19] Dr. Sonia Browne submitted a medical report dated 20 February, 2005 in which she stated that she became involved in the treatment of the Claimant on the 8th of September 2004 as a consequence of his regular physician going on vacation. The Claimant reported that he had been treated by Dr. Ramhendar for injuries sustained in a motor vehicle accident on 23 July 2004.

[20] The Claimant complained of right flank pain, which was radiating to his lower back as well as pain in the right shoulder. On examination, she observed that the Claimant was an over-weight gentleman who was in obvious pain, finding difficulty even to walk into the office. Dr. Browne found mild tenderness of the lower back with some degree of muscle spasm, moderate tenderness on palpation of his right side just above the hip. He was able to move his right shoulder but this caused much pain.

[21] Dr. Browne diagnosed the Claimant as having soft tissue injury with muscle spasm and prescribed oral medication for pain and spasm. One-month sick leave was recommended. The Claimant was reviewed one month later on 5 October 2004 and he reported that he was feeling better since the pain in the right shoulder was no longer present. He was,

however, experiencing severe burning across his lower back when he stood for long periods. It was advised that his sick leave be extended by another month and his medication was continued.

[22] Dr. Browne reviewed the Claimant on three occasions during a two-month period and observed slow progress. The Claimant attempted to return to work. He returned to Dr. Browne in severe pain. Two weeks sick leave was recommended, to be reviewed. Dr. Browne informed the Claimant that this back problems may become chronic, waxing and waning for what could be years. He was advised to keep up his exercises, lose weight and seek medical attention for needed pain relief.

[23] Dr. Browne gave evidence that she saw the Claimant on eleven other occasions after her medical report of the 20th of February 2005 and that, during that time, the Claimant's injury became more severe. In relation to the pain suffered as a result of attempting to lift an object on the 31st of October 2006, Dr. Browne was of the opinion that the pain suffered from that event was of a different kind and that the Claimant was forthcoming about the origin of that pain. She believed it was an isolated event, for which he took medication and the pain from that event was resolved. Dr. Browne concluded that there was no impact on the Claimant's injuries under investigation.

[24] This evidence is relevant to the issue of Novus Actus Interveniens raised by Mr. Mottley QC and will be dealt with later in this decision.

**Medical Report of Ms. Jacqueline King (Ms. King) Dip. P.T.
Physiotherapist**

[25] Ms. King submitted a report on 7 December 2005. It stated that the Claimant first came to her clinic on 17 August 2004 having been referred by Dr. Ramhendar. On initial assessment, he complained of pain in the lower back with radiation into the muscles on both sides of the spine and increased pain on sitting, standing or driving for long periods.

[26] On examination Ms. King found that the Claimant was an overweight man in moderate painful distress. There was:

1. Decreased active forward flexion of the Claimant's lumbar spine.
2. Tenderness on palpation of L4, 5 and the lumbar paravertebral muscles.
3. A negative slump test.
4. Decreased straight leg raising 60/90 bilaterally, (normal 90/90).
5. Tightness of both hamstring muscles and
6. Weakness of the abdominal muscles.

[27] The Claimant was started on a twice-weekly physical therapy programme of moist hot packs to the lumbar region, ultrasound and back and abdominal strengthening exercises. Ms. King noted that, due to financial considerations, the Claimant was unable to attend physical therapy as regularly as he should have. His symptoms improved but as his rate of progress was slow. He was last seen on 15 November 2004, after receiving sixteen sessions (of therapy). At that time he reported only experiencing occasional low back pain after long periods of activity.

[28] Ms. King summarized that the Claimant suffered low back pain secondary to a motor vehicle accident. While he has recovered reasonably well, she opined that he “still experiences occasional pain. The nature of his job, which requires sitting and driving for long periods can be a predisposing factor to low back pain. Mr. Gibson will therefore need to maintain his back and abdominal muscle strength to help prevent further exacerbations of his symptoms.”

**Medical Report of Mr. John Gill FRCS (Ed) SN FCCS, Consultant
Neurosurgeon**

[29] Mr. Gill is a consultant neurosurgeon. In his report dated 19 June 2008, Mr. Gill stated that the Claimant had suffered a side impact collision and, since that time, experienced severe lower back pain. The pain had radiated into the right lower limb and is exacerbated by standing, walking and bending. The lower back pain and right sided leg pain have prevented the Claimant from pursuing his vocation as a heavy-duty truck driver at the Ministry of Transport and Works. The Claimant was examined on 29 June 2017. At that time there was limitation of bending and there was tenderness over the lower limb of the lumbar spine. The straight leg raising of the lower limbs were 60 degree on the right and 90 degree on the left. Extension of the spine led to severe discomfort of the lumbar region of the spine and pain in the right buttock.

[30] Neurological examination elicited blunting of pinprick sensation of the right L4 and L5 dermatomes. MRI imaging of the lumbar spine showed herniation of the L4/5 disc.

[31] The Claimant was advised that Lumbar Laminectomy and Discectomy at L4/5 were required in order to achieve amelioration of his pain. Prior to his accident, the Claimant had experienced only transient episodes of back pain. The protracted lower back pain with the radiculopathic component that radiated into the right lower limb commenced after the

accident. Mr. Gill opined that the likely cause of the Claimant's current back and leg pain was the trauma of 23 July, 2004 accident.

[32] Mr. Gill also submitted a post-operative medical report on the 1 October 2009. Lumbar Discectomy Surgery had been performed on 10 June 2009. Dr. Gill noted that the indications for surgery were "back pain, radicular pain of the right lower limb, and sensory symptoms that were distributed in the dermatomal territory of the right L5 root." On being reviewed on 24 July and 1 October 2009, the Claimant reported improvement of the lower back pain, resolution of the numbness and sensory symptoms of the right L5 radicular pain.

[33] On examination his ability to bend remained restricted and twisting caused discomfort of the lower back.

[34] With respect to clinical assessment, Mr. Gill noted that there was full resolution of the right L5 radiculopathy following L4/5 Discectomy, however, Mr. Gill noted, that any sudden or extended excursion of the lumbar spine might precipitate discomfort.

[35] In relation to the Claimant's ability to work, Mr. Gill rendered the opinion that the duties of the Claimant's "vocation" which required climbing into a very tall cabin; operating the truck's dumping mechanism and its ancillary operations would re-initiate severe lower

back pain and the Claimant would be well advised not to return to this type of work. Mr. Gill found that he would be fit for work that would not require heavy lifting, bending frequently or climbing.

[36] On 15 June 2012, Mr. Gill submitted a letter, which referenced questions posed by the Claimant's attorney. In that letter he stated that the Claimant was unable to attend his office for follow-up because he was not financially able to do so. He also stated that when the Claimant presented to his office on 29 June 2007, almost three years after the accident with symptoms and signs of lower back pain and right sided lumbar radiculopathy due to irritation of the right 5th lumbar nerve root. These symptoms began within 24 hours of the accident and were "unrelenting despite the employment of conservative methods such as physiotherapy."

[37] Mr. Gill requested an MRI of the lumbar spine, which confirmed L4/5 disc protrusion that "would be consistent with right L5 radiculopathy." The doctor said that it was therefore his opinion that the Claimant "would experience relief of the right L5 radiculopathy." On reviewing the Claimant on 24 May 2012, the Claimant stated that the right-sided leg pain had completely resolved. However, the Claimant had numbness of the left thigh and lower back pain. It was therefore Mr.

Gill's opinion that surgical intervention would have benefitted the Claimant and according to the Claimant's testimony, the presenting symptom of right L5 radiculopathy resolved after the lumbar disc surgery.

[38] Mr. Gill noted that the Claimant had chronic back pain and numbness of the left thigh. He made reference to the imaging findings on the 27 July 2007 and noted that the Claimant's lumbar spine also manifested osteoarthritic changes on the facet joints at L4/5 and L/S1, with mild foraminal stenosis. He opined "The interaction of trauma and lumbar degenerative disease can give rise to chronic symptoms such as lower back and various neurological symptoms of the lower extremities. Mr. Gibson will have chronic back pain and this can be associated with numbness or radicular symptoms." He continued, "Hence it would not be frank to say that Mr. Gibson has no risk or vulnerability to back problems for the remainder of his life. In fact this cannot be said with certainty regarding any individual; **as all human beings are subject to the effects of skeletal aging.**" (Emphasis added)

The Defendant's Submissions – Novus Actus Interveniens

[39] Having outlined the history of this matter and the medical testimony associated with the Claimant's treatment, I now turn to Mr. Mottley QC's submission that the Defendants are not liable for the totality of the injuries sustained by the Claimant.

[40] Mr. Mottley QC, Attorney-at-law for the Defendants, submitted that the Defendants admitted liability in relation to the motor vehicle accident on 23 July 2004 but denied liability for all the alleged loss and damage suffered by the Claimant. He averred that the Claimant had a pre-existing condition, which was exacerbated by the July accident. It is also the Defendants' contention that the injury to the Claimant's right leg, right buttock and right big toe were not attributable to the July accident but to an event on 31 October 2006 (the October incident) when the Claimant lifted or moved a heavy object by himself.

[41] Mr. Mottley QC summarized the evidence of the Claimant, Mr. Gill, Dr. Ramhendar, Dr. Browne and Ms. King in support of his submissions. He also made reference to the MRI reports. Counsel noted that on the day of the accident or the day after the Claimant felt pain radiating down his legs. Dr. Browne said he presented with back pain after moving a heavy object on his own which counsel characterised as an admission against his own interest.

[42] With respect to Dr. Browne's report, the doctor said the Claimant was an overweight man, he complained of lower flank pain radiating to his lower back. There was, in Mr. Mottley QC's opinion, no complaint of pain radiating down his leg.

[43] Counsel referred to Dr. DeCaires' report of 26 July 2004 which revealed that the vertebral heights and disc spaces were normal. Mild degenerative changes were noted. This was three days after the accident. His view was that, this report showed that the Claimant's condition existed, prior to the accident and could not have occurred within three days.

[44] The Claimant attended Dr. Browne in January 2007 at this time pain was radiating down his leg. Dr. Browne requested another x-ray which was done in 02-06 2007 (February). The resulting report on the "SPINE-LUMBOSACRAL" revealed that the LS angle was wide "with moderate to severe degenerative spondylosis involving mainly L4-S1 facet joints OA, disc space narrowing of L4 and L5/S1 with osteophytes noted." Mr. Mottley stated that this condition was not noted in the earlier report. Secondary spinal stenosis due to degenerative changes were seen. Mr. Mottley QC suggested that degenerative changes do not occur as a result of trauma but rather aging. The Claimant's clinical

history, according to Mr. Mottley QC, was not only of lower back pain, but of lower back pain and right side L5 radiculopathy or pain radiating to the leg, for this to occur, counsel opined that, there must have been interference with the spinal nerve.

[45] The MRI report (of 2007-07-27), which counsel also made reference to, noted that there was “mild bilateral foraminal stenosis” and that there is a right central disk protruding which would be consistent with right L5 radiculopathy which Mr. Mottley QC opined, meant that the jelly between the disk vertebrae had become desiccated. It was Mr. Mottley QC’s view that this meant and could only mean that it did not exist prior to the Claimant moving the heavy object.

[46] In light the medical evidence, as analysed by Mr. Mottley QC, the desiccation of the disc and its protrusion on the nerve caused the Claimant to have the operation performed by Mr. Gill and not the original accident. This was caused on his own admission by moving the heavy object two and half years after the accident. If that is so then everything after this is outside of the ambit of the accident. Counsel conceded that the desiccation of the disc is part of the aging process as given in evidence by Mr. Gill.

[47] Counsel did not deny that the Claimant suffered pain but denied that the pain radiating to his right buttock and the operation to relieve that pain were caused by the accident.

[48] Mr. Mottley QC sought to buttress his argument by looking at the Claimant's history of sick leave. He submitted that the Claimant was granted sick leave for 29 days from 8 August 2004 to 3 September 2004, 80 days as at 26 November 2004, no sick leave in 2005 and from 23 March 2006 to 15 April he had 22 days. Counsel submitted that the court ought to look to what occurred immediately after the October incident and made the supposition that, if the Claimant had pain radiating down his back, one would expect sick leave in 2005 whereas the Claimant returned to work in 2005 doing the same thing that made him sick.

[49] It was Mr. Mottley QC's further submission that it was unreasonable for a person who was attending physiotherapy and who had been home for 109 days to try to move a heavy object on his own.

[50] Counsel for the Defendant further submitted that in January 2007 the Claimant attended the doctor and complained of pain radiating from his right buttock into his leg. The doctor said, counsel argued, that was the first complaint of pain radiating down his leg. Mr. Mottley QC opined

that it was significant that the motor vehicle accident in 2004 never resulted in pain radiating down the leg.

[51] There was, in Mr. Mottley QC's submission, no pain radiating down the leg in 2004, 2005 and 2006. The Claimant said in late October 2006, he was moving a very large object on his own and that the day after he had the pain down his leg, which became worse in January.

[52] This was caused, on his own admission, by moving the heavy object two and half years after the accident. If that is so then everything after this is outside of the ambit of the accident. Counsel conceded that the desiccation of the disc is part of the aging process as given in evidence by Mr. Gill.

[53] Counsel did not deny that the Claimant suffered pain but denied that the pain radiating to his right buttock and the operation to relieve that pain were caused by the accident.

[54] He further opined that what caused the operation that Mr. Gill performed was the pain radiating down the leg.

[55] He relied upon **McKew v Holland & Hannen Cubitts (Scotland) Ltd [1969] 3 All E.R. 1621** and **Allan v Barclay (1863) 2 Macph of Sess) 873.**

[56] Counsel also argued that Mr. Gill's analysis of the need for surgery resulting from the July accident was on the basis that the Claimant had suffered from pain in his leg directly after the accident. Mr. Mottley QC further noted that Mr. Gill, under cross-examination that, if the pain in the Claimant's leg began after the lifting of the object in October 2006, this would have affected his conclusions **and contributed to the symptoms**, which he observed.

[57] Counsel further argued, that Mr. Gill, in cross-examination stated that the symptoms were as a result of degenerative changes in the lumbar spine.

[58] Mr. Mottley QC submitted that the October incident was a voluntary and unreasonable act to be undertaken by the Claimant who was undergoing physiotherapy. It therefore represented an intervening event (novus actus interveniens) which caused the pain and suffering and consequential loss and damage after the October event. Consequently, the pain felt by the Claimant after this date was as a clear result of the Claimant's voluntary act. Counsel contends that any injury or pain after this point is not the fault of the Defendants but resulted from the novus actus interveniens.

[59] The Defendants, therefore, submitted that the loss suffered by the Claimant, for which the Defendants is liable would be reflected in the total damages claimed and would be limited to those losses which occurred prior to the October incident.

The Claimant's Submissions in Reply

[60] In relation to the October event, Mr. Greenidge, counsel for the Claimant, disagreed with the submission that the October event created a Novus Actus Interveniens which would break the chain of causation. He submitted that the Claimant attended Dr. Browne in relation to pain he felt after the October event, took the medication prescribed and the pain caused went away.

[61] In addressing the arguments made by the Defendants Mr. Greenidge submitted that the Claimant had suffered a back pain prior to the accident but stated that it was of a 'transient' nature. The Claimant had never been treated for or required medical attention or sick leave for this back pain. Prior to the accident the Claimant was pain free and without symptoms of degenerative changes. X-rays taken on 26 July 2004 confirmed that there was evidence of degenerative changes but these were found to be mild.

[62] Counsel for the Claimant submitted that the Defendants must take his victim as he found him and could not limit liability for personal injury, loss and damage on the basis that the Claimant was likely to suffer injury anyway. The Claimant relied upon **Brewster v Davis (1992) 42 WIR 59**.

[63] In addressing the Defendant's contention that the Claimant's pain had ceased three months after the accident, Mr. Greenidge submitted that, though pain in some areas had ceased or been reduced, the more serious injuries were still causing pain. These pains waxed and waned as described by Dr. Browne, over a period of years. Further the Claimant submitted that Dr. Browne gave evidence that the Claimant's injuries could become chronic and more severe.

[64] The Claimant's attorney-at-law also disputed the assertion that the Claimant's injuries were as a result of his occupation as there was no scientifically proven causal link between occupational driving and lumbar degeneration.

[65] Mr. Greenidge contended that Ms. King's report from a physical examination on 17 August 2004, was in accord with the report of Mr. Gill in June 2007, except that the pain had increased and the matter was therefore more serious than expected. Mr. Gill, at that time,

recommended surgery, which he performed, resulting in the reduction of pain, though the injuries were not fully resolved as some motions resulted in pain. Mr. Gill, counsel submitted, advised that the Claimant should not return to heavy duty driving, as this could exacerbate the injury. He also relied upon the fact that the Claimant was found by the Medical Board to be medically unfit.

[66] Based on the evidence of Dr. King and Dr. Gill, Mr. Greenidge finally submitted that there was no novus actus interveniens breaking the chain of causation.

The Claimant's Overweight Condition

[67] Mr. Mottley QC further argued that the Claimant's personal injuries and consequential loss and damage resulted from the Claimant's overweight condition for which the Defendants bore no responsibility.

[68] Mr. Greenidge, also disagreed with the submissions that the Claimant's weight contributed to his injury as any weight gain was as a result of the Claimant's lack of activity due to the pain caused by the accident. The Claimant's counsel also submitted that the Claimant could not continue to attend physiotherapy due to a lack of funds though he continued to do exercises at home.

[69] Counsel also submitted that the Claimant was unable to perform physical exercise because of the injuries suffered and the consequential weight gain. The Defendants, counsel argued, had to take their victim, the Claimant, as they found him.

[70] It was therefore Mr. Greenidge's submission that the Defendants are liable for all the pain and suffering caused to the Claimant by the accident.

The Issues

[71] There are two issues, which arise on these submissions. They are:

1. Whether the Defendants are fully liable for the injuries suffered by the Claimant or whether that liability ceased on 31 October 2006, as a result of a new intervening act or *Novus Actus Interveniens*; and
2. What effect, if any, does the Claimant's weight have upon the Defendant's liability for the Claimant's consequential loss and damage.

[72] Once these issues are resolved, we then have to determine the appropriate quantum of damages to be awarded to the Claimant.

The Law on *Novus Actus Interveniens*

[73] The concept of a *Novus Actus Interueniens* or a new intervening act is used to describe an event, which interposes itself between the original tort of the tortfeasor and the injuries suffered by the victim of the tort. Such an act may result from the actions of a third party or from the actions of the victim himself. It has been described in various ways in the case law. Suffice to say that in **The Oropesa [1943] page 32** it was stated that:

“Certain well-known formulae are invoked, such as, that the chain of causation was broken and that there was a *novus actus interveniens*. These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other.”

[74] **In M'Kew v. Holland & Hannen & Cubitts (Scotland) Ltd 1969 SC 14** Lord Justice-Clerk (Grant) said, in relation to a matter where the pursuer (Claimant) had sustained two successive injuries for which he sought to hold the defendant liable:

“For practical reasons, however, there must come some stage in the sequence of events where damages cease to be exigible from the wrongdoer. There may be some intervening act which interrupts the chain of causation or the stage may come when the ultimate result is too remote or too indirect to found a claim for damages.”

Novus Actus Interueniens - Analysis and Discussion

[75] The Defendants have raised the issue of Novus Actus Interveniens and they bear the burden of establishing that there was a new intervening act breaking the chain of causation. The standard of proof is the civil standard of a balance of probabilities. Mr. Mottley QC, in cross-examination, put to Mr. Gill, Dr. Browne's evidence that, on 30 January 2007, the Claimant presented with radiating pain down his leg and that was the first time he complained of radiating pain down the right buttock into his leg. Mr. Gill was asked whether he wanted to change his evidence in relation to what he previously said in light of the doctor's evidence that the Claimant only complained of pain radiating down his leg three years later. Mr. Gill stated that that information cast a different light on the matter. He said that Dr. Browne had pinpointed a cause and that it seemed that whatever the object was played a significant part in the symptoms, namely the pain that he, Mr. Gill, saw.

[76] Under re-examination by Mr. Greenidge, Mr. Gill said that you could not discount that there was a clear temporal connection between the symptoms and moving the heavy object. He was asked how long the pain would have lasted and replied that by the time he saw the Claimant the symptoms were there. The symptoms, he opined, could have gone

on for years. Sciatica, he opined, could manifest itself for years as a result of disc problems. In some instances, Mr. Gill, further opined, it could last for days.

[77] I am faced with apparently conflicting testimony of two clinicians. Mr. Gill is a specialist neurosurgeon and Dr. Browne who is the Claimant's primary clinician. Mr. Gill saw the Claimant upon referral by Dr. Browne. Dr. Browne's opinion is that the lifting of the object caused pain of a different nature which was resolved and had no impact on the persistent pain suffered by the Claimant as a result of the accident.

[78] The evidence of Mr. Gill is the only medical evidence that suggests any material impact of the lifting of the object upon the Claimant's symptoms. Mr. Gill stated under cross-examination, that the act of lifting would have played a substantial part in the symptoms he observed. He never explained what was meant by "a substantial part." The Claimant was never requested to submit to any further medical examination by Mr. Gill to determine the impact, if any, of the lifting of the object on the Claimant's complaints of pain or whether or not any pain attributable to the lifting had resolved as Dr. Browne had opined.

[79] When asked whether there was a level of certainty that the injuries were caused by anything other than the accident, Mr. Gill replied that before hearing of the lifting on October 2006, “no”, but that the information could not be discounted.

[80] In analyzing the weight to be placed on Mr. Gill’s testimony, we must compare it with the testimony of Dr. Browne. Dr. Browne, as the Claimant’s primary clinician, was primarily responsible for the management of his pain and other symptoms. She was aware of his early complaints and was able to clinically assess the progression of his symptoms. Her opinion is based upon her first-hand clinical experience of managing the Claimant’s injuries including those occasioned by the October incident. In contrast, Mr. Gill, though a specialist, had no first-hand knowledge of the lifting of the object and had not managed the Claimant’s pain, which arose from that incident. Had he done so, he would have been able to opine definitively upon the impact, if any, of the lifting on the Claimant’s pain.

[81] In order to determine whether, and the extent to which if any, the October event contributed to the injury of the Claimant, the Defendants must give evidence of such a nature, quality and kind as to satisfy the evidential burden which rests upon them. Mr. Gill was unable to state

with certainty that none of the pain suffered by the Claimant when he examined him was not as a result of the accident. His testimony is that sciatica could manifest itself for years as a result of disc problems and, in some instances, it could last for days. This is a general opinion expressed by the specialist. He was not asked to re-examine the Claimant or to review his MRI's and X-Rays in order to determine whether there was a proper clinical foundation for his opinion.

[82] I therefore feel compelled to refer to Mr. Gill's prior opinion, expressed in his report of 19 June 2006, based upon his clinical examination of the Claimant and the MRI imaging of the Claimant's lumbar spine received on 2 August 2007, that the likely cause of the Claimant's back pain and leg pain was the trauma of the 23 July 2004 accident. Where an expert changes his opinion, he must adduce the facts upon which that change is posited so that the court can feel satisfied that the change of opinion is warranted. In this regard, Mr. Gill was unable to adduce into evidence the facts upon which his changed opinion was based.

[83] This is no shortcoming on the part of Mr. Gill. He was never asked to reassess the Claimant in light of the October event.

[84] This failure must also be addressed in light of the MRI reports upon which Mr. Mottley QC so heavily relied. The report of 7/26/2004 states that “The vertebral heights and the disc spaces remain normal” but also reveals “Mild degenerative changes of vertebrae with facet joint OA noted.” The MRI report of 2007/07/27 is now reproduced fairly extensively, it states that:

“At L4/5 the disc space is narrowed. The disc is dessicated. There is a right para-central disc protrusion, which extends slightly below the disc space as well as deforms the thecal sac on this right side. It would be consistent with a right L5 radiculopathy. The facet joints at this level are also hypertrophied and there is mild foraminal stenosis.

At L5/S1 the disc is dessicated. There is a small broad-based posterior central disc protrusion. It does not appear to displace the S1 roots. There is mild facet joint hypertrophy at this level as well and the foramina appear mildly narrowed.”

The impression of Dr. DeCaires, who authored this report is:

- “1. Right para-central L4/5 disc protrusion which would be consistent with right L5 radiculopathy.
2. Small broad-based posterior central L5/S1 disc protrusion.
3. Facet joint OA at L4/5 and L5/S1 with mild foraminal stenosis.”

[85] This report was not commissioned to determine the effect, if any, of the October incident on the Claimant’s state and condition. Mr. Gill was not asked to interpret these reports in light of any clinical examination of the Claimant in light of the October event. Mr. Gill and Dr. Browne utilised these reports in coming to their clinical opinions on the

Claimant's medical condition in light of the injuries he sustained as a result of the accident. They appear not to have seen any inconsistencies between the MRI and X-Ray results and the Claimant's subsequent presenting complaints to support Mr. Mottley QC's submissions.

[86] In consequence, I find that the opinion of Mr. Gill is theoretical, speculative and hypothetical. I am therefore unable to place such weight upon Mr. Gill's testimony that would displace the findings of Dr. Browne who examined and treated the Claimant and his own prior opinion that the likely cause of the Claimant's injuries was trauma of the 2004 accident.

[87] I therefore find that the Defendants have not proven, on a balance of probabilities, that the Claimant's personal injuries, loss and damage after the October incident are attributable to the October incident.

[88] In consequence I hold that there was no break in the chain of causation.

The Claimant's Weight and its Alleged Contribution to his Degenerative Condition- The Thin Skull Rule

[89] The Defendants also argued that the Claimant's weight and job of driving contributed to his degenerative condition, which caused or contributed to his lower back pain. Mr. Greenidge submitted that the

Defendants must take their victim as they found him under the thin skull rule.

The Law

[90] In **Smith v. Leech Brain & Co. Ltd. and Another.** [1962] 2 Q.B.

405, Lord Parker C.J. defined the principle thus:

“It has always been the law of this country that a tortfeasor takes his victim as he finds him. It is unnecessary to do more than refer to the short passage in the decision of Kennedy J. in *Dulieu v. White & Sons*, where he said: "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart."

[91] In **Barker v Saint-Gobain Pipelines plc** [2005] 3 All ER 661 the court

noted that:

“...the eggshell skull, and (in the case of multiple torts) the concept of concurrent tortfeasors are all no more and no less than tools or mechanisms which the law has developed to articulate in practice the extent of any liable defendant's responsibility for the loss and damage which the Claimant has suffered.”

[92] The principle has been succinctly stated in *Charlesworth and Percy on*

Negligence 12 Edn. (2010) Sweet & Maxwell, London, UK, as

follows:

“... a defendant has to take the victim of his or her tort as he or she finds that victim, so the defendant is liable for the whole damage even though its severity or extent has been increased because of the victim's pre-existing weakness or susceptibility to harm. Provided some personal injury was foreseeable, it is no answer that a “normal” person would not have suffered to the same extent.”

Analysis and Discussion

[93] It is not disputed that the Claimant is an overweight man who suffers from a degenerative condition. Dr. Browne's findings on presentation was that the Claimant was an overweight man. The medical evidence in relation to the desiccation of the fluid between the discs (foraminal fluid) is that this occurs with ageing. Mr. Gill's evidence is that **those degenerative changes were present in the Claimant prior to the July accident**. Prior to the accident, the Claimant had only experienced transient episodes of back pain. Mr. Gill found that "The protracted lower back pain with the radiculopathic component that radiated into the right lower limb commenced after the injury of the lower back in the aforementioned accident." He further found that:

"The radiculopathy symptoms are consistent with L4/5 disc herniation and L5 nerve root irritation and compression" and opined that "the likely cause of this man's current back and leg pain is the trauma of 23rd July, 2004 accident."

Findings

[94] The Defendant's must take the Claimant as they found him, namely an overweight driver of heavy-duty vehicles. It is no defence that drivers of heavy-duty vehicles are more disposed to suffering low back pain. I therefore am unable to accept Mr. Mottley QC's submissions that the Claimant's overweight condition and his occupation were pre-disposing factors, which provide reasons why the Claimant ought not

to receive full compensation for his injuries. On the basis of the medical evidence elicited in this trial I find that the harm caused to the Claimant was as a result of the negligent acts of the Defendants, consequently, I find no merit in the Defendants' submissions.

[95] I find, therefore, that the Defendants are liable for all of the Claimant's personal injuries, loss and damage.

The Assessment of Damages

[96] I now turn to the assessment of damages for the Claimant's personal injuries, loss and damage. The Claimant has claimed the amount of \$814, 812.85 from the Defendants, on the basis that they are liable for the full extent of his injuries due to the Defendants' negligence. The claim is under the following heads of damage.

Pain and Suffering

[97] Under this head, the Claimant has claimed \$200,000.00. Mr. Greenidge's submission is that the Claimant was a happily married 44 year old at the time of the accident who was permanently employed in the Government service. He was a proud husband, father and breadwinner of his family and an avid domino player. The compensation he seeks is for:

1. Severe and constant physical pain and discomfort for the past 12 years and continuing,
2. Physical impairment including impaired agility,
3. Having to walk with a cane for stability and support,
4. Psychological pain, anguish and depression,
5. Inability to meet the physical demands of marriage,
6. Loss of manhood and ego,
7. Inability to financially provide for his family,
8. Permanent interruption of recreational activities and disruption of social life.

[98] Mr. Greenidge submitted that the Claimant's present circumstances fall under the Judicial Studies Board Guideline 7 B (a) iii, which states: "cases of disc lesions or fractures of discs or of vertebral bodies or soft tissue leading to chronic conditions where, despite treatment (usually involving surgery), there remain disabilities such as continuing severe pain and discomfort, impaired sexual function, depression, personality change, alcoholism, unemployability and the risk of arthritis." and would attract an award ranging from \$113, 016.75 to \$203,231.88.

[99] The Claimant submitted two cases in support namely **Eardley v North Anglia Health Care NHS Trust (1997) (Eardley) and Stone v**

Commissioner of Police of the Metropolis (1999) (Stone). The Defendants have submitted that the Claimant's injury was a previously symptomatic one, which was aggravated by the accident. The Defendants have calculated the Claimant's pain and suffering for a two year period, immediately preceding the incident in October and has suggested a payment of \$20,000.00 under this head.

[100] Mr. Mottley QC, submitted that the court ought to "divide or cut off the point where it considers, based usually on medical evidence, that the claimant would have stopped suffering due to the accident and thereafter treat continuing symptoms as being constitutional in nature, arising from the degenerative disease." He relied upon **Lobley v Patel (Lobley) (2010)** and **Hodkinson v Wedllington (Hodkinson) (2009)** found in the Personal Injuries Quantum Database.

Discussion and Analysis

[101] I refer to my previous acceptance of Dr. Browne's evidence that the Claimant will continue to suffer pain in the future and that of Mr. Gill who opined that future pain could not be ruled out. Having regard to my ruling on the issue of Novus Actus Interveniens, I am unable to accept Mr. Mottley QC's submission that his pain and suffering should be subject to a cut-off point.

[102] In **Eardley** the Claimant was a 44-year-old female nurse who sustained a back injury, namely a prolapse of the L4/5 intervertebral disc with damage to tissues and nerve roots while lifting a patient in the course of her work. She also suffered injury to her back, losing sensitivity in her lower leg, severe back pain and loss of function. Though extensive varied treatment had been undergone, the Claimant continued to have a constant gnawing pain across her lower back and was unable to sit or stand in the same position for long periods of time. She could not walk briskly and sometimes required assistance to get out of bed on mornings. She was unable to undertake heavy shopping, housework or gardening. She lost the pleasure of cooking. Prior to the accident she was a keen and accomplished swimmer but after the accident could only swim breaststroke at a “plodding pace”, she also had to give up cycling. With the exception of part-time work at home for about 4 months she had not worked since the accident.

[103] The Claimant was unemployed as a result and lost the intimate relationship with her partner. She was unable to contemplate any future intimate relationships. Her condition was expected to be permanent. The judge found that she faced a lonely future. She was awarded the equivalent of GBP 72,220.35 as at 2016 for pain and suffering and loss

of amenity not the equivalent of Bds \$252, 771.23 as suggested by Mr. Greenidge.

[104] In **Stone** the Claimant a female was 23 years of age at the time of the accident and 28 at trial. She suffered soft tissue injury to the lower back, which gave rise to persistent and severe backache as a result of repetitive and awkward handling of heavy loads at work. She was unable to lift heavy objects and travel any distance without discomfort and walking was limited to a mile. Her husband had to undertake many of the routine household chores. She was unable to resume any of the sporting or leisure activities she previously enjoyed. The facet joint injections, physiotherapy, hydrotherapy, acupuncture, epidural and steroid injections she underwent made no significant improvement to her condition. She was considered to have substantial residual disability. She was unable to return to work. Her injury severely restricted her ability to enjoy motherhood and family life. She was awarded 25,000.00 GBP in 1999 for general damages. Her future loss of earnings were calculated with a multiplier of 17.68 allowing for 5 years off work to raise a family, the equivalent of Bds \$152, 941. 36.

[105] I consider **Lobley** and **Hodkinson** to be inapplicable to the case at bar for the following reasons. In **Lobley** the facts were that the Claimant

was unable to pursue her hobby of fishing for about 12 months after the accident and needed help with heavier housework. In **Hodkinson** there was medical expert evidence attributing the claimant's symptoms to 24 months post-accident. In the case at bar there is no conclusive evidence limiting the period for which the Claimant will suffer pain. Mr. Gill, in his report of 15 June 2012 noted:

“Mr. Gibson has chronic back pain and numbness of the left thigh. Referring again to the imaging findings of 27/07/2007, it was noted that Mr. Gibson's lumbar spine also manifested osteoarthritic changes of the facet joints at *L4/5* and *L1/S1*, with mild foraminal stenosis. The interaction of trauma and lumbar degenerative disease can give rise to chronic symptoms such as lower back and various neurological symptoms of the lower extremities. Mr. Gibson will have chronic back pain and this can be associated with numbness or radicular symptoms. Hence it would not be frank to say that Mr. Gibson has no risk or vulnerability to back problems for the remainder of his life. In fact this cannot be said with certainty regarding any individual; as all human beings are subject to the effects of skeletal aging.”

[106] I am of the opinion that **Eardley** and **Stone** are more applicable, however the injuries in **Stone** rendered her unfit for employment whereas in the instant case, the Claimant is not totally incapable of work. I consider that the pain and suffering over the period and the loss of amenity, inability to play with his son or the joy of gardening, the impairment of his ability to play dominoes and the impairment of his sex life to be considerable for a man who has lead an active life. I also consider the possibility of spontaneous recurrence of his pain and

suffering after the expected period of recovery in making this award, and I award the sum of \$175,000.00 for pain and suffering and loss of amenity.

Past Loss of Earnings

[107] Under this head, the Claimant is seeking compensation comprising (1) loss of earnings from his employment with the Ministry of Transport and Works as an Operator 1V and (2) loss of earnings from rearing rabbits for sale which he classifies as loss of earnings from other sources.

[108] There has been no dispute as to the factual basis upon which this claim is made. With respect to the first item of loss, the Claimant was employed at a salary of \$2,221.20 per month or \$1,110.00 bi-monthly or \$512.56 weekly a total of \$148, 817.65 for the period 21 August 2008- 19 February 2010. During this time he was on half-pay and on no-pay leave for the period of 20 February 2010 to 30 June 2010 when he was declared medically unfit to work. He was paid an invalidity pension by the National Insurance Department of \$248.85 per week commencing 01 July 2010, \$260.89 from 03 January 2011 and \$271.35 from 02 January 2012.

[109] With respect to the second item of loss or losses from other sources, Mr. Greenidge submits that the Claimant was unable to rear his rabbits

and other animals and suffered a loss therefrom which is modestly estimated to be \$80 per week from the date of his injury and continuing to present. In consequence, he suffered a loss of income from other sources of \$80 X 52 X 11.5 years (\$47,840.00).

[110] The total loss of \$148,817.65 which the Claimant is seeking compensation for is neatly set out in the following table provided by Mr. Greenidge:

PERIOD	MONTHS	WAGES	PENSION	LOSS
1st July to 31st Dec, 2010	5	11,106.00	5,391.75	5,714.25
2011	12	26,654.40	13,566.28	13,088.12
2012	12	26,654.40	14,110.20	12,544.20
2013	12	26,654.40	14,537.63	12,116.77
2014	12	26,654.40	14,851.72	11,802.68
2015	12	26,654.40	14,851.72	11,802.68
1st Jan to 30th April, 2016	4	8,884.80	4,950.56	3,934.24
		153,262.80	82,259.86	71,002.94

2008-08-21 to 2010-02-19	Half pay	20,409.09
2010-02-20 to 2010-06-30	No Pay	9,565.62

2010-07-01 to 2016-04-31	Disability Pension	71,002.94
2004-07-24 to 2016-04-31	Other Sources	47,840.00
		\$148,817.65

[111] With respect to past loss of earnings, Mr. Mottley QC submitted that a sum of \$9,598.76 would be adequate compensation calculated upon a bi-monthly salary of \$1,110.60 and the periods of sick leave as follows:

2004	24 July 24- 17 August	15 days- \$1,189.93
	4 September -26 November	60 days- \$6,663.60
2005	20 February	14 days
2006	23 March – 13 April	22 days \$1,745.23
	31 October – 10 November	11 days -
2007	21 – 23 February	3 days -
	30 May – 13 July	45 days -
	17-31 August	11 days -
2008	22 January – 20 August	211 days
	Total	336 days - \$9,598.76

[112] Mr. Mottley further submitted an offer of compensation for the period 24 July to 17 August 2004 and 23 March to 13 April 2006. He also submitted that no compensation was payable for the two week period

commencing 20 February 2005 because the Claimant admitted that he did not take these days off.

[113] It was counsel's further submission that the periods of sick leave from 31 October 2006 coincided with the intervening incident or Novus Actus Interveniens of October 2006 and accordingly any compensation for lost earnings ought to be restricted to the Claimant's last period of sick leave prior to that event.

Analysis and Discussion

Loss of Earnings from Employment

[114] I will deal with Mr. Mottley QC's last submission first. Having regard to my findings on his submission that there was a Novus Actus Interveniens, I find no merit in counsel's submission, which is accordingly dismissed. Accordingly, damages are payable in respect of past loss of earnings up to the date of trial.

[115] With reference to the submission that no past loss of earnings are payable for the two week period commencing 20 February 2005, the onus is on the Claimant to establish his loss. He must establish by evidence that he was not paid for this period. The periods for which the Claimant was granted sick leave are contained in a letter dated

27 October 2010 from the Chief Personnel Officer of the Personnel and Administration Division (PAD) to counsel for the Claimant. This was unchallenged and is an extract from the records of the PAD. The sick leave granted to the Claimant is recorded as follows:

“Extension on sick leave on full pay

2004-08-08 to 2004-09-03 = 29 days
2004-09-08 to 2004-11-26 = 80 days
2006-03-23 to 2006-04-13 = 22 days
2006-10-31 to 2006-11-10 = 11 days
2007-02-21 to 2007-02-23 = 3 days
2007-05-30 to 2007-07-13 = 45 days
2007-09-17 to 2007-12-31 = 106 days
2000-01-22 to 2008-08-20 = 211 days

Extension on sick leave on half pay

2008-02-20 to 2010-02-19 = 548 days

Extension on sick leave on no pay

2008-02-20 to 2010-06-30 = 131 days”

[116] This letter also confirmed the Claimant’s appointment to his post of Operator 1V and his retirement on medical grounds with effect from 2010-07-01 and his wages of \$1,110.61 bi-monthly. It appears to me that the date 2008-2-08 in respect of extensions on sick leave without pay ought to be 2010-02-20 and is adopted by Mr. Greenidge in his calculations. The letter of 14 May 2012 to the Claimant from the National Insurance Office reveals that the Claimant was awarded

pension at \$248.85 per week from 1 July, 2010 which increased to \$260.80 from 3 January 2011 and \$271.35 with effect from 2 January 2012. Mr. Greenidge, in his submissions, indicated that pensions increased to \$297.57 from 2013 and \$285.61 from 2014 and has remained unchanged since then. There was no challenge to this from Mr. Mottley.

[117] This Whilst Mr. Greenidge's submissions are not evidence, they are, however, of assistance to me in calculating the loss in a manner which is fair to both parties since the increase in pensions would result in a reduction in the damages which the Defendants would have to pay. In consequence, the Claimant's loss under this head while on half-pay is up to the date of trial, computed as follows:

$$\begin{aligned} \text{Bi-monthly salary of } \$1,110.61 \times 2 &= \$2,221.22 \times 12 = \\ \$26,654.64 &= \$73.03 \text{ daily. Half pay} = \$36.52. \end{aligned}$$

[118] These are the base figures on which I will make my calculations.

Accordingly, my award is \$138,537.22 calculated as follows:

Extension on sick leave on half pay

2008-08-20 to 2010-02-19 = 548 days
 548 days at \$36.52 daily = \$20,012.96

Extension on sick leave on no pay

2010-02-20 to 2010-06-30 = 131 days
 131 days at \$73.03 per day = \$9,566.93
 Total \$29,579.89

Loss of Earnings for the period after 30 June 2010:

PERIOD	MONTHS	WAGES	PENSION	LOSS
1st July to 31st Dec, 2010	5months 30 days	13,297.00	6,261.36	7, 036.64
2011	12	26,654.40	13,566.28	13,088.12
2012	12	26,654.40	14,110.20	12,544.20
2013	12	26,654.40	14,537.63	12,116.77
2014	12	26,654.40	14,851.72	11,802.68
2015	12	26,654.40	14,851.72	11,802.68
1st Jan to 30th April, 2016	4	8,884.80	4,950.56	3,934.24
		155,545.80	832,129.47	72,325.33

Loss of Earnings from other Sources

[119] With reference to the claim of loss of earnings from other sources no evidence has been led as to the business operation, which the Claimant had in place with respect to his rearing of rabbits. I have not had the benefit of seeing any bills or receipts for this farming operation or its market, profits or loss, neither have I had the benefit of any income tax returns showing the alleged income derived from this source.

[120] Mr. Greenidge has calculated this loss at \$47,840.00 estimated at \$80.00 per week from the date of injury until 01 June 2016 date of filing of closing submissions and continuing at that rate until present.

[121] The onus is on the Claimant to place sufficient evidence before the court to prove his loss or enable the court to assess the loss claimed. Sadly there is a dearth of evidence in this regard. On the other hand, counsel for the defendants has not seriously challenged the claim that the Claimant reared rabbits and derived profit therefrom.

[122] In assessing the Claimant's claim under this head, I will err on the side of caution and discount the sum claimed under the head of loss of income from other sources by 10% to take into account the uncertainty inherent in such a claim. The methodology to be employed is the same as set out above. Thus loss of past earnings from other sources up to trial is:

2008-02-20 to 2010-02-19 = 78weeks
78 weeks at \$80.00 weekly = \$6,240.00

2008-02-20 to 2010-06-30 = 19 weeks
19 weeks at \$80.00 per week = \$1,520.00
Total \$7,760.00

2010-07-01 to 30 April 2016 = 304 weeks

304 weeks at \$80.00 weekly = \$ 24,320.00

Total loss \$6,240.00 + \$1,520.00 + \$ 24,320.00 = \$ 32,080.00

[123] Thus discounting the sum of \$32,080.00 by 10%, I arrive at the sum of \$28,872.00, which I award as loss of earnings from other sources.

When added to the sums of \$20,012.96, \$9,566.93,

\$72,325.33, \$6,240.00, \$1,520.00 and \$28,872.00 this gives an

aggregate of \$138,537.22 which I award as past loss of earnings.

Loss of Future Earnings

[124] Mr. Greenidge submitted, that the Claimant suffers, and will continue to suffer, an annual loss of earnings which will continue until his retirement at age 67 in September 2026. This loss counsel calculated at the difference between his annual wages of \$26,654.40 and his annual disability pension of \$16,506.88 or \$10,147.52 annually. He urged this court to employ a multiplier of 10 which represents the number of years left until retirement and to award the Claimant the sum of \$101,475.20 for loss of future earnings.

[125] Mr. Mottley QC submitted that this matter does not attract an award under this head since the Claimant could have mitigated his loss and sought employment elsewhere that would not require heavy lifting or bending. He submitted, therefore, that alternative employment was not ruled out. He also submitted, based on Mr. Gill's medical report, that the Claimant was fit for employment that would not require heavy lifting, bending frequently, or climbing. No suggestions were forthcoming from Mr. Mottley QC with respect to quantum.

Discussion and Analysis

[126] An award under this head compensates the injured party for the future stream of earnings that would have been available to him but for the injury. The calculation undertaken employs the multiplier-multiplicand method.

[127] The multiplier represents the number of years the Claimant would have worked between trial and the predicted date of his retirement at age 67.

[128] The use of actuarial tables to assist in arriving at the multiplier has been approved in **Phillips v London & S.W. Ry (1879) 5 Q.B.D. 78 (CA)** and **Roach v Yates (1938) 1 K.B. 256**.

[129] The onus is on the Defendants to prove that the Claimant has failed reasonably to mitigate his loss - **Roper v Johnson (1873) L.R.8 C. &**

P.167. An analysis of the medical evidence in this matter reveals that the Claimant was not rendered totally incapable of work. Mr. Gill opined in his report of 01 October 2009 that the Claimant would be well advised not to return to “this type of work. He is fit for employment that would not require heavy lifting, bending frequently, or climbing.”

[130] There is no evidence as to his qualifications for any other form of employment or of any efforts to find alternative employment and at what wages. Likewise there is no evidence as to the kind of employment, which would be available to a driver of heavy-duty vehicles, which would not require bending frequently, or climbing. There is a paucity of evidence to assist me under this head. The medical evidence is unhelpful with respect to what alternative employment he is fit for. This, however, does not end the matter. The court must do its best to calculate the damages suffered notwithstanding the difficulties in so doing. In these circumstances, I find it difficult to see how the Claimant could reasonably have mitigated his losses.

[131] The assessment under this head employs the multiplier/multiplicand methodology. In arriving at the multiplicand for loss arising from his employment, the evidence is that the Claimant was earning wages of \$26,654.40 annually and now receives a disability pension of

\$14,851.73 annually. The difference of \$11,802.67 I will employ as the multiplicand. No explanation is given for the sum of \$16,506.88 which Mr. Greenidge submitted as the Claimant's annual disability pension in light of his submission that the disability pension rate of \$14,851.72 has not increased since 2014.

[132] With respect to the multiplier, whilst the multiplier of 10 suggested by Mr. Greenidge flows logically from the difference between the Claimant's age at trial and his retirement age from the Government service, Mr. Greenidge's suggested multiplier fails to take into account that the law requires that the multiplier be adjusted or decreased to take into account certain contingencies, traditionally called the vicissitudes of life. There is no concrete formula for making such adjustments. The Claimant does not enjoy good health and is overweight. The medical evidence does not speak to his future medical prognosis for employment save as I have previously indicated.

[133] In the circumstances, I will apply a multiplier of 7.

[134] Applying a multiplier of 7 to the multiplicand of \$11,802.67 the award for loss of future earnings from his employment in the Government service is therefore \$82,618.69

Past Domestic Assistance

[135] For domestic assistance the Claimant claims \$88,920.00 calculating the daily worth of such assistance at \$40.00 (**Clover Barker v Tyrone Boyce, No. 2534 of 2000**) during the periods of his sick leave and disability computed as follows:

PERIODS OF SICK LEAVE	DETAILS	AMOUNT
2004-07-24 to 2004-09-03 (44 days)	44 X \$40.00	1,760.00
2004-09-08 to 2004-11-26 (80 days)	80 X \$40.00	3,200.00
2006-03-23 to 2006-04-13 (22days)	22 X \$40.00	880.00
2006-10-31 to 2006-11-10 (11 days)	11 X \$0.00	-
2007-02-21 to 2007-02-23 (3 days)	3 X \$40.00	120.00
2007-05-30 to 2007-07-13 (45 days)	45 X \$40.00	1,800.00
Sub-total - Sick Leave	194 X \$40.00	\$7,760.00
DISABILITY		
2007-09-17 to 2007-12-31 (106 days)	106 X \$40	4,240.00
2008-01-01 to 2011-12-31 (4 years - 208 weeks)	208 X 5 days X \$40	41,600.00
2012-01-01 to 2016-12-31 (4 years - 208 weeks)	209 X 4 days X \$40	33,280.00
2016-01-01 to 2016-04-31 (120 days - 17 weeks)	17 x 4 x \$40	2,040.00
Sub-total - Disability		81,160.00
TOTAL (\$7,760.00 + \$81,160.00)		\$88,920.00

[136] Mr. Mottley QC conceded that the Claimant's friends and relatives who rendered gratuitous assistance would be entitled to compensation for domestic services gratuitously rendered. Adopting a convalescence period of 2 years and a rate of \$35.00 per day, Mr. Mottley QC offered assistance twice weekly in doing "his chores and household duties" at this rate. He therefore suggested an average rate of twice weekly for a total sum of \$6,720.00.

[137] Mr. Mottley QC further submitted that past domestic assistance should be limited to the time that the Claimant was at home from the accident, "a hundred plus days." The Defendants' counsel submitted that an award of \$9,598.76 covering 336 days would be reasonable.

Analysis and Discussion

[138] The figures claimed under this head have not been contested as incorrectly calculated. The contest is to the period for which the claim is made. Mr. Mottley QC's response to the claim is posited on his argument that there must be a cut-off point in relation to the claim based upon his argument with respect to Novus Actus Interveniens, which I have rejected.

[139] With respect to the claim for past domestic assistance, I am unable to accept Mr. Mottley QC's submission that the sum of \$35.00 per day is appropriate. This sum was accepted by **Blackman J** in **Clover Barker v Tyrone Boyce unreported decision No: 2534 of 2000 (Clover Barker)**. This decision was rendered 6 January 2006. That decision does not take into account the prevailing commercial rates for domestic assistance at that time. In **Clover Barker, Blackman J** accepted the contention that "with the ravages of inflation since the 1992 decision of *Selma Jones v. Urban Holder et al* which determined \$35 to be the cost of daily help, a sum of \$40 per day as the daily rate for domestic services, is not unreasonable."

[140] **Blackman J** did not have the assistance of evidence as to the commercial rate for domestic assistance. I find myself in a similar situation. I consider that in matters like these evidence as to the commercial rate for domestic services ought to be admitted to assist the trial judge in making an award under this head.

[141] I also consider the sum claimed to be extremely reasonable as it fails to take into account inflation since 2006 when **Clover Barker** was decided. The pain and suffering detailed in the various medical reports and the Claimant's evidence of his inability to perform household

functions for himself reinforced by the evidence of his wife, lead me to conclude that his claim is justified. Mr. Greenidge's calculations speak to specific dates and times which I assume are based on his instructions. In the absence of a challenge to these dates and figures, I will adopt them and award the Claimant the sum of \$88,920.00

Future Domestic Assistance

[142] Mr. Greenidge submitted that it is anticipated that the Claimant will continue to require domestic assistance and care for the foreseeable future. The Claimant's ability to lift, bend or participate in physical activities is severely restricted. He continues to rely upon the gratuitous care of family and friends. It is counsel's further submission that he will continue to require domestic assistance on average 3 times per week for the rest of his life. He suggests the multiplicand/multiplier method utilising a multiplicand of \$6,240.00($\$40.00 \times 3 \times 52$) and a multiplier of 15 for a total sum of \$93,600.00.

[143] Mr. Mottley QC submitted that, if one accepts that the Claimant's symptoms were due to constitutional causes, which had, pre-accident caused intermittent flare-ups, his post-operative state is no different

from what it was prior to the accident. He therefore submitted that the Claimant has returned to his pre-accident state.

Discussion and Analysis

[144] I have already addressed Mr. Mottley QC's submission in my analysis of the submissions in relation to Novus Actus Interveniens and the application of the "Thin skull rule" to this matter. Based on my decision on these matters, I hold that there is no merit in Mr. Mottley QC's submissions on this issue. Accordingly, I am of the opinion and hold that the claim for future domestic assistance is a legitimate head of damage emanating from the tortious acts of the Defendants, which caused this accident.

[145] I now proceed to assess that loss. Having accepted that the sum of \$6,240.00 per annum ($\$40.00 \times 3 \times 52$) was a reasonable sum claimed in respect of past domestic assistance and having awarded the Claimant past domestic assistance at that rate, I consider that sum to be a reasonable multiplicand to assist me in this quantification.

[146] Mr. Greenidge relied upon the award of \$40.00 per day in **Clover Barker**, however, no account has been taken by Mr. Greenidge of inflation since 2006 when that case was decided and no evidence has

been led concerning the impact of inflation on a 2006 award. Whilst there is no evidence as to the prevailing commercial rate, I am of the opinion that the rate claimed, based as it is upon a 2006 ruling, does not take into account the rate of inflation since that time, which would make a modern rate considerably higher. I therefore consider that the sum of \$40.00 per day is extremely reasonable.

[147] With respect to the multiplier I propose to use the multiplier of 15 suggested by Mr. Greenidge, which would take the Claimant up to his normal age of retirement, without any discount for the contingencies of life. **Thomas v Brighton Healthy Authority[1999] 1 A.C. 345 and Hunt v Severs [1994] 2 A.C. 250**, for the simple reason that future assistance and future medical care will last for the rest of the Claimant's natural life unlike future loss of earnings which end on his attaining the age of retirement. This gives a total of \$93,600.00. I therefore award the Claimant the sum of \$93,600.00 for future domestic assistance.

[148] I will briefly address Mr. Mottley QC's submission that the award for future domestic assistance should be discounted by 20% to take into account that the persons rendering assistance in the future will have to

pay income tax and National Insurance contributions. There was no response to this submission from Mr. Greenidge.

[149] I am of the view that those persons who will render assistance in the future will most likely be self-employed persons who will be responsible for paying their own income taxes (if applicable) and national insurance contributions from their gross earnings. They will have to do so from the sums paid to them by the Claimant out of the sum awarded to him. To reduce the award by 20% will result in the Claimant being subjected to impositions which he is not legally obligated to pay. **See Pryce v Elwood (1964) 108 S. J. 583 and Morahan v Archer and Belfast Corporation [1957] N.I. 61.**

Loss of Congenial Employment

[150] Mr. Greenidge submitted that the Claimant is unable to work and has lost the satisfaction not being able to fulfill this activity. Mr. Greenidge predicated his client's claim upon the submission that the Claimant derived great pleasure from his job as a truck driver and enjoyed the excitement of working outdoors and being constantly on the move. This passion for driving, counsel argued, was dealt a devastating and harsh blow by the accident. The Claimant,

Mr. Greenidge submitted, had driven since the accident. The amount sought for damages for Loss of Congenial Employment of \$10,000.00. He relied upon the dictum of Edmund Davies LJ in **Morris v Johnson Mathey [1967] 112 Sol Jo 32**: that “The joy of a craftsman in his craft is beyond price”.

[151] Mr. Mottley QC, while conceding in law that a claim may be made for loss of congenial employment, submitted that no award ought to be made since there was no medical evidence that the Claimant could no longer drive.

The Law

[152] This head of damages compensates a Claimant for his inability to continue in his former employment. **Willbye v Gibbons [2004] P.I.Q.R. P15CA**. It embraces the loss of satisfaction derived from one’s employment.

Discussion and Analysis

[153] The Claimant gave evidence that he loved driving and had lost the satisfaction from his job as a driver. It was not disputed that the Claimant enjoyed driving nor was it dispute that compensation is awardable in law for such loss. The counter to his claim is that (1) the

Claimant can still drive and (2) that his claim is unsupported by the medical evidence.

[154] It is necessary therefore to analyse Mr. Mottley QC's submissions under this head in light of firstly the law and secondly the medical evidence. These relate to (i) the Claimant's ability to drive and (ii) the submission that the claim is unsupported by the medical evidence. I now deal with these submissions seriatim.

[155] Mr. Mottley QC's argument that the Claimant can still drive and is therefore not entitled to an award is based upon the supposition that congenial employment relates to driving, on the contrary, it relates to loss of employment of which driving is but one aspect. It relates to the loss of one's job. The Claimant was employed as a driver of a heavy-duty truck. Having heard and seen the Claimant give his evidence, and having regard to the professional opinion of Mr. Gill relative to the Claimant's inability to perform his duties as a heavy duty driver and not a driver simpliciter, I am of the opinion and find that the Claimant has not only lost his job as a result of this accident but has also lost the satisfaction associated with his job as a driver of a heavy duty driver in the Ministry of Transport and Works.

[156] With respect to the submission that the claim is unsupported by the medical evidence, I now turn to examine the medical evidence. Mr. Gill, the consultant neurosurgeon, in his report of 19 June 2008 noted that the Claimant experienced “severe lower back pain” and that that pain and right sided leg pain have “presented [sic] [prevented] Mr. Gibson from pursuing his vocation as a heavy duty truck driver at the Ministry of Transport & Works.”

[157] In his report dated 1 October 2009, Mr. Gill opined, “With regard to Mr. Gibson’s ability to work, **one is mindful that his vocation by which he earned his living was as a chauffeur of a Heavy Duty Truck. This would entail climbing into a tall cabin; and operating the main dumping mechanism and its ancillary operations on the truck. It is my opinion that such duties will re-initiate severe lower back pain, and Mr. Gibson would be well advised not to return to this type of work (emphasis added).** He is fit for employment that would not require heavy lifting, bending frequently, or climbing.”

[158] In this case, the medical evidence supports the proposition that the claimant will be unable to return to his previous occupation as a driver of a heavy-duty vehicle. I refer to the opinion of Mr. Gill in paragraph [116] above that the Claimant would be well advised not to return to

his previous employment. In addition, Mr. Gill, in his letter dated 15 June 2012 to Mr. Greenidge with respect to the Claimant's injuries noted that:

“Mr. Gibson has chronic back pain and numbness of the left thigh. Referring again to the imaging findings of 27/07/2007, it was noted that Mr. Gibson's lumbar spine also manifested osteoarthritic changes of the facet joints at L4/5 and L/S1, with mild foraminal stenosis. The interaction of trauma and lumbar degenerative disease can give rise to chronic symptoms such as lower back and various neurological symptoms of the lower extremities. Mr. Gibson will have chronic back pain and this can be associated with numbness or radicular symptoms. Hence it would not be frank to say that Mr. Gibson has no risk or vulnerability to back problems for the remainder of his life. In fact this cannot be said with certainty regarding any individual, as all human beings are subject to the effects of skeletal aging.”

[159] I am of the view and hold that the medical evidence of Mr. Gill is pellucid in establishing that the Claimant is unable to continue in his occupation as a driver of heavy-duty vehicles and is supportive of the Claimant's claim. I therefore reject Mr. Mottley QC's submissions on this issue.

[160] With reference to the quantum of damages for loss of congenial employment, two following cases are instructive. In **Goodman v Darby [2001] C.L.Y. 1640** G, female, aged 18 at the date of the injury and 21 at trial, who had begun a four year undergraduate course in education, suffered a whiplash injury in a road traffic accident. She had ambitions of becoming a physical education teacher but the medical

evidence cast doubt upon on her ability to teach PE. Although G might be able to do a reasonable amount of physical education, she was very unlikely to be able to engage herself fully G intended to try supply teaching as opposed to full time teaching, but would lose considerable job satisfaction in terms of permanency and building a relationship with pupils. An award of 5.000 GBP was made for loss of congenial employment.

[161] In **Willbye**, Kennedy LJ noted that the appellant was “being compensated for being unable to pursue a career as a nursery nurse which she thought she would have enjoyed. She never actually embarked on that career, although she probably had the ability to obtain the qualifications required, and in financial terms she has been fully reimbursed” Kennedy LJ, continued “so this is really an award for a particular disappointment, which may or may not be prolonged.” The appellant was awarded 5,000 GBP for loss of congenial employment.

[162] I note that the injuries suffered in **Goodman** were not as serious as in the instant case, whereas those suffered in **Willbye** were more serious in terms of their impact on loss of congenial employment. No two cases are alike. Having regard to the sums awarded in the two mentioned cases I am of the opinion that the sum claimed is reasonable and

accordingly, I award the sum of \$10,000.00 for loss of congenial employment.

Past Transportation

[163] The Claimant claims the sum of \$6,040.00 under this head in respect of travelling to and from medical appointments and physiotherapy.

[164] On the basis of receipts, the Defendants have submitted a cost of \$3,890.00 for the cost of transportation.

Discussion and Analysis

[165] Past transportation costs flow naturally from the tort for which the Defendants have been found liable provided that they are required and are reasonable. These expenses are normally proved by admittance into evidence of receipts for such costs. In most cases, these expenses are agreed by counsel. Sadly this has not occurred in this matter.

[166] The onus is on the Claimant to prove his loss. Receipts evidencing this expenditure were not admitted into evidence. The Claimant has therefore failed to discharge the burden of proof, which rests upon him. In these circumstances, I can only award the sum of \$3,890.00 accepted by counsel for the Defendants.

Future Transportation

[167] Mr. Greenidge submitted that the Claimant will continue to incur transportation expenses in the foreseeable future related to future visits to the doctor, physiotherapist and pharmacy. He submitted also that the Claimant is still unable to travel by public transportation, which makes his cost of commuting higher. Counsel conceded the difficulty in quantifying this claim with any degree of specificity and recommends that this court adopts the broad-brush approach. The sum claimed is \$53,760.00.

[168] Once again the submission of counsel for the defendants is that the Claimant has returned to his pre-accident state and therefore no award should be made for future transport.

Discussion and Analysis

[169] Having regard to my analysis of the medical evidence of Mr. Gill and Dr. Browne and my finding that the Claimant has not returned to his pre-accident state of health, a claim for future transportation is a legitimate head of damage. The difficulty in quantifying this claim is no bar to the court's duty to assess this item of loss.

[170] To assist me in this regard, I have looked at the various medical reports and find some measure of assistance in the report of Mr. John Gill dated 15 April 2010. There, Mr. Gill opines that the Claimant is:

“**likely** (emphasis added) to require future medical care for the lower back pain. This care is **likely** (emphasis added) to consist of but not limited to:

- (1) **Physiotherapy**- 12 sessions per year at \$100.00 per session.
- (2) **Physician visits**- 5 visits per year at \$200.00 per visit.
- (3) **Pharmacy**- \$2000.00 per year for analgesics.

Provision should be made for the requirement of interventional pain management; the cost of this procedure is estimated to be \$5,000.00.”

[171] An analysis of this prognosis leads me to the view that the Claimant will need to travel for care and treatment at least 17 times per year. Applying a conservative rate of \$70.00 per trip, the total is \$ 1,190.00 per year. His period of partial disability until retirement is 15 years which gives a total of \$17,850.00. Due to the level of uncertainty inherent in Mr. Gill’s opinion as I have outlined in parenthesis at paragraph [136] above, I will discount this sum by 10%, which leaves a total of \$16,065.00.

[172] I therefore award the Claimant the sum of \$16,065.00 for future transportation.

Future Medical Care

[173] Mr. Greenidge submitted that the Claimant is entitled to compensation for the cost of medical care which he will likely incur in the future as a result of his injury. He relied upon Dr. Browne's opinion in her report that the Claimant's back problems may wax and wane sometimes for years, in which case he should seek medical attention for pain relief. He relied also upon Mr. Gill's opinion that any sudden or extended excursion [sic] of the lumbar spine may precipitate discomfort and re-initiate severe lower back pain.

[174] The Claimant was advised against continuing in his current job because of the possibility that he would re-initiate severe lower back pain. The sum sought as compensation for future medical care is \$72,200.00.

[175] Mr. Mottley QC did not dispute the submission that the Claimant is entitled to the cost of his medical care. He contends however that this case does not attract an award for future medical care. Counsel for the Defendants submitted that there is no cost for future medical care or

future transport and hence no award ought to be made under these heads.

Discussion and Analysis

[176] I have already found liability in the Defendants for this accident. All medical expenses reasonably incurred as a result thereof are recoverable since they flow from the tort. The full particulars of the claim for future medical care have not been set out. The evidence of Mr. Gill at paragraph [141] above is instructive in this regard. The cost of interventional pain management is \$5,000.00. The other prospective expenses amount to \$1,000.00 per year for “physician visits” and \$1200.00 per for physiotherapy making an aggregate of \$2,200.00 per annum. With respect to the multiplicand, I will apply a multiplier of 15 for the reasons set out at paragraph [171] of this decision. Using a multiplicand of \$1,000.00 and a multiplier of 15, we arrive at the sum of \$15,000.00 for physician visits. Applying the same multiplier to a multiplicand of \$2,200.00, we arrive at the sum of \$33,000.00 for future physiotherapy. This makes an aggregate of \$48,000.00 for future physician visits and physiotherapy. Having regard again to the uncertainty in the opinion of Mr. Gill set out in parenthesis above, I will

discount this sum by a similar amount of 10% which leaves a total of \$43,200.00. The added cost of \$5,000.00 for interventional pain management gives us a total of \$48,200.00. This sum I award for future medical care.

Smith v Manchester Award

[177] Mr. Greenidge submitted that the Claimant runs a substantial, rather than a speculative or fanciful, chance of being at a disadvantage on the labour market. He further submits that the Claimant is at a distinct disadvantage since any form of employment requiring physical exertion is out of his reach. His disadvantage on the labour market, counsel argues, is long-term and ought to be compensated. The amount claimed as reasonable compensation is \$50,000.00.

[178] Mr. Mottley QC submitted that since Dr. Gill opined that the Claimant was fit for employment, which would not require heavy lifting, bending frequently or climbing, no award ought to be made under this head.

Discussion and Analysis

[179] An award under this head compensates the Claimant for the loss of earning capacity occasioned by his physical injury. See **Smith v Manchester Corporation (1974) 17 K.I.R. 1. CA**. It is not a

prerequisite to an award that the Claimant be in employment at the date of trial **Cook v Consolidated Fisheries [1977] I.C.R. 635**.

[180] The evidence of Mr. Gill establishes that the Claimant will be handicapped on the job market. His inability to return to his previous employment but to engage in employment not requiring “heavy lifting, bending frequently or climbing” is clearly indicative of such a handicap, the extent of which is unknown. The medical evidence of Mr. Gill suggests that it will last for the duration of his working life.

[181] Dr. Browne opined “his back problems may well become chronic, waxing and waning sometimes for years, as often with these types of accidents”. This evidence also suggests that his reduced earning capacity is long-term and I so hold.

[182] There is no precise formula for calculating such an award and none has been suggested by counsel for the Claimant. This was highlighted in **Moeliker v Reyrolle & Co [1977] 1 W.L.R. 132 CA** where Browne LJ noted that:

“It is impossible to suggest any formula for solving the extremely difficult problems involved in...the assessment. A judge must look at all the factors which are relevant in a particular case and do the best he can.”

[183] In spite of this I must do my best to arrive at a suitable and reasonable award under this head. I have therefore decided to use the

multiplicand/multiplier method so as to avoid the uncertainty inherent in the several decisions on this head such as **Foster v Tyne and Wear County Council [1986] 1 All E R 567** and **Ronan v Sainsbury's Supermarkets Ltd [2006] EWCA Civ 1074**.

[184] In the matter at bar, the Claimant has been thrown onto the job market. It is clear therefore that he must compete with persons more able than himself. As previously mentioned, there is no evidence as to what work he is now physically able to perform having regard to his chronic back pain. I have already made awards for future loss of earnings and am mindful that there is a risk of overlap between this head and future loss of earnings. I consider that the sum of \$50,000.00 sought by the Claimant is sufficiently large that it would constitute such an overlap.

[185] I am of the opinion that an award representing two years purchase at the rate representing the difference between his pre-accident earnings and his current invalidity benefit calculated previously at \$12,542.92 annually would adequately meet the justice of this case. The **Smith v Manchester** award is therefore the sum of \$ 25,085.84.

Special Damages

[186] The injured victim is entitled to recover pecuniary damages in respect of expenses incurred due to the accident. The Claimant therefore seeks

to recover the cost of medical consultancies, physiotherapy, medication and medical reports of \$9,164.06. The claim under this head is \$28,594.00 made up as follows:

i.	Medical costs of Dr. Sonia Browne	\$1,270.00
ii.	Expenses of Ms. Jacqueline King	\$1,940.00
iii.	Mr. John Gill	\$21,540.00
iv.	MRI, X-Rays, medication	<u>\$3,844.00</u>
	Total	\$28,594.00

Discussion and Analysis

[187] Special damages are distinguishable from general damages. General damages in tort are such damages as are presumed to flow directly and naturally as a consequence of the tort whereas special damages are not so inferred. As a consequence, special damages must be specially claimed and strictly proved. See **Stroms Bruks Atie Bolag v Hutchison [1905] A.C. 515** per Lord Macnaghten.

[188] Counsel for the Defendants has not opposed the special damages sought by the Claimant save and except to the extent previously mentioned. There has been no allegation that they were nor reasonably incurred. I therefore award the Claimant the sum of \$28,594.00 as special damages.

[189] Mr. Gill during his testimony, in response to a question from Mr. Mottley QC, gave the sum of \$5,000.00 as his expenses for attending court. That sum is a legitimate expense and ought to be factored into the damages awarded to the Claimant. I therefore award the Claimant the sum of \$5,000.00 in respect of Mr. Gill's costs.

Summary of Various Awards

[190] The various sums awarded are as follows:

1. Pain and suffering and loss of amenity	\$175,000.00
2. Past loss of earnings	\$138,537.22
3. Future loss of earnings	\$ 82,618.69
4. Past domestic assistance	\$ 88,920.00
5. Future domestic assistance	\$93,600.00
6. Loss of congenial employment	\$10,000.00
7. Past transportation	\$3,890.00
8. Future transportation	\$16,065.00
9. Future medical care	\$48,200.00
10. Smith v Manchester award	\$25,085.84

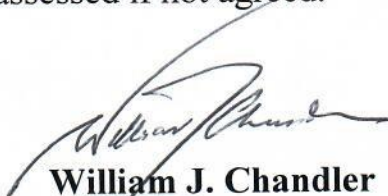
11.Special damages	\$28,594.00
12.Mr. Gill's costs	<u>\$5,000.00</u>
Total	\$715,510.75

[191] Under the head of past domestic assistance, the law requires me to extract an undertaking from the Claimant to pay over the sums awarded to the caregivers who rendered past domestic assistance. For the sake of completeness, I now accept the Claimant's undertaking given through his counsel.

Disposal

[192] In the circumstances, the court orders as follows:

1. The Defendants do jointly and severally pay to the Claimant damages assessed in the sum of \$715,510.75
2. Interest will accrue on the damages at the rate of 6 per cent per annum from today's date until payment.
3. The defendants do jointly and severally pay to the Claimant his costs to be assessed if not agreed.


William J. Chandler
High Court Judge