IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV 00054/2004

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| BETWEEN | KENROY BIGGS | CLAIMANT |
| AND | COURTS JAMAICA LTD | FIRST DEFENDANT |
| AND | PETER THOMPSON | SECOND DEFENDANT |

OPEN COURT

Christine Hudson instructed by K.C. Neita and Company for the claimant
Lowel Morgan and Kerry-Ann Sewell instructed by Nunes Scholefield Deleon and Co-Partners for the first defendant

ASSESSMENT OF DAMAGES - APPLICATION FOR ADJOURNMENT - SECTION 31D (d) OF THE EVIDENCE ACT - LOSS OF FUTURE EARNINGS - LOSS OF EARNING CAPACITY - COST OF FUTURE MEDICAL CARE - APPLICABILITY OF MULTIPLIER/MULTIPLICAND APPROACH TO COST OF FUTURE MEDICAL CARE - SIZE OF MULTIPLIER - RULES 10.5, 10.6 AND 10.7 OF THE CIVIL PROCEDURE RULES

December 10, 15, 18, 2009, and January 22, 2010

SYKES J.

1. This is a case in which liability has been admitted and the current trial is on the question of the quantum of damages that should be awarded to Mr. Kenroy Biggs.

2. On the night of March 23, 2003, at approximately 11:00 pm, Mr. Kenroy Biggs, then nineteen years old, was walking along the Cane River Road, in the parish of St. Andrew. He heard a skidding sound. The next thing he knew was that a truck driven by Mr. Peter Thompson, an employee of Courts Jamaica Limited ("Courts"), had pinned him against a wall - from his stomach down to his feet.

3. He tried to stand up after the accident but he noticed that he was bleeding "a whole lot from his foot". This was his left foot. He was

taken to the Bull Bay Police Station where he remained for about one and a half hours before being taken to the Kingston Public Hospital ("KPH").

**The nature and extent of injuries**

4. Mr. Biggs complained of feeling pain in his hip and "belly bottom" from the time of the accident. He noted that the flesh on his left foot was torn away. The left foot was crushed from the knee down to the ankle. He also had bruises to his side and right arm.

5. While at the police station, he found out that he was not able to urinate and this added to his pain and discomfort. This was the beginning of his urological problem that has continued to this day.

Treatment at KPH

6. By the time he got to KPH, he was feeling weak and had lost a lot of blood. He was taken to the operating theatre for surgery to be done on his foot. The urination problem was solved by way of a tube and urine bag.

7. He underwent further surgery where skin was removed from his left leg and placed at "the area of the wound." After surgery, he was placed in intensive care for approximately one week and thereafter he was on the public ward. Each day his wound would be dressed. Dead flesh was removed. Mr. Biggs says this treatment was painful.

8. After six months, it was decided that the left leg would be amputated. During this six-month period he was unable to go to the bathroom without assistance. He was wearing diapers. He had to be lying on his back for virtually the whole six months prior to the amputation. In order to prevent bedsores he was placed on an "egg crate mattress."

9. The decision to amputate the left leg came after the attempts at saving it failed. Mr. Biggs underwent at least three surgeries in relation to this leg before amputation. The attempt to save the leg involved the use of plates, screws, fixator and antibiotics. Inspite of these efforts, his leg became discoloured - a sign of a lack of

circulation of the blood which means that the leg has "died". The leg was amputated above the knee. He was discharged from KPH in September 2003. He could not urinate normally. He had to use a urine bag.

10. While he was in the hospital, Mr. Biggs experienced great travail in adjusting to the urine bag. It kept falling out. There were times when no urine was going into the bag. The rectification of this problem involved using some kind of rod to insert into the tube which itself was coming from a hole in his body. The clearing of the tube was done without pain killers and this process caused great discomfort. At times the urine bag overflowed. The misery and embarrassment are obvious. He returned to KPH for follow up treatment of that bit of leg left after the amputation. The amputation site finally healed in February 2004.

11. He also visited the urology clinic at KPH. On three occasions between December 2, 2003, and May 24, 2004, Mr. Biggs was readmitted to KPH because of infections related to his urological problems. Despite the best efforts of the medical staff at KPH, the catheter used to extract the urine was frequently blocked. The problem, from a medical standpoint, was how to enable Mr. Biggs to evacuate urine in the normal manner. After due deliberation, his medical team advised that he needed an operation which was best done in the United States of America ("USA"). The infections did not abate.

Dr. Rory Dixon's Report

12. Mr. Biggs' description of what happened on the night of the accident and what took place while he was a patient at KPH is more than amply supported by medical evidence. According to the report of Dr. Rory Dixon, Consultant (Ag.), Orthopaedic Department, dated November 4, 2003, Mr. Biggs presented with the following injuries:

    a. abrasions to right side of chest and upper abdomen;

    b. abrasions to medial aspect of right arm;

c. mangled left lower limb with wound extending from mid thigh across the posterior aspect of the knee, down to the leg. No sensation below the knee;

d. fracture right and left superior and inferior rami of the pelvis;

e. open facture of the left femur (Grade IIIc) with injury to pelvis;

f. transaction of the urethra with inability to pass urine

13. Dr. Dixon states that Mr. Biggs was taken to the operating theatre where the left popliteal artery was repaired. An external fixator as placed across the fractured femur and there was skin grafting done at the area of skin loss. There was a suprapubic cystostomy to drain the urinary bladder. This is the procedure to insert the tube mentioned earlier through which the urine was extracted.

14. The wounds became infected. They were treated effectively and stabilized.

15. He was taken back to operating theatre for surgery. This surgery was for open reduction and internal fixation of the left femur. During this surgery, the site of the repaired popliteal artery was torn inadvertently. The artery was repaired immediately with restored blood flow.

16. There was significant blood loss during the surgery (five litres). The left leg became infected and required above the knee amputation. Dr. Dixon expressed the view that Mr. Biggs had a permanent disability of 25% of the whole person.

Dr. Wan's first report

17. Dr. Robert Wan is a consultant urologist. He has produced three reports. The first one dated October 31, 2006, indicated that when Mr. Biggs was admitted to KPH he had multiple injuries including a fractured pelvis and injury to urethra. Mr. Biggs was treated by the teams from the departments of general surgery, orthopaedic and

urology. His urological treatment, as mentioned already, included a suprapubic cystostomy which was used to void his urinary bladder. This was a necessary procedure "because of a severe injury to [the] urethra."

18. The report also indicates, that Mr. Biggs has had persistent urethral stricture. Mr. Biggs was seen several times over the period April 2003 and October 30, 2006. Mr. Biggs, when last seen on October 30, 2006, was "voiding quite well."

19. The prognosis was that Mr. Biggs, "will need long term, repeated urethral instrumentation (which he is now doing himself) for a very long time, likely for the rest of his life." Also Mr. Biggs "has a significant erectile dysfunction, which he (Biggs) has stated was not present prior to his injury." Viagra was recommended for treatment of the erectile dysfunction.

20. Dr. Wan's conclusion was that Mr. Biggs was a young man who "has sustained a severe urethral injury which necessitated reconstructive surgery."

Dr. Wan's second report

21. The second report is dated September 11, 2008. Dr. Wan saw Mr. Biggs on July 25, 2008. Mr. Biggs complained of "suprapubic discomfort, perineal discomfort, slowing of his stream and a split stream and erectile dysfunction." The diagnosis was that there was a "recurrence of his urethral narrowing." It is "likely that [he will] need repeated urethral dilations in the future." Ominously, Dr. Wan indicated that "[s]hould urethral dilations prove to be impossible because of tightening of the urethral stricture, he may need reconstructive surgery, which would be a major undertaking."

Dr. Wan's third report

22. Dr. Wan saw Mr. Biggs on July 15, 2009. He complained of "diminished urinary stream with dribbling and malodorous urine." On August 3, 2009, cystoscopic examination showed that "he was found to have a recurrent urethral stricture in the area of previous repair." There was also "narrowing of the bladder neck."

23. This recent examination convinced or reinforced Dr. Wan's earlier conclusion that it seems that Mr. Biggs will definitely need "a long term programme of urethral dilations." Dr. Wan gives the current cost of this as $6,000.00 which will increase in January 2010.

Treatment in the USA

24. Mr. Biggs was able to secure a visa and so came under the treatment of Dr. Gousse, a urologist at the Jackson Memorial Hospital in the state of Florida, USA. Mr. Biggs was seen by the doctor in November 2004 which resulted in an appointment for surgery in March 2005. Between November 2004 and March 2005, the blockage, clearance, blockage saga of the catheter continued.

25. Until the surgery was done he stayed in the United States but because of the distance he lived from Jackson Memorial, the blockage removal was done at La Aventure Hospital. He found out much to his chagrin, that the pain experienced in clearing the blockage was just as intense, or even greater than he experienced at KPH. Mr. Biggs stated that tenderness was not a virtue of the nurses at La Aventure.

26. Dr. Gousse performed the corrective surgery in March 2005. In effect Dr. Gousse had performed reconstructive surgery on the urethra of Mr. Biggs. A catheter was placed in his penis. Others were placed in his groin and his side. The operation was successful but he had to lie still for approximately 3 - 4 weeks. For the first time in two years he did not have to wear a urine bag.

27. The euphoria was short lived. Mr. Biggs suddenly found that he had no control over his urine function. There was no sensation or indication when he needed to urinate. Without the normal sensation of when he needed to urinate, he would suddenly find himself drenched in urine. Needless to say this must have been a great source of embarrassment and mental distress. This lasted for about two weeks. After two weeks, some sensation returned but that was followed by his inability to pass urine.

28. Dr. Gousse performed a second surgery to remove scar tissue and a catheter was placed inside Mr. Bigg's penis which resulted in a return

to the use of the urine bag. The cycle of blockage, clearing, blockage resumed. The nurses, said he, were not gentle and this only increased his discomfort.

29. Dr. Gousse did a total of three surgeries. He was finally discharged by Dr. Gousse in April 2006. He was able to pass urine but it was still painful to do so. He was taught the technique of self dilation which was to ensure that the urine was indeed evacuated from the body.

Dr. Angelo Gousse's Report

30. Without detailing the many pages of Dr. Angello Gousse's reports, it is sufficient to say that the proposed surgery to deal with Mr. Bigg's inability to void via the urethra was done and apparently successful. However, Dr. Gousse did note that Mr. Biggs did present with narrowing of the urethra which did not allow passage of the endoscope. This was on August 23, 2005. The doctor noted that this was not the case when he saw Mr. Biggs on April 12, 2005. This was approximately one month after the urethroplasty, as the procedure for reconstruction of the urethra is known, which was done on March 3, 2005.

31. Dr. Gousse saw Mr. Biggs again on November 9, 2005. Mr. Biggs continued to complain of recurrent urethral stricture. The doctor noted that for four months post surgery, Mr. Biggs did well.

32. What is clear from the reports is that in the period immediately after the surgery, Mr. Biggs was coming along nicely then from August 2005 onwards there was obstruction of the urethra which necessitated "catheterization in order to maintain patency of the urethra."

33. In the end Mr. Biggs was presented with the option of further surgery or self catheterization. He opted for the latter.

34. It appears that Mr. Biggs was last seen by Dr. Gousse on March 8, 2006. He noted that Mr. Biggs was voiding well and was performing self-catheterization.

35. In summary, Dr. Grousse and Dr. Wan agreed on two things. First, Mr. Biggs would need to have repeated dilations if patency (opening) of

the urethra was to be maintained. Second, further corrective surgery may be needed if the dilations prove ineffective.

Back to KPH

36. Within three months of his arrival back in Jamaica, Mr. Biggs was back at KPH. He was infected at the site of the catheter in the penis. He is still having problems passing urine. He complains that at times when he feels like he needs to urinate, he goes to the bathroom but no urine comes. His stomach would "puff up and [he] would start to feel terrible pains in [his] belly."

37. When he cannot pass his urine he goes to KPH or to Dr. Wan where he is dilated. The procedure is that rods of varying lengths and diameters would be pushed into his penis. He has been dilated at least twice since he returned to Jamaica. The most recent experience of having to be dilated was in July 2009. This was done by Dr. Wan, who he has been seeing privately.

38. He says that Dr. Wan has greeted him with the unpleasant news that the dilation of his penis is life long. The frequency of the dilation depends on the rate of scar tissue formation inside the penis.

Dr. Sadiki Fletcher's report

39. Dr. Fletcher is a general practioner. I cannot tell from the name whether the doctor is male or female so I will use the gender neutral expression doctor or Dr. Fletcher. Dr. Fletcher examined Mr. Biggs on March 18, 2008. Mr. Biggs was complaining of lower back pain and pain in the auxiliary area. A number of tests were done and the relevant one for this assessment is that relating to the lower back pain and pain in the auxiliary area. The doctor concluded that "Mr. Biggs is likely having lower back pain secondary to motor vehicle accident and subsequent complications." In effect, Dr. Fletcher is making a connection between the accident and the lower back pain.

Dr. Grantel Dundas' reports

40. Dr. Dundas, consultant orthopaedic surgeon, has produced two reports. One is dated May 8, 2006 and the other June 1, 2006. The second one will be dealt with later. In the first report of Dr. Dundas,

it was noted that Mr. Biggs had a left mid thigh amputation with irregular contours which were said to be inappropriate for a prosthetic device. The left hip was mobile but it was painful on extension and was resistant to abduction of the joint.

41. On the right side, there was normal power in the quadriceps and hamstrings. The ankle movements were not impaired. However, it was found that Mr. Biggs "had synovitis and tenderness at the mid-tarsal areas which limited supination and pronation due to pain." The right upper extremity (right arm) had full range of motion. He also had a scar which had healed well.

42. Dr. Dundas' diagnosis was that Mr. Biggs suffered:

    a. a left above knee amputation;

    b. anterior cruciate ligament instability of the right knee;

    c. chronic urinary tract infection with urethral stenosis (narrowing of the urethra);

    d. mid-tarsal arthrosis; and

    e. fractured pelvis.

43. It was noted as well that Mr. Biggs had:

    a. butterfly pelvic fracture with mild misalignment of the united bones;

    b. a bony spur had developed to the rear and side of the end of the bone where the amputation had occurred;

    c. significant osteoporosis of the left femur consistent with an above knee amputation;

    d. diminution of the joint space in the right knee with a cartilage gap of 5mm on the lateral aspect and 3mm on the medial aspect.

44. Dr. Dundas noted the impairment of Mr. Biggs as follows:

    a. 90% of the left lower extremity or 36% of the whole person;

    b. 17% of the lower right extremity or 7% of the whole person;

    c. the impairment of the right forefoot amounts to 10% of that extremity or 4% of the whole person;

    d. the urinary impairment amounts to 20% of the whole person.

45. The combination of what has been noted in the immediately preceding paragraph amounts to 55% of the whole person.

46. Dr. Dundas recommended that the lower left extremity will have to be revised before any prosthesis can be fitted.

**The nature and gravity of resultant physical injury**

47. Mr. Biggs now has one leg. He moves around with the aid of crutches. He has gained weight and the weight loss programme at the Dragon gym is not going fast enough. Mr. Biggs complains that his right knee and right ankle are now paining him. He says that there is constant pain in his right ankle whenever he stands. At times, the knee and ankle become swollen.

48. Since the accident, Mr. Biggs has pain in the lower back, chest and hip. Painkillers alleviate the suffering from these pains. His back is now a frequent source of pain. The connection between the lower back pain and the accident was made by Dr. Fletcher. The chest pains are not as frequent as the back pains.

49. In the period since the accident Mr. Biggs has made the alarming discovery that his sexual function is impaired. He was too ashamed to speak to anyone about it. He did muster the courage to raise the issue with Dr. Wan until 2006. The miracle drug Viagra helps but is not quite effective.

50. In fact, he says that Viagra gives him the sensation as if he is "going to pass out." Dr. Wan prescribed another medication. This medication has eliminated the sensation but as far as his erection is concerned it is not as efficacious as Viagra. So depressing has this situation become that he, from time to time, loses interest in sex. He is terrified at the prospect of members of his community finding out about his current state.

**The pain and suffering endured**

51. From the narrative given so far, it is plain that Mr. Biggs has suffered great pain. He was in pain from the night of the accident. The various treatment regimes, for example, the traction on his leg, the clearing of catheter to his penis, the dilation of his penis, all produced significant discomfort and pain. It has already been noted that the dilation of the penis will be a life long matter and this means that he will experience pain and discomfort whenever this is being done.

52. Mr. Biggs has spoken of back, hip and chest pains. He has spoken of pain in his right knee and right ankle.

53. Of course, there is the discomfort and pain suffered after his left leg was amputated and it was healing. There is more pain and discomfort to come when the revision of his left stump is done to accommodate the prosthesis.

**Loss of amenities**

54. Mr. Biggs indicates that he is now unable to play football and basketball. Since his misfortune, he has not been to any parties or dances as was the case before. He enjoyed riding his bicycle.

55. He has also lost the freedom of a body without all these injuries and complications. As it has been said, loss of good health is loss of something of great value. Mr. Biggs is simply unable to enjoy life to the fullest as he did before the accident. This loss, even if he were a couch potato, would attract compensation.

**Psychiatric evaluation**

56. There is a report from Dr. Frankly Ottey, dated October 20, 2006. In that report Dr. Ottey stated that Mr. Biggs was "suffering from

Adjustment Disorder with anxiety and depressed mood." The stressors were said to be "the traumatic events following the accident in March 2003 and particularly the loss of his left leg and the development of an erectile dysfunction." There was no evidence of thought disorder, hallucinations or delusional thinking. Neither was there any "impairment of attention, concentration, orientation or memory." The report concludes that Mr. Biggs "is functioning at 65% of his full overall psychological functioning."

57. The main thrust of the report was to show that Mr. Biggs, at some point, suffered depression and anxiety. He had anxiety about whether he would be able to engage in sexual relations, father a child by what may be called in these days of invitro fertilization, the old fashioned way.

**Quantum of damages**

58. The parties have agreed the following amounts:

    a. special damages - JA$432,506.37;

    b. post discharge cost of extra help - JA$738,000.00;

    c. pre-trial loss of earnings - JA$1,735,000.00;

    d. the cost of renting property (excluding utility costs) in USA - US$12,750.00;

59. Under special damages there are contested claims for:

    a. cost of wheel chair and crutches (JA$8,500.00);

    b. cost of medication from Victoria Pharmacy (JA$2,330.00);

    c. visit by Mr. Bigg's mother while he was in hospital (JA$115,200 at JA$800 per trip for six months);

d. claimant's cost of trips to visit outpatient department KPH for treatment (JA$2,500 per trip for 40 trips).

e. voluntary care rendered by mother while the claimant was in the hospital (JA$72,000.00);

f. costs at Jackson Memorial Hospital (US$57,365.52);

g. cost of medication in USA (US$519.77);

h. cost of wire transfer (JA$12,000.00);

i. cost of future medication and dilation -

(i) cost of medication for erectile dysfunction - JA$8,075.24 per month;

(ii) cost of future dilation - JA$6,000.00 per six months.

j. cost of travel, domestic assistance and utilities while in the United States

(i) transportation to hospital - US$1,398.00;

(ii) extra help from mother while in USA - US$24,000.00 at US$4,000.00 per week from November 21, 2004 - December 2004;

(iii) extra help from cousin while claimant in USA - US$4000.00 at US$250.00 per week from December 2004 to April 2006;

(iv) miscellaneous expenses - US$6,000.00;

k. cost of non immigrant visa application:

(i) cost of first visa application both claimant and mother (rejected) - JA$12,400.00;

(ii) cost of second visa application (successful) - JA$12,400.00;

(iii) cost of third visa application (mother) - JA$6,200.00;

(iv) cost to claimant to gain extension - JA$6,200.00;

(v) cost of airline tickets for mother and claimant - JA$70,000.00;

(vi) cost of airline ticket to mother for second visit - JA$24,000.00;

(vii) cost of airline ticket to mother for third visit - JA$19,000.00;

(viii) cost of return ticket to Jamaica (claimant) - JA$19,000.00.

Contested special damages - cost wheel chair, crutches, drugs at Victoria pharmacy

60. The claim for wheel chair and crutches is allowed. No receipts were tendered but having regard to the injuries there is no doubt that these items would be needed. The costs are not excessive. The claim for JA$2330.00 for drugs purchased at Victoria pharmacy is accepted. There are three receipts supporting the claim.

**Cost of travel to hospital and domestic assistance in Jamaica and USA - general principle relating to recovery of cost of hospital trips and domestic assistance and proof of special damages**

61. There is a claim for an item of special damages for the costs of Mr. Bigg's mother travel to the hospital while he was there and the claim for extra help while he was in the hospital. The total from these two claims is JA$182,000.00. The relevant legal principle applicable to this item of claim will be stated after I have stated the general principle applicable for special damages.

62. It is well settled that a claimant is entitled to recover losses and expenses incurred arising directly from the negligent conduct of the tortfeasor. It is equally well established that a claim for special damages must be pleaded and proved strictly. However, this second statement of principle has been adjusted by the Court of Appeal of Jamaica to take account that of the fact that in Jamaica, some claimants, by virtue of their station in life, do not keep records at all (***Walters v Mitchell*** (1992) 29 J.L.R. 173 by Wolfe J.A.). In these instances, the trial court uses its best judgment of conditions in Jamaica and make an award provided, of course, that the court has accepted that the claimant incurred/suffered the loss or incurred the expense.

63. As expansive as the principle established by the Court of Appeal is, there are limits. If there were no limits then the exception would swallow the rule and the rule disappears completely. It would seem to me that where a claimant is relying on expenses incurred in a jurisdiction outside of Jamaica, then the strict requirements of the special damages rule ought to be adhered to because, the court is not able to use its judgment in making any intelligent assessment of costs in that jurisdiction and the absence of supporting receipts and bills, the problem is compounded. On the contrary, where a claim is made in respect of costs incurred in Jamaica, the court may be able to use its judgment to determine whether the sum claim is reasonable assuming, of course, that the court accepts that the costs were incurred and it was reasonable to incur them. It is this understanding that I will be applying in respect of claims made for costs in Jamaica and claims made for costs in the USA.

64. I now return to the principles applicable to cost of travel and domestic care. The applicable legal principle is to be found in the House of Lords decision of ***Hunt v Severs*** [1994] 2 W.L.R. 602. This case has been relied on in Jamaica for some time in dealing with claims of this nature.

65. In ***Hunt***, there were three issues before the House of which only two are relevant to this case. The first was the cost of the defendant's

travel to visit the claimant while she was hospitalised. The second was the cost of gratuitous case rendered to the claimant by the defendant after her discharge. The trial judge had awarded a sum of money for the cost of visiting the defendant and another amount for the cost of caring for the claimant. Both sums were upheld, in principle, by the House of Lords, although on the unusual facts of that particular case, the awards were set aside because the tortfeasor was the caregiver. Lord Bridge held that a claimant is entitled to recover the cost of gratuitous services rendered to him by a relative or a friend if those services were rendered necessary by the injuries suffered by the claimant. It is said that the basis for allowing this recovery is to enable the voluntary caregiver to be recompensed his or her expenses since he or she would not have a cause of action against the tortfeasor. If such sum is recoverable, then having regard to the basis of the recovery, the successful claimant, on recovery of the sums involved, is a trustee of the sums and has to hand them over to the caregiver. According to Lord Bridge, "the award's central objective [is] compensating the voluntary carer" (page 363).

66. The House in ***Hunt*** accepted that the defendant's visits "made a valuable and important contribution to her general well-being and were calculated to assist her recovery from the devastating consequences of the accident. But for the fact that the defendant was himself the tortfeasor, the propriety of the award under this head would be no more open to question than the award for his services as a voluntary carer" (pp. 356/7).

67. There is no evidence to suggest that in Mr. Biggs' case Miss Lorna Henry's (his mother) visits did not contribute to his recovery in the case before me and in that regard, the visits can be regarded as part of the care given to the claimant. Certainly, at the very least, the psychological benefits of maternal visits cannot be underestimated and in that sense, she provided necessary care. On this basis I am prepared to uphold the claim for the cost of travel (JA$115,000.00) but I have my doubts about the cost of care while Mr. Biggs was in the hospital. The evidence did not make it clear what exactly Miss Henry did which was not or could not have been done by the nursing staff. The evidence does not show that what Miss Henry did was

necessary. Thus this aspect of the claim is not recoverable (JA$72,000.00).

68. There is a claim for US$1,398.00 for travel to and from the hospitals in the USA. I do not see any receipt is support of this claim. I have no experience with traveling in the USA by taxis in the state of Florida. This sum is denied.

69. I take the point made by Mr. Morgan that the claimant did not provide strict proof of his 40 trips to KPH and has only proved strictly 21. The body of evidence makes clear that in this particular case, Mr. Biggs had to make an extraordinary number of trips to KPH. His urological problems and treatment did indeed require consistent visits and prolonged treatment. The facts of this particular case do suggest to me that 40 trips is not an unreasonable amount to be undertaken by Mr. Biggs. During the assessment, no issue was taken with the number of trips. I therefore award the full cost of travel for the number of trips (JA$100,000.00).

Cost of utilities and cost of care in USA

70. The application of the principle already stated means that in this particular case I am unable to make any award of the following expenses said to have been incurred while the claimant was in the United States. Mr. Kenroy Biggs is therefore unable to recover the following sums claimed:

    a. US$6,000.00 for electricity and water while staying at property rented in the USA. I am not familiar with costs of utilities in the USA generally and in the State of Florida in particular. I am not familiar with social and economic conditions in the part of Florida where these costs were said to have been incurred. Mr. Biggs ought to have produced affirmative supporting evidence to bolster his claim.

    b. US$200 - US$250 as cost of care given by Mr. Herman Darby to Mr. Kenroy Biggs. Miss Hudson has placed before the court a document called Federal Minimum Wage (1995 - 2009) as the basis for this claim. No admissible and reliable evidence was

adduced to indicate the source and status of this document. It appears to have been printed from a website. This, I dare say, is not sufficient for me to act on it. I do not know whether this website is reputable and even if it were, questions would still remain regarding the legitimacy and accuracy of what is placed there because being reputable does not mean infallibility. I do not know whether the website has any disclaimers or has sought to qualify in any way the information appearing there.

Cost of visa applications and air travel

71. For the costs associated with securing a visa as well as airline tickets these are my conclusions. The sum of JA$12,300.00 is recoverable (receipts dated June 15, 2005 and August 9, 2004). The sum of JA$133,039.00 (receipts from Travel Solutions Ltd) is recoverable. These costs were properly incurred to secure treatment in the USA.

72. For the cost of extra help from his mother while he was in the United States, Mr. Biggs is claiming US$24,000.00. It is not clear the basis of this figure. There is no reliable evidence to support this claim to US$24,000.00. As I understand it, she was employed in Jamaica and according to Mr. Biggs she was earning JA$4000.00 per week and her travel was from Jamaica to the USA. Only JA$24,000.00 can be recovered here.

73. Mr. Biggs says that he spent US$100.00 for renewing his visa to the USA. There is no receipt for this. I do not know how much these application cost. The claim is refused.

74. There is a claim of JA$12,000.00 for wire transfer. The evidence does not indicate why this cost was incurred and by whom. The claim is refused.

Cost of care at Jackson Memorial Hospital and purchase of medication in USA

75. The bill from Jackson Memorial Hospital shows the amount billed is less than the real cost of the service. The bill shows that in no instance was the sum paid greater than the amount actually billed. In

other words, Mr. Biggs did not pay nor was he billed the actual cost of the services. In light of this I do not see the basis for the claim of US$48,717.75. The sum awarded is US$21,335.00.

76. There are two bills from the University of Miami Medical Group. These total US$8,120.00.

77. There are receipts indicating purchase of medication from Walgreens pharmacy totaling US$366.32 and not US$519.77 as claimed.

**General damages**

Pain, suffering and loss of amenities

78. It is well established that the assessment of damages has two components. There is the objective part and the subjective part (see ***H.W. West & Sons v Shephard*** [1964] A.C. 326). The objective component deals with the actual injury and the subjective part takes account of the injury on the claimant. Additionally, there is a distinction between pain and suffering on the one hand and loss of amenities on the other (see Lord Scarman in ***Lim Poh Choo v Camden and Islington Health Authority*** [1980] A.C.174, 189G, reaffirming what was said in ***H. West & Son Ltd. v. Shephard*** [1964] A.C. 326). Lord Scarman made the very important point, often overlooked, that pain and suffering depends on the claimant's awareness of and capacity for suffering. Thus it is entirely possible for there to be a low award in a personal injury case for fairly serious injuries if the evidence shows that the claimant is unable to appreciate the suffering or has no capacity for awareness of the pain. On the other hand, the lack of awareness of pain and the lack of capacity for suffering does not necessarily mean that the award for personal injury will be low. It can be quite high, if the injuries in and of themselves are so serious that the claimant has, on an objective view, suffered a significant loss. This was indeed the case in Lim Poh Choo were the claimant was unable to appreciate her suffering and pain but suffered a substantial loss.

79. The combined effect of these principles is that where the claimant suffers a substantial loss and is acutely aware of his suffering and undoubtedly suffers greatly from the injuries, then the award is going to be a high one.

80. Many cases were cited by both sides on the question of pain suffering and loss of amenity. Miss Hudson, in effect, was asking that I reject a number of decisions from the Supreme Court on the basis that the awards were inordinately low. I am afraid that I cannot do as suggested by counsel. That is a function for the Court of Appeal and while they are not binding authority, nonetheless they represent what the Supreme Court thinks is an appropriate award in the circumstances of those cases. It must be remembered that while individual judges deliver judgments, the judgments are that of the Supreme Court. Thus counsel would have to make a powerful argument that those cases were decided in error. The error being (a) an incorrect assessment of the facts; (b) misstatement of legal principle; or (c) error in applying law to fact. None of this has been demonstrated here and so I am afraid I have to take into account the cases relied on by the defendant.

81. I need not refer to all the cases. The case cited by Mr. Morgan that is of most help is the case of ***Francis v Baker*** S.C.C.A. 109/91 (delivered November 16, 1992). In that case, the claimant was shot and injured by the police. His left kidney, left spleen, left hemi-diaphragm, left lung, pleura and small intestines were damaged. In fact, the claimant lost his left kidney and left spleen. There was damage to the spinal cord. The claimant was a paraplegic with a 35% whole person disability. The claimant was a sports man who participated in badminton, swimming, jogging and working out in the gymnasium. Miss Hudson said that I am to ignore this case. Quite a bold submission given that the decision is from the Court of Appeal and not the Supreme Court. The trial judge awarded $400,000.00 for pain, suffering and loss of amenities. The Court of Appeal increased this award to $500,000.00. The current value of that award is $8,020,833.00. There was no indication of urological damage.

82. There were cases cited where there were injuries to lower limb followed by amputation. There is ***Clarke v NWC*** Suit No. C.L. 1993 C 371 (delivered October 25, 2001) (Khan's volume 5, page 21). The claimant had an open fracture of the lower third of the right tibia. There was an above knee amputation followed by a further

amputation. There was 36% whole person disability and it appears that there was some degree of sexual dysfunction. The court awarded $3m which is valued now at $7,267,759.56. There is no report of urological damage.

83. There is the case of ***Lealan Shaw v Coolit Limited and Glenford Coleman*** Suit No. C.L. 1991 S 109 (delivered July 26, 1995) (Khan's volume 4 at page 41). The claimant suffered injuries which culminated in an **above knee amputation**. He was awarded $1,500,000.00 for pain and suffering and loss of amenities. The current value is **$4,967,418.71**. Again, there is no report of urological damages. The report in Khan's does not mention any whole person disability though it does say that the claimant suffered 70% permanent impairment to lower limb. There is also no indication of any kind of sexual dysfunction.

84. It would seem to me that injuries which result in an above knee amputation attract high awards. It appears that the range is at least $4m. Where there is urological damage, the award goes up to around $6m. If there is impairment of sexual function then the award goes up to $7m. Whether it goes far above $7m seems to be influenced by the extent of the dysfunction. If there is a complete loss of sexual function then the award gets to around $8m.

85. In the case of Mr. Biggs, the impairment of sexual function is not total. Medication does provide assistance. Neither is he a paraplegic. He has not suffered loss of any internal organs. What he has suffered is damage to his urological system and as serious as those injuries are, it is not a total loss of urinary function. All the medical reports say that the urethral constriction with the consequential need for dilation is life long. This is a significant inconvenience and the dilation is done without anaesthetic. The evidence is that this treatment is painful.

86. I take into account that Mr. Biggs has not only suffered great pain on the night of the injury but the treatment regimen has undoubtedly been unpleasant. The constant dilation with it, is accompanying discomfort. The traction of his left leg before amputation. The leg was eventually amputated. This fact alone is quite traumatic. Mr. Biggs

would have moved, emotionally, from a position where his leg might be saved to one where his leg had to be amputated. This would have a serious psychological impact on him.

87. Mr. Biggs not only had the leg amputated but he also had a butterfly fracture of the pelvis. His right leg shows "synovitis and tenderness in the mid-tarsal areas which limited supination and pronation due to pain."

88. I also take into account the sheer inconvenience of having to deal with a urine bag which from time to time, before the uroplasty, overflowed and spilt on him. The odour and discomfort that must have caused is noted. He himself speaks eloquently to this. He said that after his initial discharge, he had to go about his activities with the urine bag in hand - exposed for all to see. This in turn produced gaulking onlookers who were not reticent about enquiring of him how he came to be ambulating with a urine bag. This produced shame and embarrassment.

89. Mr. Biggs also mentioned that even at his home, the constant smell of urine was overbearing. When he went to Miami for surgery on his urethra, the smell of urine was overpowering. It is not surprising that Dr. Ottey mentions Mr. Biggs' depression and anxiety.

90. According to the medical evidence, Mr. Biggs has a 55% whole person disability. Let me admit that when Miss Hudson proposed the figure of $18m - $20m as appropriate, I had grave doubts about this. However having reviewed the cases cited by both sides, it is clear to me that the figure of $10m put forward by Mr. Morgan would not be an adequate amount for the degree of physical and psychological damage that Mr. Biggs has suffered. It does not take account of the severe impact that this injury has had on a previously healthy 19 year old male who played sports. To go from an independent working adult to a dependent person, at least for the first few months after the accident, must have been crushing to the spirit and the psyche. It could not have been easy for an able bodied young man to find himself bed ridden and constantly engulfed in the smell of urine. Even to relieve himself in other ways posed a serious problem.

91. Mr. Biggs is terrified of persons in his community finding out about his sexual dysfunction. This has no doubt dampened his enthusiasm for life. His injuries are such that he will be constantly reminded of his disabilities.

92. In light of all that has been said, I find that the sum of $18m is appropriate compensation for pain, suffering and loss of amenities. This head of damage covers physical as well as psychological suffering. Mr. Biggs has permanent urological damage. There is the permanent problem of stricture of his urethra which can only be relieved by the painful insertion of catheters. Mr. Biggs has permanent erectile dysfunction. He has lost a leg.

Handicap on the labour market

93. By now it should be accepted, based on case law, that there is a distinction between handicap on the labour market and loss of future earnings. The Court of Appeal of Jamaica in ***Monex Limited v Mitchell and Grimes*** S.C.C.A. 83/96 (delivered December 15, 1998) held at pages 12 and 13 that there was a difference between handicap on the labour market and loss of future earnings. Harrison J.A. who delivered the leading judgment, accepted as correct, Lord Denning's distinction between the two. This Lord Denning did in ***Farley v John Thompson*** [1973] 2 Lloyd's Rep. 40. Harrison J.A. also held that loss of earning capacity arose where the claimant had resumed work without any loss of earning or resumed work at a higher rate of earning but there was a risk of losing the current job and the claimant will be at a disadvantage in the labour market which will make it less easy to secure employment (see pages 12 and 13). His Lordship cites ***Moeliker v Reyrolle*** [1977] 1 W.L.R. 132. Harrison J.A. repeated this view in ***Dawnette Walker v Hensley Pink*** S.C.C.A No. 158/01 (June 12, 2003).

94. The position then from these two decisions of the Court of Appeal of Jamaica is that the claimant must be working at the time of the trial and there must be a risk of job loss before the court can embark upon a consideration of whether the claimant should be compensated. The court is called upon to assess the risk of this arising and take account of how difficult it would be for the claimant to secure another job in the open labour market.

95. However, subsequent research has indeed uncovered the small but important fact that Browne L.J., the author of the ***Moeliker*** judgment, accepted that he had, initially, misstated the law. In ***Cooke v Consolidated Industries*** [1977] I.C.R. 635 by Browne L.J. at page 640:

> *In my view, it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial. The trial judge said: "Looking ahead as best I can with the information before me, I expect that [the plaintiff] will obtain employment pretty well immediately." The judge turned out to be quite right, because he did. In Moeliker's case at p. 261 of the report in [1976] I.C.R. 253, I said: "This head of damage only arises where a plaintiff is at the time of the trial in employment." On second thoughts, I realise that is wrong. That was what I said, but on second thoughts I realised that was wrong; and, when I came to correct the proof in the report in the All England Reports, I altered the word "only" to "generally," and that appears at [1977] 1 All E.R. 9, 15.*

96. So what we have here is a situation, unfortunate enough as it is, where the Court of Appeal of Jamaica has accepted a statement of principle in a form which the author of that principle has now confessed to be in error. So what does a trial judge do? It is indeed an uncomfortable position since the trial judge is bound by the decision of his own higher courts. But the trial judge now knows that the principle that his higher court accepted is now regarded as stating the matter too narrowly by the same court from which the higher court adopted the principle. It would seem that the best resolution is to say that the Court of Appeal always intended to accept the correct statement of principle. This being so, I conclude that the Court of Appeal, would have accepted the restatement had it been brought to their attention. Indeed, the Court of Appeal of Jamaica accepted the

restated principle of Browne L.J. (see ***Gravesandy v Moore*** (1986) 40 W.I.R. 222). So I go with the restated principle of Browne L.J.

97. In ***Atlas v Briers*** 144 C.L.R. 202 Barwick C.J. of the High Court of Australia, notwithstanding the lukewarm reception of the other members of the court stated the true position of what handicap on the labour market is compensating. His Honour stated at page 209:

> *The plaintiff in Gourley's Case had been deprived of some part of his earning capacity. It was for this deprivation that compensation was to be awarded. Undoubtedly that capacity is a capital asset, though like other capital assets capable by its use or employment of producing income. Logical adherence to this concept would, in my opinion, avoid much of the confusion which to my mind has crept into the assessment of damages for loss of earning capacity tortiously caused. Although statements can be found in decided cases to the effect that it is for loss of earning capacity that compensation by way of damages is to be assessed, in other cases the method of determining, or the factors employed in determining, the value of such an asset as earning capacity have been confused with the identity of the asset itself. It can be seen in the reasons in Gourley's Case itself, where loss of earnings or non-receipt of remuneration is treated as synonymous with loss of earning capacity: compensation for the non-receipt of earnings is what is there sought rather than compensation for the deprivation of a capital asset, albeit one capable of producing earnings. The confusion is exacerbated, in my opinion, by the practice of determining the compensation for non-receipt of earnings by estimating the value of an annuity to produce the actual earnings which the earning capacity might have been expected to produce during the remaining working life, some*

*endeavour being made by arbitrary discounting to take account of the vicissitudes of life. A multiplier is applied to the estimated periodic earnings.*

*But the plaintiff has not in a relevant sense lost the earnings either in the period before verdict or the future thereafter: he has lost the capacity to earn perhaps the equivalent of his current earnings or perhaps more or less according to the reasonable expectations of the employment of his earning capacity. If the award of damages for such an injury destroying or diminishing his earning capacity were merely a matter of replacing those earnings, the amount of the award would be taxable: but it is not, for the reason that the award is for a capital loss, however much the amount of the award is quantified by a consideration of what the use or employment of that capacity might be expected to produce. In other words, the assessment of damages for loss of earning capacity is in truth an exercise in valuation.*

98. Here, his Honour is making a clear distinction between the capacity to earn and the assessment of the loss. The learned Chief Justice makes the telling point that confusion has arisen because of the methodology of computing the damages. The usual mode of computation is by reference to what the claimant has earned but that should not obscure the fact that the capacity to earn is more in the nature of a capital asset than it is simply loss of income. This is brought out by the fact that a person may not be earning but there can be no doubt that his capacity to work has been impaired. In this circumstance, the only difficulty, if difficulty it is, would be the correct amount for compensation of the injury to this asset.

99. This was brought out with greater clarity by the High Court of Australia in the case of ***Medlin v State Government Insurance***

*Commission* 182 C.L.R. 1. In that case, the claimant was injured in a motor vehicle accident. He resumed work but was forced to take early retirement because of the effect of the injuries. At the trial, the claimant indicated that his injuries did not make him able to perform at the level that he wanted. It appeared that his employer did not have any difficulty with his work. The issue was whether he could claim for handicap on the labour market. The court held that he was entitled to recover under that head. McHugh J. at page 15 summed up the distinction in this way:

> *In Australia, a plaintiff is compensated for loss of earning capacity, not loss of earnings. In practice, there is usually little difference in result irrespective of whether the damages are assessed by reference to loss of earning capacity or by reference to loss of earnings. That is because "an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss". Nevertheless, there is a difference between the two approaches, and the loss of earning capacity principle more accurately compensates a plaintiff for the effect of an accident on the plaintiff's ability to earn income. Earning capacity is an intangible asset. Its value depends on what it is capable of producing. Earnings are evidence of the value of earning capacity but they are not synonymous with its value. When loss of earnings rather than loss of capacity to earn is the criterion, the natural tendency is to compare the plaintiff's pre-accident and post-accident earnings. This sometimes means that no attention is paid to that part of the plaintiff's capacity to earn that was not exploited before the accident. **Further, there is a tendency to assume that if pre-accident and post-accident incomes are comparable, no loss has occurred.***(my emphasis)

100. The last sentence is important. It points out the fallacy of equating loss of income or the absence of loss of income with impaired working capacity. In Jamaica, we have followed the English approach in this regard. In ***Farley v John Thompson*** [1973] 2 Lloyd's Rep. 40 Lord Denning held at page 42:

> *It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages. If I may give an instance, a manual worker may be incapacitated for manual work, but after the accident he may learn a clerical trade. At his new trade he may actually earn more than he would have done before. He will have diminished earning capacity, but he has not lost any future earnings.*

101. This reasoning is consistent with the Australian position. It is the damage to the loss of the capital asset that is being compensated. In this analytical framework, it is obvious that it matters not whether or not the claimant is working at the time of the trial.

102. This reasoning of Browne L.J. in ***Cooke*** is consistent with the decision in ***Glady's Smith (feme sole) v Lord Mayor, Aldermen and Citizens of Manchester*** (1974) 17 K.I.R. 1. In that case the claimant did not suffer any loss of future earnings because her employers agreed to keep her on. She did suffer a loss of earning capacity because, as her lawyer submitted, she was not able to leave the job she was in and go out into the open labour market and compete on equal footing with her competitors. But, if it were not for the generosity of her employers, she would have been out in the cold. This decision demonstrates the point made by in ***Medlin*** - one is not to confuse loss of earnings with loss of earning capacity.

103. Once it is accepted that the true object of compensation is the claimant's intangible asset of his earning capacity and not his actual earnings, what can it matter if it is the case that the claimant never worked at all? The fact that a claimant did not use his working capacity, his intangible asset, does not make it any less an asset which, if damaged, is a proper object of compensation. If this is the case, it is not quite clear what is the relevance of the risk of losing the current job.

104. A step in the right direction was made by ***Monex***. The claimant in that case was 10 years old at the time of the accident and twenty four years at the time of trial. She had never worked. An award of loss of earning capacity was upheld by the Court of Appeal. This could only have been on the basis that the claimant had an intangible asset that was now impaired. As Harrison J.A. said at page 14:

> *The award of damages for loss of earning capacity in respect of an infant victim not yet earning a wage and disabled by the act of the defendant, although speculative, represents to the said victim a real loss which a court has a duty to examine and quantify, if material is provided by the evidence.*

105. The real loss referred to in this passage could not possibly be loss of income since if the claimant has never worked, was not working at the time of the trial and unlikely to work in the future, Harrison J.A. could not possibly have been referring to loss of future earnings. The only possible loss that the court could have had in view is the capacity to earn as distinct from the earnings themselves. Thus, at least in this case, the Court of Appeal of Jamaica and the High Court of Australia are at one, never mind the contradictions inherent in the ***Moeliker*** formulation.

106. Mr. Biggs has suffered amputation. His urological problems have been set out in detail above. His back pains have been documented. It is true that the medical reports have not explicitly addressed the issue of handicap on the labour market and the Court of Appeal of Jamaica has said that before an award under this head can be made

there must be medical evidence supporting the claim (***Dawnette Walker v Hensley Pink*** S.C.C.A No. 158/01 (June 12, 2003)). The Court of Appeal also held that the claimant must be working at the time of trial to become eligible for an award under the head of handicap on the labour market. It would seem to me that the decision of the court has to be seen in the context of the case that was before it. There was no evidence that the claimant in that case had such extensive injuries as Mr. Biggs. In other words, the severity of the injuries of the claimant in ***Walker's*** case did not make it immediately obvious that the claimant must necessarily have suffered an impaired capacity on the labour market. I do not understand the Court of Appeal to be saying that if the injuries are so extensive that it does not require medical evidence to confirm that the claimant would suffer a handicap on the labour market, the trial court could not make such an award. This would be like saying that a mason who has lost both hand and legs cannot get an award under this head if the doctor does not indicate that he has suffered a handicap on the labour market.

107. By parity of reasoning, from the injuries suffered by Mr. Biggs there can be no doubt that he has suffered damage to his capacity to work, or if one prefers more familiar language, he is not able to compete with other able bodied persons on the open market. Additionally, Mr. Biggs dropped out of school. His reading, by his own admission, is not too good. The prospect of work for a severely injured inadequately educated twenty five year old young man is not very good. If Mrs. Smith in ***Gladys Smith*** could secure an award under this head, even more so Mr. Biggs.

108. As is now the law, it does not matter whether or not he is working at the time of the trial. The only remaining issue is the method of quantification of the loss. Both sides have agreed that the method in this case should be lump sum payment rather than the multiplier/multiplicand. It appears that this agreement arose because both sides have agreed that the multiplier/multiplicand should be used for that part of the assessment which deals with loss of future earnings.

109. Miss Hudson suggests a lump sum of $500,000.00. Mr. Morgan submits $300,000.00. In deciding which, if any to accept, it is clear from the English approach, which has been adopted in Jamaica, that the lump sum payment is not meant to be derisory because it is real loss that is compensated. It would appear to me that $500,000.00 is an appropriate sum.

Loss of future earnings

110. Both sides have proceeded on the basis that Mr. Biggs is entitled to claim for loss of future earnings. I will make the award on the basis of the defendants' calculations. The evidence is that the defendant earned $5,000.00 per week from masonry. There is no challenge to this. The amount is not exorbitant and despite the absence of better proof, the court will act on this evidence. Using the multiplier/multiplicand method the calculation is $5,000.00 x 52 x 14. This gives $3,640,000.00.

Cost of future medical care

111. This aspect of the assessment requires me to examine separately the various costs under this head. But there is an aspect of principle that needs to be resolved. When dealing with future costs of medical care there are two issues to be considered. The first is when will those costs arise and second, what will be the duration. From these two issues, a third issue arises and that is, the method of calculation. Should it be adding up the anticipated costs and award that figure or should it be a multiplier/multiplicand approach?

112. As far as case law in Jamaica goes, the research of counsel unearthed the case of ***Gregory Hamilton v Courtney Barnett*** Suit NO. CL 2001/H144 (delivered December 1, 2003) by Straw J. Her Ladyship held at page 6

> *The claimant has stated that the prosthesis with which he is presently fitted has to be replaced... He has submitted for the court's consideration an estimate ... [of] ... US$2,0000.00 for a new prosthesis. This will have to be replaced every 2 to 5 years. The life expectancy table produced by the*

*Statistical Institute of Jamaica for the period 1999-2001 estimates that a male at age 25 years has on average a life expectancy of another 48.88 years. The claimant can be reasonably estimated to have a life expectation of another 46 years. In all the circumstances, the Court will award him US$2,000.00 for a new prosthesis and a further US$20,000.00 for 10 replacements to cover his life time.*

113. Mr. Morgan submits that this approach is wrong in principle and a multiplier/multiplicand method should be used. The rational for his submission is that when one is looking at care over time, it ought to be bourne in mind that in a lump sum payment system, as is the case in Jamaica, the claimant is entitled to receive his entire award at once. The expectation is that he will invest his money to take care of his future needs. If this is the case, there is the risk of overcompensation because, on Straw J.'s approach, he is being given the full cost now with no deduction to take account of the fact that he is getting everything now.

114. Mr. Morgan submitted, with support of cases from Scotland and England, that the better practice, at least in respect of care as distinct from prosthetic devices or similar costs, a multiplier/multiplicand is better. He also submitted that if the cost is expected to be life long, then the multiplier should be higher than that used for loss of future earnings. The bedrock premise is that loss of future earnings multipliers take account of working life, whereas cost of care multipliers are directed at life long costs, costs which may persist long after the person has stopped working.

115. It is now time to examine the cases to see if they decide what has been attributed to them by Mr. Morgan. If they do, the second stage is to determine whether they should be adopted and applied and if so, to what extent and whether they should be adopted with any modification.

116. Perhaps one of the clearest exposition of principle can be found in the judgment of the Lord President in the Scottish case of ***O'Briens Curator Bonis v British Steel Plc*** [1991] S.C. 315, 320 (an appeal from the decision of the Lord Ordinary on the grounds that his awards were too low):

> *The purpose of an award of damages for future expenditure is to place the pursuer as near as may be in the same financial position as he would have been in if the accident had not occurred. What is required in the present case therefore is such a sum of money as may reasonably be expected to pay for the nondomestic element of caring for the incapax at Quarrier's Village for the rest of his life. Since the whole damage must be recovered in one action, the award which the court must make once and for all for the future has to take the form of a capital sum. So that sum should be assessed at such figure as will, if reduced by the annual amount of the expenditure but increased by the interest which it can be expected to earn if invested, provide what is necessary over the entire period until the date of death of the incapax . The mechanism by which the capital sum is arrived at is the selection of a multiplicand, as representing the estimated annual cost of the care as at the date of the proof, and a multiplier which, when applied to the multiplicand, will provide the amount which can be expected to achieve the desired result. There may be cases where, because the period is so short or the circumstances are so uncertain, this method is inappropriate and it is better to make a broad estimate of the damages in the form of a lump sum. But everyone is agreed that in this case the traditional method of estimating the amount of future loss by using multiplier is the one to use. The aim is not to put the pursuer in a better financial position than he would otherwise have*

*been in if the accident had not occurred but to compensate him for the loss which he will sustain.*

117. The principle that emerges is very clear. In the case future, the court has to look and see how the cost is likely to be endured. If that period is short then a lump sum method is more appropriate. If the period is likely to be for a very long time then the assessment uses the multiplier/multiplicand approach which has as its goal the establishment of a capital sum which ought to be invested so that it will be increased by interest but reduced by the annual expenditure required to meet the future costs. The goal is compensation and not to place the claimant in a better position than he would have been in had the injury not occurred. It is compensation, not enrichment.

118. I do not find anything objectionable in the principle outlined by the Lord President. It would seem to me that it is perfectly sensible and therefore appropriate that it be adopted. I do not see the need for any modification of the general statement of principle. Of course, how it applies in Jamaica may be another matter, but concerns about that should not delay the adoption of a good idea. No need to reinvent the wheel.

119. The principle has been applied in other cases. In ***Harris v Harris*** [1997] C.L.Y. 1982 Moreland J. awarded the cost of future prosthetic supplies on a multiplier/multiplicand basis. The multiplier was 28 for a boy who was 3 years at the time of the injury and 9 years at the time of trial. In ***Pennington v Crossleigh Construction*** [2003] EWCA Civ 1684, there was an appeal on the basis that the trial judge should have used a lower multiplier when calculating the future cost of prosthetic devices. The appeal was dismissed but the judgment proceeded on the basis that the multiplier/multiplicand method was legitimate.

120. In light of what has been indicated in ***O'Brien***, Mr. Morgan does have a point so far as he says that the approach of Straw J. did not give sufficient weight to the fact that the claimant was getting all the future year's purchase now and not later. Indeed the methodology of Straw J. did not give any discount for the fact that the claimant was

being compensated in respect of a cost that would be incurred several years down the road - at least in respect of the prosthetic devices that would be needed towards the end of the life of the claimant in that case.

121. This jurisdiction has very little experience with selecting multipliers for cases of future medical care. This is not to say that the process should not begin. What it does mean is that the process should be watchful. As the Lord President pointed out in ***O'Brien*** at page 329 "the factors which must be taken into account in selecting a multiplier for future wage loss are not the same as those which are appropriate to a claim for the cost of future care for the remainder of a person's lifetime."

122. The Lord President also cautioned against the usual (Scottish?) judicial method of selecting a multiplier. That method was judicial experience, combined with experience of counsel and "the feel of the case." It seems that the warning came because the Scottish courts had not at the time of the decision built up a body of experience and knowledge of cases of the kind the Lord President had to deal with so as to make judicial experience a fairly reliable guide. In Jamaica, the position is the same. Unfortunately, unlike Scotland, there is no equivalent of the Ogden tables in Jamaica that can be used as a reference point. So it appears that the unsatisfactory method of trial and error is the order of the day - for now at any rate in Jamaica.

123. In the absence of anything like the Ogden tables, I will have to use the methodology deprecated by the Lord President. It should be pointed out that in assessing the damages for future costs in this specific case there has been some modification to the multiplier/multiplicand approach. The modification in this case is necessary because in respect of the purchase of the prosthesis there is no annual purchase of the device. This cost is incurred every few years.

124. I now make the future costs assessments. I should indicate that the cost of future surgery will be assessed on the basis of the stated costs by the health professionals.

Cost of prosthesis and future replacements

125. According to Mr. Passero, the cost of the prosthesis and what is called a diagnostic socket is US$28,576.00 (entire prosthesis) plus US$13,215.00 (socket). This gives a total cost of US$41,791.00. He added that prosthesis and the socket, together last approximately 3 - 7 years. It would be appropriate to say that a fair estimation of the average length life span of prosthesis and socket together is 5 years.

126. Miss Hudson submits that Mr. Biggs should receive the cost of 7 replacements (prosthesis and socket). She bases this on the life expectation of Mr. Biggs which is now 49.3 years (see Life Expectancy Table by Statistical Institute of Jamaica (2006)). She further submitted that the number of years should be scaled back by 25% which give 36.9 years. From this Miss Hudson submitted that these number of years should be divided by 5 (the average life span of prosthesis and socket) and to arrive at 7 sockets at a cost of US$41,791.00. The scaling back was her way of taking into account the imponderables and inherent difficulties in arriving at an appropriate multiplier. It is not clear why 25% was chosen as the scaling back percentage.

127. Mr. Morgan on the other hand suggested that there should be a multiplier of 18 divided by the life span of prosthetic and socket and so he arrives at 3.6 replacements. Mr. Morgan's submission is based on the methodology used in the English and Scottish cases where there seems to be an average of six years purchase by which the multiplier used for calculating the cost of future cost exceeds the multiplier for future earnings. Mr. Morgan is also submitting that his method does not confer a windfall. Mr. Biggs is expected to invest the money received now to pay for the replacements.

128. I will not use Miss Hudson' method. The scaling back by 25% seems to have been the outcome of trying to secure full recovery for 7 replacements. The multiplier proposed by Miss Hudson is too high. Even in the England and Scotland were the Ogden Tables are used, with a nine year old victim the multiplier was 28 (***Harris v Harris***).

129. I would use a multiplier of 22. I arrived at this multiplier using the decision of ***Stone v Dyer*** as a guide. That case did not deal with multipliers for future cost of care but with loss of earnings. The rough guide from that case shows that 26 years old would have multiplier of 14 if I were calculating loss of future earnings. However, the principle is that the multiplier for cost of future case is to be significantly higher than that for future earnings calculations. This calculation yields 4.4 replacements. Rounding of the fraction to the nearest whole number gives 4 replacements. The cost of future replacement is 4 x US$41,791.00 which gives US$167164.00. This is the capital sum which can be invested to take counter the effects of inflation.

Cost of future dilation

130. Dr. Wan said that the cost of dilation is $5,500.00 per dilation. The particulars of claim have $5,500.00. This is JA$11,000.00 per year. Using the multiplier of 22, this gives JA$242,000.00.

Cost of Viagra

131. Mr. Biggs said in his witness statement that it costs approximately $8,000.00 for six Viagra tablets, prescribed by Dr. Wan, that would enable him to have an erection. I have not seen any documentation to support this claim. I note as well that the particulars of claim have the figure of $8075.00. In examining the document the most recent bill (July 25, 2008, from Gynae Associates Pharmacy) shows that 6 Viagra tablets cost $5,366.18. I will therefore use JA$5,366.18. This is not a case of the helpless claimant. Mr. Biggs' witness statement shows that many of the expenses and reports of anticipated expenses were paid for by his attorney. I see no good reason why the same could not have been done here.

132. Miss Hudson submitted that there should be a further reduction from her 36 years (the 25% reduction from the life expectancy of 49.30 years) by another 25% which would make the number of years purchase 27 years. The rationale for this further reduction was that there may be period of sexual inactivity. I am not too sure of the basis for this figure. It certainly did not come from the medical reports. As I have indicated, in countries with more reliable

methodologies of arriving at the years purchase, a multiplier of 27 is reserved for very young persons. This multiplier by Miss Hudson appears to be catering for inflation but the jurisprudence which has been accepted in Jamaica is that inflation is excluded from assessing damages and the way for that factor to be taken into account is by prudent investment (see ***Lim Poh Choo***). I will use the multiplier of 22 which I used in respect of the prosthetic costs.

133. Mr. Biggs said that he cannot take more than one Viagra tablet per week because of its side effects on him. He added that the doctor told him that more frequent use may cause problems.

134. The figure I have chosen for the cost of Viagra gives the cost of one tablet at JA$1,341.55. At one tablet per week and with 52 weeks in the year the total annual cost is JA$69,760.34. Twenty two years purchase gives JA$1,534,727.50.

**Two procedural issues**

135. There were two procedural issues that arose which I decided against the first defendant. I gave brief reasons then. These are my full reasons for (a) refusing an adjournment on the application of the first defendant and (b) admitting the medical report of Dr. Rory Dixon.

Application for adjournment

136. On December 10, 2009, when this matter came up for assessment, Mr. Lowel Morgan applied for an adjournment on the basis that when he read Dr. Dixon's report dated November 4, 2003, he decided that he needed to consult an expert regarding certain aspects of the report. The section of the report that caused some anxiety for Mr. Morgan was that portion which read; *The site of the previous arterial repair was torn inadvertently and the artery was repaired immediately by the General Surgeons (sic) with restoration of blood flow."*

137. Mr. Morgan suggested that his sentence raised the issue of causation and he wanted to explore whether it could be said that the inadvertent tearing was sufficiently strong so as to obliterate the

initial negligent driving of Mr. Peter Thompson, the second defendant and employee of Courts Jamaica Limited.

138. There was one devastating response to this application. It comes from Miss Hudson. Learned counsel referred to rule 10.6 of the Civil Procedure Rules ("CPR") which reads:

> (i) *This rule sets out additional requirement with which a defendant to a claim for personal injuries* ***must*** *comply.*
>
> (ii) *Where the claimant has attached to the claim form or particulars of claim a report from a medical practitioner on the personal injuries which the claimant is alleged to have suffered, the defendant* ***must*** *state in the defence -*
>
> *(a) whether all or any part of the medical report is agreed and*
>
> *(b) if any part of the medical report is disputed, the nature of the dispute.*
>
> (iii) *Where -*
>
> > *(a) the defendant intends to rely on a report from a medical practioner to dispute any part of the claimant's claim for personal injuries; and*
> >
> > *(b) the defendant has obtained such a report, the defendant* ***must*** *attach that report to the defence.* (my emphasis)

139. This rule speaks for itself. It is mandatory. It says what the defendant must do in cases of personal injury when he receives a claim form or particulars of claim with a medical report attached. When this rule is combined with rule 10.5, it is clear that a defendant is no

longer at large to make a mere denial. He must join issue with the claimant and state specifically what issue he is taking and the reasons for joining issue. This approach is in keeping with the point that I have made on numerous occasions that the new system of litigation in which the defendant is required to spell out his case is an indispensable necessity as part of the case management system. Unless the defendant responds in accordance with the rules, the court is hampered in its case management efforts. Specifically, the court will not be able to identify readily which matters need full exploration at a trial and which issues can be disposed of summarily. Under the system of active case management, the judge is under a duty to see to it that the litigants act in accordance with the rules so that the case can be properly managed by (a) identifying the real issues in dispute; (b) resolving those issues summarily which can be so resolved; (c) leaving out matters for determination if substantial justice can be done between the parties. All these principles are aimed on one objective: dealing with cases justly in a cost effective manner.

140. It is only if the system is effectively policed and the rules rigourously applied will we be able to change the litigation culture that the CPR demands. In this case, the first defendant waited five long years to take the point which I have described. Mr. Morgan's belated appeal to justice for the first defendant overlooked the fact that it painted itself into a corner. Why, in this particular case, should Courts be rescued by the court when the claimant did all that was required of him and Courts had the benefit of counsel?

141. Let us look at the history of tardiness on the part of Courts. Mr. Biggs filed his claim form and particulars of claim on January 14, 2004. Dr. Dixon's report was attached to the claim form from 2004 when the claim was filed. Courts filed an acknowledgment of service on February 24, 2004.

142. Courts had every opportunity to defend this case on any legitimate basis that it chose. The claimant, in response to the defendants' inactivity after the acknowledgment of service was filed, applied for, and received, judgment in default of defence against Courts on November 5, 2004. Two years later, on September 19, 2006, Courts

was granted leave to file a defence limited to quantum only. Despite being granted leave to file a defence, Courts did not file a defence until November 25, 2009, and even then, there was no compliance with the CPR. In effect, the first defendant had two years before they got leave to file a defence to read the report and even after being granted leave to defend, they had a further three years.

143. The first defendant clearly decided that Rip Van Winkle was their patron saint and worthy of emulation. The defence filed did not join issue with Dr. Dixon's report. An addition, rule 10.7 points out the consequences of failing to comply with rules 10.5 and 10.6. Rule 10.7 reads:

> *The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission.*

144. This is another example of what I have called automatic sanctions that permeate the CPR. The automatic sanctions imposed by the rules apply without any application by any other litigant or any action by the court. No defendant who fails to comply with rules 10.5 and 10.6 can escape the consequences stated by rule 10.7, unless the court says otherwise.

145. The new age of efficiency demands that trial dates are treated as trial dates and not a date to see if something will happen. A claimant who complies fully with the rules should expect that the court will respect his efforts and act appropriately with regard to sluggish defendants. I am, quite frankly, unable to appreciate what could possibly be unjust to deny the application for an adjournment in these circumstances.

Admission of Dr. Dixon's report

146. The first defendant's next stratagem was to seek to exclude Dr. Dixon's report by saying that he ought to attend to give evidence and that the court should not admit the report under section 31E of the Evidence Act as submitted by Mr. Biggs. This issue arose because

Miss Hudson was being cautious. In addition to appending the report to the claim form she also served a notice under section 31E of the Evidence Act indicating that she did not intend to call Dr. Dixon as a witness because he was out of the island.

147. It is common ground that Dr. Dixon was off the island at the time when this trial commenced. In fact, Dr. Dixon wrote saying that he would be off the island because of a commitment from which he could not extricate himself. The only remaining issue was whether section 31E (4) (c) was met. This provision is set out below. Apart from the opening words, it is identical to section 31D (c). The relevant parts read:

> *The party intending to tender the statement in evidence shall not be obliged to call as a witness, the person who made the statement if it is proved to the satisfaction of the court that such person -*
>
> ...
>
> *(d) is outside of Jamaican and it is not reasonably practicable to secure his attendance.*

148. This provision applies to civil proceedings. I had to interpret the identical provision in R v Frank Richards (delivered September 3, 2009). I see no reason to alter what I said there save to make the necessary modifications so that it applies to civil proceedings. This means that the standard of proof is on a balance of probabilities for any litigant who wishes to rely on the provision.

149. Mr. Morgan, in seeking to resist the application for Dr. Dixon's report to be admitted under this provision, submitted that if the adjournment were taken then Dr. Dixon would be able to attend at some future date so that he can be cross examined. In ***R v Ernest French*** (1993) 97 Cr. App. R. 421, the Court of Appeal of England and Wales had to interpret a similar provision; it was held that court has to look at the evidence at the time the application is made without any regard to what may happen in the future. The court also held that the test is not whether it is reasonably practicable for the witness to

attend but whether it is reasonably practicable to secure his attendance.

150. From the evidence placed before me, it is clear that efforts were made to have Dr. Dixon attend but as his letter indicated, he had to be off the island. There is nothing Mr. Biggs could have done about this. All that Mr. Biggs is required to do is to take reasonable steps. Where a willing witness has apparently agreed to attend and at the last moment leaves the island, short of imprisoning the witness, it is difficult to see what more the party relying on the witness could do. I am satisfied on a balance of probabilities that Mr. Biggs could not reasonably secure the attendance of Dr. Dixon for court on December 10, 2009.

**Summary of award**

**General damages**

151. The following sums are awarded:

a. pain, suffering and loss of amenities JA$18m at 6% interest from the date of the service of the claim form to June 21, 2006, and 3% from June 22, 2006 to January 22, 2010;

b. loss of future earnings - JA$3,640,000.00 at no interest;

c. handicap on the labour market - JA$500,000.00 at no interest.

**Special damages**

152. The following sums are awarded:

a. special damages - JA$432,506.37;

b. cost of drugs at Victoria pharmacy - JA$2330.00;

c. cost of wheel chair and crutches - JA$8,500.00;

d. cost of medication in USA - US$366.32;

e. pre-trial loss of earnings - JA$1,735,000.00;

f. the cost of rent in USA (excluding utilities) - US$12,750.00;

g. cost Miss Lorna Henry visiting claimant in hospital in Jamaica - JA$115,200.00;

h. cost of trips by claimant to outpatient department at KPH - JA$100,000.00;

i. cost of travel to USA (airline tickets and visa application costs) - JA$145,339.00;

j. cost of care at Jackson Memorial Hospital and University of Miami Medical Centre - US$29,455.00;

k. cost of report from Mr. Tom Passero - US$957.00;

l. cost of future dilation - JA$242,000.00 (no interest);

m. cost of future medical care (Dr. Grantel Dundas) - JA$962,050.00 (no interest);

n. cost of prosthesis - US$167164.00 (no interest);

o. future cost of Viagra - JA$1,534,727.50 (no interest);

p. post discharge cost of extra help - JA$738,000.00 (no interest).

153. Under special damages, items a - k in paragraph 152 attract 6% interest from March 23, 2003 to June 21, 2006, and 3% from June 22, 2006 to January 22, 2010.

154. No interest on items l - p in paragraph 152.

155. Costs to the claimant to be agreed or taxed.