[2014] JMSC Civ.102

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2005HCV2297

IN COURT

BETWEEN	**DAVE BLAIR**	**CLAIMANT**
A N D	**HUGH C HYMAN & COMPANY**	**1ST DEFENDANT**
A N D	**HUGH C. HYMAN**	**2ND DEFENDANT**

Mr. Kevin Williams instructed by Grant, Stewart, Phillips and Co. for the Claimant.

Mr. Allan Wood, Q.C, instructed by Livingston, Alexander and Levy for the 1st and 2nd Defendants.

HEARD: 12th & 16th May, 2014 & 24th June, 2014

CORAM: DUNBAR-GREEN, J. (Ag.)

[1] At the Assessment of Damages in this case, learned counsel for the defendants, Mr. Allan Wood, Q.C., raised two preliminary points: (i) that Rule 12.1 of the Civil Procedure Rules 2002 (CPR) is unconstitutional because it deprives the defendant of his constitutional right to a fair hearing (access to the Court) in that it restricts the defendants' participation; and, (ii) that the latest Notice of Intention to admit Hearsay Evidence (The Notice) was short-served, having been filed on 17th April, 2014 and served on the defendants on 29th April 2014, in circumstances where a twenty-one (21) day period of notice is required.

[2] For convenience, but without any intention to minimise counsel's submissions, I summarise his arguments as follows:

i). The Assessment of Damages in this case is a part of the trial process (***Leroy Mills v Lawson Skyers (1970)27 J.L.R. 196***);

ii). This is a technical matter as it involves determining the prospects of the first action, had it proceeded. It is those prospects that the Court would be valuing in the assessment (per Dukharan J.A. in ***Hugh Hyman & Co et al v Dave Blair [2013] JMCA App 15****);*

iii). In assessing those "lost prospects", the Court must also consider the sum of $888,000 which was paid to the claimant by Aluminium Partners of Jamaica (ALPART) in 2005, in relation to the primary action. That sum will have to be given its current value. Determination of these matters could benefit from the assistance of the defendants;

iv). It is also important that Mr. Hyman (the 2nd Defendant) be heard in relation to a Contingency Fee Agreement which entitled him to a thirty percent (30%) contingency fee if the primary matter went to trial;

v). Rule 16.3 of the CPR gives the Court a discretion to entertain the defendants' further assistance in the assessment of damages, regardless of rule 12.13;

vi). The right to be heard was considered by the Eastern Caribbean Court of Appeal in ***Blaize v Bernard La Mothe et al HCVAP 2012/004*** and it was decided upon examining an equivalent rule to 12.13, that the Supreme Court had a discretion to allow the defendants a right of access as the principles of natural justice guaranteed it, and also because the assessment is a part of the trial.

vii). It could not be described as a fair process, under the Constitution of Jamaica (The Constitution), to completely shut out a defendant from giving evidence on that which might be of assistance to the Court. The rules of the CPR do not bar the defendants from participating if the Court is satisfied that the interest of a fair hearing dictates it. The Court had a duty, not to comply with the rules of the CPR, but with the provisions of the Constitution of Jamaica;

viii). The nature and content of the defendants' participation would be to cross-examine the claimant on damages and deal with hearsay statements (also hearsay upon hearsay) in the Notices filed herein and served on the defendants;

ix). The fact that Notices were served on the defendants under Section 31 of the Evidence Act is supportive of the view that the defendants have a right to be heard on the hearsay evidence to which the Notices relate;

x). That the latest Notice was short-served, having been served on the second Defendant on 29th April 2014, less than 21 days before the hearing of this assessment, in circumstances where the Evidence Act stipulates a notice period of twenty-one (21) days;

xi). That the medical report dated 16th August 2013, contains hearsay evidence which is inadmissible (See ***Fenella Kennedy – Holland et al v Dawn Paris et al SC Civil Division, 2008HCV91916)*** and in relation to which the defendants should have an opportunity to be heard**;** and

xii). As Mr. Hyman, the second defendant, will have a right of appeal from the Court's decision in the Assessment of Damages, the Court should allow the defendants to assist, to avoid further and unnecessary litigation.

Decision on Points in Limini

[3] Rule 12.13 states as follows:

> *Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are-*
>
> *(a) Costs;*
>
> *(b) The time of payment of any judgment debt;*
>
> *(c) Enforcement of the judgment ; and*
>
> *(d) An application under rule 12.10 (2).*

This rule prohibits the defaulting defendant from any cross-examination and any comment on evidence advanced in the Assessment of Damages.

[4] With respect to the preliminary point that Rule 12.13 is repugnant to the provisions of the Constitution, inter alia, I have considered the decision of the Court of Appeal in **Hugh Hyman et al v Dave Blair.**.

[5] The issue raised by counsel is dealt with at paragraphs 13, 14, 17 and 29 of the judgment.

[6] It is apparent from paragraph 13, that in arguing the grounds of appeal, counsel made submissions in relation to Rule 12.13. He was critical of the rule, and argued that it was “so startling and so repugnant to any principles of natural justice” that he would ask the Court to review the matter.

[7] Paragraph 14 of the judgment makes reference to a further submission by counsel that “the applicants had a constitutional right to participate as the Constitution guarantees the right to a fair hearing” and that “any rule in the Civil Procedure Rules must be read subject to the constitutional guarantee.” Rule 12.13, he said, “would be an absurdity if one could not participate.”

[8] This matter was dealt with by Dukharan J.A. at paragraph 29 of the judgment where he concluded as follows:

> *It is clear that Rule 12.13 of the Civil Procedure Rules applies. It is subject to, and is in conformity with the dictates of the Constitution. The applicants' having failed to have the judgment set aside will only have limited participation at the assessment.*

[9] The rule to which counsel refers in 16.3 is found at sub-paragraph 6 which comes under the heading of Assessment of Damages after Admission of Liability. It provides as follows:

> *The defendant is entitled to cross examine any witness called on behalf of the Claimant and to make submissions to the court but is not entitled to call any evidence unless the defendant has filed a defence setting out the facts the defendant seeks to prove.*

I do not see how this rule assists the defendants. It applies to judgments on admission only.

[10] Counsel relied on the decision of the Court of Appeal of the Eastern Caribbean in ***Blaize v Bernard La Mothe et al*** as authority for the proposition that Rule 12.13 is unconstitutional. In that case, judgement in default was entered against the defendant with damages to be assessed. The learned trial judge denied the applicant the right to participate in the assessment hearing, except when the issue of costs was being dealt with. The trial judge relied on a rule, similar to 12.13. The appellant argued that his right to a fair hearing had been infringed. The Court of Appeal decided that the applicant had a right to cross-examine witnesses and make submissions in the Assessment of Damages, and anything short of that would be a denial of the applicant's right to access the court. Baptiste J.A. said at paragraph 16:

> *we are of the opinion and hold that barring the right to be heard (cross examination and the right to make submission) in the circumstances dictated by Civil Procedure Rules 12.13 effectively restricts or reduces the access left to a defaulting defendant to such an extent that it impairs the very essence of the right of access to the Court*

[11] Applying the principle of *stare decisis*, the decision in ***Blaize*** can only be persuasive. Although, in my judgment, there is much force in counsel's submission, I cannot accept his argument that this Court has discretion to grant to the defendant access beyond what is provided in Rule 12.13. This Court is bound by the dictum of Dukharan J.A. in ***Hyman v Blair***. It may possibly be argued, as counsel has done in this Court, that the constitutionality of Rule 12.13 was not the central issue on appeal, and therefore, may require closer and deeper examination. I express no opinion on this, save to say this is not the proper forum for such an argument.

[12] Accordingly, this Court finds that the first point in limini fails for reason that the Court of Appeal has pronounced on Rule 12.13 and affirmed that a defendant who fails to have a default judgement set aside will only have limited participation at the Assessment of Damages, as circumscribed by the rule. Moreover, at paragraph 29 of the judgement in ***Hyman v Blair***, Dukharan J.A concluded that Rule 12.13 is subject to and in conformity with the dictates of the Constitution.

[13] It follows from this determination that it is unnecessary for me to make any pronouncements on related arguments which were advanced by counsel.

[14] As regards the second *point in limini*, learned counsel for the claimant, Mr. Kevin Williams, conceded that the Notice was short-served. Nonetheless, he submitted that

the Court had a discretion to abridge time, provided that such intervention does not result in any prejudice to the defendants.

[15] I cannot see how the defendants' position could be adversely affected in circumstances where, were the witness to be called to give evidence at the assessment, the defendants would have had no opportunity to cross-examine, and costs would be incurred.

[16] The decision of the Court is that the claimant will be heard in relation to assessment of damages and the defendants' participation will be limited to the issue of costs.

Factual Background

[17] On 19th December 1991, the claimant, Mr. Dave Blair, suffered burns to his body in an incident which occurred while he was at work in the employment of Aluminium Partners of Jamaica (ALPART). He retained the law firm, Dunn Cox & Orett, to bring legal action against ALPART. Prior to filing the suit that firm merged with Milholland, Ashenheim and Stone. This created a conflict of interest as Milholland, Ashenheim and Stone were lawyers for ALPART. Mr. Blair's matter was, therefore, handed over to the defendants.

[18] Up to 27th December 1996, the claimant and ALPART failed to reach a settlement and this resulted in a Writ of Summons being issued against ALPART in Suit No. C.L.1996/B414 (the original action). A year later, the Writ expired, without being served on ALPART. It was renewed on 11th January, 1999, for thirty (30) days and together with a Statement of Claim was sent by registered post to ALPART on 10th February 1999, the same day the claim against ALPART became statute-barred. ALPART pleaded the **Limitation of Actions Act**.

[19] On 15th February 2005, the claimant accepted an ex gratia payment from ALPART in the amount of $888,000.00, and in that same year, filed action against the

defendants in negligence to recover compensatory damages. The claim form reads in part:

> *The Claimant, Dave Blair…claims against the Defendants…Damages for negligence in that the Defendants, while retained as the Claimant's Attorneys-at-Law in Suit No. CL 1996/B414 ('the 1996 suit')…so negligently conducted the said 1996 suit as to cause losses and damages to the Claimant.*

[20] An interlocutory judgment in default was entered against the defendants on 29th November 2006, they having failed to file a defence within the prescribed period. In an application to set aside the default judgment, Brooks J (as he then was) found that the defendants had no real prospect of succeeding in the matter. Accordingly, he refused to set aside the default judgement. That decision was upheld on a procedural appeal before Harrison J.A., sitting as a single Judge of Appeal, and subsequently, by a panel of the Court of Appeal (***Hyman v Blair***).

Assessment of Damages

[21] Against this background, I turn to consider the damages, if any, to be awarded to the claimant. The losses are particularized as follows:

(i) Losses on Special Damages as pleaded in the 1996 suit – $1,608,800.00;

(ii) Interest on Special Damages as claimed in the 1996 suit at a rate of 3% from the 19th day of December 1991 to the 15th day of July, 1999 and continuing at a rate of 6% per annum from the 15th July 1999 to the date of the claim herein and continuing;

(iii) Total loss on the claim for General Damages in the 1996 suit; and

(iv) Interest on General Damages as claimed in the 1996 suit at a rate of 3% from the 27th day of December 1996 to the 15th day of July 1999 and continuing at a rate of 6% per annum from the 15th day of July 1999 to the date of the Claim herein and continuing.

[22] The witness statement of the claimant (exhibit 1) was allowed to stand as evidence, with some amplification in relation to the medical reports and copy receipts (exhibits 2-9) which were also admitted into evidence.

[23] The claimant's evidence reveals that at the time of the incident in 1991, he was undertaking his normally assigned tasks when another employee opened an acid vat without checking to ensure that it was safe to do so or without notifying those in close proximity. As a result, there was an explosion, and the claimant was injured. Consequently, he visited several doctors from whom he received medical reports and to whom he paid associated fees.

[24] Since the incident, the claimant has been treated by four medical practitioners: Charles Thesiger, Geoffery Williams, G.C. Allen and M.S. Kainth. The medical reports were admitted into evidence upon the court being satisfied that they were the subject of two Notices of Intention to admit Hearsay Evidence, filed 27th July, 2007 and 17th April 2014, respectively, and served on the defendants. The later of the two Notices, which deals with the medical report by Dr. M.S. Kainth, was served a few days before this matter began. This procedural breach has already been addressed in this judgement.

[25] Dr. Thesiger consulted with the claimant between 20th March, 1992 and 8th March, 1995 (reports of 8th July 1993 and 8th March 1995). He particularised the injuries and conditions as follows:

i. unresolved post traumatic disorder;
ii. further hospitalization for three weeks;
iii. disability of 75% - 80%;
iv. disfigurement of the legs with itching;
v. depression; and
vi. admission on ward 21 (U.W.I) on July 13, 1993 for 6 days.

[26] In report of 20th June, 1994, Dr. Geoffery Williams particularised the injuries and conditions as follows:

(i) mild scarring of both buttocks;
(ii) scarring of lower limbs;
(iii) hypo-pigmentation of both shins;
(iv) shins grossly disfigured; and
(v) hospitalisation for 60 days.

[27] Dr. G.G. Allen's report of 14th July, 1992 indicates that the claimant was admitted to Hargreaves Memorial Hospital on 19th December 1991, with first and second degree burns to parts of his body, characterized by discolouration blebs, and peeling to the buttocks, legs and feet. There was also permanent scarring with minimal functional disability. His report of 25th May, 1994 records temporary functioning disability and 2% PPD.

[28] Dr. M.S. Kainth's report of 16th August, 2013 indicates that there was hyper-pigmentation of the skin over the buttocks, thighs and lower calves (areas of the skin grafts). He also found depression, a 50% psychological recovery since the incident, discomfort from soreness of the skin, anxiety and loss of libido. At the instance of the Court, counsel redacted elements of the report which were found to be inadmissible.

[29] The claimant's evidence substantially corroborated these medical findings. He also gave evidence that the burns have impacted his quality of life to such an extent

that he is unable to participate in sports, especially cricket, which he enjoys and played well prior to the accident in 1991.

Measure of Damages

[30] This is no ordinary case. Normally, when a claimant brings an action against counsel for negligence in the exercise of professional duties, there will be a trial within a trial. In those cases, the claimant has a legal burden to prove a lost opportunity to pursue his claim and that the loss has value. The defendant has the evidential burden to prove otherwise. However, this is a claim where judgment has been entered in default and an application to set aside judgment was refused. It is, therefore, a trial in circumstances where the defendants' participation in the process is limited. The Court, having already found that the claimant has lost something of value, which is the lost opportunity to pursue his claim against ALPART (per Brooks J in ***Hyman v Blair 2005 HCV 2297***), now has the task of quantifying that value. In doing so, I am guided by the principles enunciated by Simon Brown L.J. in **Mount v Barker Austin (a firm) [1998] PNLR 493 at 510,511**, cited with approval by Harrison J.A. in ***Hyman v Blair*** (the procedural appeal). The Court is required to "make a realistic assessment of what would have been the [claimant's] prospects of success had the original litigation been fought out".

[31] The difficulty, which did not escape Harrison J.A., is how the Court should determine the prospects of success in the original litigation. However, as a general principle, the Courts should "tend towards a generous assessment given it was the defendant's negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure" (***Mount v Barker, p. 511***)

[32] The learned authors of **Jackson and Powell on Professional Negligence (4th ed),** at page 551, have summarised the tests for lost opportunity as "the plaintiff having some prospect of success, having anything above a certainty of failure and whether it would have been open to a reasonable tribunal to make the plaintiff an award". The learned authors call this 'the lower threshold", which if not met will result in

nominal damages. In the “upper threshold”, which is the other extreme, there might be a discount “as even the best cases are not free from risk and it may be appropriate to make some discount for the hazards of litigation.”

In ***Kitchen v. Royal Air Forces Association*** **[1958] 2 All E.R. 241 at 250 (C.A.),** Lord Evershed M.R. said:

> *If…it is plain that an action could have been brought, and, that if it had been brought, it must have succeeded, the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that she can get nothing save nominal damages for the solicitors' negligence.*

[33] The gravamen of the claim against the defendants, which by their own inaction is undefended, is that the claimant would have succeeded against ALPART, on the strength of the particulars in the ‘frustrated’ claim against that company.

[34] In determining the prospects of the underlying litigation, the process must involve some degree of speculation. But this is not to say the prospect is being assessed in a vacuum. I will make that assessment based on the pleadings which the defendants had settled on the claimant’s behalf against ALPART. The fact that they were bringing the action, tends more to favour the view that they felt it had a good rather than negligible prospect of success.

[35] It was claimed that on or about the 19th December, 1991 the claimant was welding on a “vapour line” as part of his job, when pipes exploded, causing him to suffer pain and injury.

[36] The particulars of negligence were settled as follows:

(a) Failing to take any or adequate precautions for the safety of the Plaintiff while he was engaged upon said work.

(b) Exposing the Plaintiff to a risk of or unnecessary risk of damage or injury of which the Defendant knew or ought to have known.

(c) Requiring the Plaintiff to work in conditions which were unsafe.

(d) Failing to institute or enforce an adequate system for the inspection, maintenance and repair of the said pipes and other apparatus appurtenant thereto.

(e) Failure to provide any or any adequate supervision of the welding activity of the Plaintiff.

(f) Failing to provide any or any adequate supervision over the condition and use of the apparatus under the Defendant's control, to wit, the vapour line, pipes and other apparatus in the immediate work area.

(g) Causing or permitting the said explosion.

(h) Failing to keep the premises, namely the pipes and immediate work area under its control safe for persons who are lawful visitors under the Occupiers Liability Act.

(i) The Plaintiff will rely upon the doctrine of Res Ipso Loquitor.

(j) Failing, in the premises, to provide the plaintiff with a safe place and/or system of work and/or safe equipment.

[37] The Court has no crystal ball or anyway of finding out whether ALPART would have challenged the Claim. However, I have considered the evidence in paragraph 5 of the claimant's witness statement that ALPART was in negotiation with the claimant to settle. ALPART had also made an ex gratia payment to the claimant, which, though not translating as acceptance of liability, does not make it unreasonable to surmise that ALPART was more favourably disposed to a settlement of the claim, than not.

[38] These are compelling circumstances which favour the claimant's position that his litigation against ALPART would have had more than a negligible prospect of success. This claim satisfies Lord Parker's test in ***Kitchen*** that "unless the court is satisfied that [the] claim was bound to fail, something more than nominal damages fall to be awarded" (p.252).

[39] Accordingly, I am led to the view that the claimant had a formidable case and that his prospects were very good. I will be guided by the principle that in such circumstances, the Court should be "generous" in the damages to be awarded.

General Damages

[40] In determining the sum to be awarded for general damages, I will take account of awards that have been made in the past. In doing so, I will have regard to the particular facts relating to the injuries, including their nature, severity and impact on the claimant. Counsel referred the Court to three cases.

[41] In ***Keisha Banks (b.n.f. Lurlene Mitchell) v Llewellyn Clarke also called B. Clarke and Linton Smith,*** assessed 27th May 1997 (reported at Khan Vol. 4, 138), the plaintiff, an 11 year old school girl, suffered injuries as follows:

(i) partial thickness burns to right thigh;

(ii) abrasion to left foot; and

(iii) contusion Haematoma to left forearm.

[42] The burns were dressed and she was given anti-tetanus prophylaxis and analgesics. She was left with residual scars and was unable to play netball after the accident. After treatment at the hospital, she was sent home. General Damages was awarded in the sum of $325,000 with interest at 6%. At today's value, applying the C.P.I. at May 2014 the award is $1,621,000.00. It is accepted that the claimant in the instant case suffered greater injuries.

[43] In ***Winston Pusey v Pumps & Irrigation Ltd, Jamaica Public Service Ltd***., assessed 16th July 1993 (reported at Khan Vol. 4, 91), the plaintiff linesman came in contact with high powered lines and was knocked unconscious and badly burned. The particulars of his injuries and disability were:

(i) unconsciousness;
(ii) pains all over body;
(iii) burns to hands, legs and chest;
(iv) fingers of right hand "hooked up" and right hand later amputated;
(v) severe loss of amenities (no longer able to play dominoes and cricket, shuffle cards, tie shoe laces, bath self properly, wash clothes, cook or do electrical work;
(vi) embarrassment at the loss of his hand;
(vi) scars and itching;
(vii) hypo-pigmentation in the chest area; and
(viii) 54% whole person disability.

General Damages was awarded in the sum of $800,000 with interest at 3%. At today's value, applying the C.P.I. at May 2014 the award is $8,900,000,00. Counsel agreed that the claimant in that case suffered more severe injuries than in the instant case.

[44] In the case of ***Othneil Ellis v JPS Co. Ltd*, assessed 18th 1995** (reported at Khan Vol. 4, 105), the plaintiff linesman was injured when his hand came in contact with high tension electrical wires. His injuries and disability were:

(i) severe burns to left hand and right leg exposing bone;
(ii) hospitalization for 3 plus weeks;
(iii) pain in arm and leg;
(iv) sensation of heat radiating throughout his body affecting his ability to sleep;
(v) vibrations under the sole of his foot;
(vi) features of anxiety and clinical depression;
(vii) mild impairment of attention and concentration;
(viii) post trauma stress disorder affecting his ability to work;
(ix) needed psychiatric treatment;
(x) PPD 52% of upper limb; and
(xi) some neurological deficiencies;

[45] General Damages were awarded in the sum of $988,920.00 with interest at 3%. At today's value, applying the C.P.I. at May 2014 the award is $6,889,000.00. I agree with counsel that the injuries in this case come closest to the claimant's. However, I find that the injuries were somewhat more severe in the cited case. Whereas PPD in the cited case is 52% of upper limb, the medical reports in the instant case put PPD at 2%. There are also no neurological deficiencies in the instant case.

[46] When consideration is given to the differences in the injuries set out in these cases and the claimant's, and having discounted the award in ***Othneil Ellis v JPS Co. Ltd***, I assess the General Damages at $6,500,000,00.

[47] In arriving at this determination, I disregarded the medical report from Dr. M.S. Kainth dated 16th August 2013, applying the principle that the damages to be awarded should be assessed at the time the original action would have been heard and not at

the time when the claim against the Attorney-at-Law is heard (***McGregor on Damages*** 7th ed. 977). In any event, Dr. Kainth's report did not affect the claim materially.

Deductions for the Hazards of Litigation

[48] Given the vagaries of litigation or as McNair J. puts it in ***Gregory v Tarlo (1964) S.J.219*****,** "unexpected difficulties that can arise", I must consider whether to make further deductions to take account of such hazards.

[49] Mr. Williams relied on dicta from Brooks J and Harrison J.A. in ***Hyman v Blair*** to support his submission that the claimant should be given the full one hundred percent (100%) in damages, save only for the ex gratia payment. His submissions can summarized as follows:

(1). The onus was on the defendants to show that the underlying case against ALPART was of no worth;

(ii). The defendants never challenged the merit of the underlying case against ALPART;

(iii). Once the Court determines that the underlying case is of worth then the court should tend towards a generous assessment of the prospect of the litigation in circumstances where the negligent attorney was the cause of the loss of the underlying litigation; and

(iv). The claimant in this matter lost something of value and that value should be assessed by this Court.

[50] In relation to counsel's first two points, I am of the view that they could only have been dealt with at the hearing of the application to set aside the default judgment. Moreover, the Court sees no basis on which the defendants could have been reasonably expected to challenge the merits of a case for which they had settled pleadings.

[51] With respect to points (iii) and (iv), I have already established in this Judgement that "… even the best cases are not free from risk and it may be appropriate to make some discount for the hazards of litigation" (***Jackson and Powell, p.551***).

[52] In all the circumstances, I am inclined to an assessment of the value of the lost opportunity at 90%, considering the risk that something might have gone wrong at the trial, be it a finding of contributory negligence, difficulties with the evidence or the like.

[53] However, I have considered further that at paragraph 5 of the witness summary the claimant stated that in 1996 (one year before the period of limitation was set to expire) ALPART had offered to settle in the sum of $650,000 and the claimant had proposed $4.5 million. It is, therefore, very likely that the claimant would have accepted a settlement in the region of $4.5million. As it is the value of the "lost chance" that is being assessed, I must take the likely acceptance of a settlement into account. Accordingly, I assess the value of the lost chance at 75%, which is keeping with the level settlement that was proposed by the claimant.

[54] I find support for this approach in the decision of the Court of Appeal in ***Griffin v Kingsmill [2001] EWCA Civ. 934***. Sir Murray Stuart Smith found it a compelling argument that the value of the chance should be 85%. However, he decided on an assessment at a lower chance of 80% because the claimant's mother was observed as being cautious in her approach and might have accepted an offer of settlement approaching the full value of the case (para 105).

[55] The award for general damages is therefore discounted to $4,875,000.00 which represents 75% prospect of success.

Ex Gratia Payment

[56] It is settled law that a claimant may not recover more than he has lost (***British Transport Commission v Gourley [1956] AC 185*****).** However, the cases have not laid down any precise formula or principle for determining whether or when an ex gratia payment is to be deducted.

[56] In the leading case of ***Parry v Cleaver [1970] AC 1*** it was established that the determination could be dependent on "justice, reasonableness and public policy" (per Lord Reid, p.13). The approach, which is being adopted by this Court, was articulated by Lloyd L.J in ***Hussain v New Taplow Paper Mills Ltd; CA [1987] 1 WLR 336****:*

> *…It could, of course, be said that an ex gratia payment is like a sum coming to the plaintiff by way of benevolence, and should therefore be disregarded. This is so, where it is a third party who is ultimately held liable: see* ***Cunningham v Harrison [1973] QB 942****. But there must surely be an exception to that general rule where the ex gratia payment comes from the tortfeasor himself.*

[57] On the particular facts of this case, I am persuaded to apply the principle that where an ex gratia payment is made by the tortfeasor (and here I am referring to ALPART), the damages assessed should be reduced after taking account of the payment (**Hussain v New Taplow Paper Mill Ltd; CA [1987] 1 WLR 336).**

[58] Having found a good prospect of the claimant succeeding against ALPART, I equally find that had the case proceeded, the ex gratia payment would have been considered in the award. I find support in the judgement of Brooks J (***Blair v Hyman, 13***) that "[Mr. Blair] deserves to have that loss quantified and have set off against it the amount received in the settlement."

[59] However, it is also a matter of justice and fairness that the law should not be applied such that a wrongdoer is spared the full liability for his tortious actions because of a gratuitous, charitable or collateral payment by some other person. So, in this case, it would be an unjust outcome if the employer's ex gratia payment were to confer some kind of bounty on the defendants.

[60] I accept Mr. Williams' submission that the deduction should be made at the date of receipt of that payment; that date being the 15th February, 2005. To do otherwise, is to create an injustice. Counsel's argument is that, if the sum were to be adjusted to current value, before deduction, without the attendant interest over the period being awarded thereon, the claimant would be penalized.

[61] The ex gratia payment will therefore be deducted as at 15th February 2005, the date on which it was paid. In other words, the ex gratia payment will not be given its current value.

[62] I have arrived at this position, as a matter of justice and fairness, based on the particular facts and circumstances of this case, as I have found them to be. I am not here stating a general principle of how ex gratia payments are to be treated.

Interest on General Damages

[63] Interest on General Damages will be awarded for four periods: between the date of the Writ, 27th December 1996 and 30th June 1999 at a rate of 3% per annum; between 1st July 1999 and 15th February 2005 (the date of the ex gratia payment) at a rate of 6% per annum; between 16th February 2005 and 21st June 2006 at a rate of 6% per annum on the reduced award of $4,875,000.00; and between 22nd June 2006 and the date of assessment, on the reduced award at a rate of 3% per annum

Special Damages

[64] It is not in issue that the claimant worked at ALPART as a mechanical maintenance man at the time of the accident in 1991. It was determined from the medical report of Dr. Thesiger, dated March 8, 1995, that the claimant could not work after his release from hospital for two years (between 1992-1994) and required therapy for an additional year. At the time of the accident he earned $14,932 (net) per month. This amounted to $358,368.00 annually. The claimant did not produce any documentary evidence of income because he said such had been furnished to the defendants but was not returned.

[65] It is a general principle that special damages must be specifically pleaded and strictly proven. However, failure to do so is not necessarily fatal to a claim. The court is expected to look at all the evidence offered to substantiate the claim, however tenuous each aspect may be (***Dalton Wilson v Raymond Reid SC Civ. App*. no 14/2005** per Smith J.A. at p.12). In the circumstances outlined above, the failure to produce evidence to substantiate the claim for loss of income is not fatal. The Court accepts the claimant's explanation that he had handed over his documents to the defendants and they were not returned. I have no difficulty believing that he done so because a Statement of Claim had been settled by the defendants on his behalf in which there was an item for loss of income which was not significantly different from the sum claimed by him.

[66] In his witness statement (para. 31), the claimant indicates that he did not work for approximately ten years after the incident because he could not pass a medical examination. However, the medical evidence is that he could not work up to 1995. There was no other evidence to support the claim in his witness statement that he was unable to work after that time. This is the kind of evidence that the Court would have expected the claimant to substantiate with documentary proof.

[67] Accordingly, I will not award loss of income for ten years but instead four years, less three months during which he received a salary from ALPART. This amounts to $671, 940.000

[68] In addition, I will award $38,991.53 for other items of Special Damages broken down as follows:

i. $641.53 spent at Haughton's Pharmacy to purchase a pair of elastic stockings;
ii. $3,350 expended for medical reports; and
iii. $35,000 for costs related to hospitalization, medication and other incidentals consequent on the 1994 surgery.

The total award for Special Damages is therefore $710, 931.53.

Interest on Special Damages

[69] Interest on special damages will be awarded for three periods: between December 1991 and 30th June 1999 at a rate of 3% per annum; between 1st July 1999 and 21st June 2006 at a rate of 6% per annum; and between 22nd June 2006 and date of Judgement on the assessment of damages at a rate of 3% per annum.

The Order

[70] As a result of the foregoing, judgment is granted in favour of the claimant in accordance with the following order.

(a) The defendant is ordered to pay the claimant damages as follows:

(i) General Damages: $4,875,000

(ii) Interest on General Damages as follows:

- between the date of the Writ, 27th December 1996 and 30th June 1999 at a rate of 3% per annum.

- between 1st July 1999 and 15th February 2005 (the date of the ex gratia payment) at a rate of 6% per annum.

- between 16th February 2005 and 21st June 2006 at a rate of 6% per annum on the reduced award of $4,875,000.

- between 22nd June 2006 and the date of assessment, on the reduced award of at a rate of 3% per annum

(iii) Special Damages $710, 931.53

(iv)Interest on Special Damages as follows:

- between December 1991 and 30th June 1999 at a rate of 3% per annum
- between 1st July 1999 and 21st June 2006 at a rate of 6% per annum .
- between 22nd June 2006 and date of Judgment on the assessment of damages at a rate of 3% per annum.
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(b) Costs to the Claimant to be agreed or taxed.

(c) Application for stay pending appeal refused.