SUPREME COURT LIBRARY
KINGSTON
JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

Judgement / Brod

IN COMMON LAW

SUIT NO CL G 050 OF 2001

BETWEEN	**CHRISTOPHER GAYLE**	**CLAIMANT**
AND	**MARK WRIGHT**	**FIRST DEFENDANT**
AND	**RONHAM & ASSOCIATES**	**SECOND DEFENDANT**

Mrs. Ingrid Clarke-Bennett instructed by Pollard, Lee, Clarke and Associates for the claimant

Mr. Keith Bishop for the second defendant

June 24, July 5, 23, 27, 29, August 23, 30, September 6, 20, 2004

Sykes J (Ag)

ASSESSMENT OF DAMAGES: PERSONAL INJURY

Mr. Christopher Gayle, the claimant, shares the same name as the West Indian opening batsman and plays cricket as well. The claimant, like the test cricketer, is also left handed. This, however, is where the similarity ends. The claimant worked as sideman on a truck that was involved in an accident on November 25, 1999. He was on the truck while it was traveling from Guys Hill, St. Mary to Kingston. When it

reached the roundabout near to Bog Walk, St. Catherine the truck over turned. He was pulled from the truck by volunteer rescuers and whisked away to the Linstead Hospital. He was sent to the Spanish Town Hospital and later transferred to the Kingston Public Hospital (KPH).

The first defendant was an employee of the second defendant and also the driver of the truck at the material time. In this case there is no issue of liability. Judgment was entered against both defendants in November 2001. The only issue is the quantum of damages to be assessed.

The assessment

I have used the headings developed by Wooding CJ in ***Cornilliac v St. Louis*** (1965) 7 WIR 491. Haynes C in ***Heeralall v Hack Bros. (Construction) Co. Ltd*** (1977) 25 WIR 117, 125 indicated that Wooding CJ's headings have the virtue of capturing the usual headings of (i) pain, suffering and loss of amenity, (ii) loss of future earnings and (iii) the injury itself.

A. The nature of injuries sustained

Mr. Gayle received a broken left hand and broken left foot. The left hand is his dominant hand. At the insistence of Mr. Bishop two doctors testified in this trial. They were Dr. Rory Dixon and Dr. Ian Neil. I will deal with Dr. Dixon's testimony first.

Testimony of Dr. Dixon

Dr. Dixon has a Doctor of Medicine in Orthopaedics. He has been practicing in this area since 1994. He first saw Mr. Gayle on January 1, 2000. Mr. Gayle was being reviewed by the doctor at a post surgery clinic. The doctor also prepared a medical report. This report is dated September 28, 2000. It showed that when Mr. Gayle was admitted to KPH he had

(a) 1.5cm laceration to the left cheek;

(b) multiple abrasions to the left forearm with deformity of the wrist;

(c) swollen tender left thigh;

(d) swollen left leg with multiple puncture wounds;

(e) no neurovascular deficit.

The radiographs(x rays) showed that he suffered

(a) a comminuted fractured left femur;

(b) segmented fractured left tibia, undisplaced;

(c) displaced fractured distal left fibula;

(d) fractured distal left radius;

(e) fractured left acetabulum (hip).

At KPH an operation was performed on Mr. Gayle that involved opening his left leg so that the bone was exposed. The bones of the fractured left femur were realigned and a metal pin placed within the bone itself to maintain the realignment. This was necessary because the fracture was a comminuted one which means that it was broken into

many pieces and so in essence the pieces were strung along the metal pin.

The doctor testified that the claimant would be incapacitated for at least seven months, from the time he saw him in January 2001, because of the fractures to the left leg, thigh, hip and forearm. He last saw the claimant on November 13, 2000 and at that time the claimant was not fully recovered.

I now turn to the testimony of Dr. Ian Neil.

Testimony of Dr. Neil

Dr. Neil testified that he saw the claimant on November 26, 2001. He conducted a physical examination of Mr. Gayle and found

(a) full range of pain free movement in the left hip;

(b) healed surgical scar on the lateral left thigh;

(c) full range of pain free movement in the left knee with no swelling or deformity;

(d) bony prominence on the anterior distal left leg. The ankle had normal range of movement;

(e) no limb length discrepancy;

(f) two surgical incisions overlying the left wrist. There was a 30° wrist flexion and a 30°extension. The normal wrist flexion is 60° and the normal extension is 60°;

(g) forearm pronation of 70°and supination of 60°. The normal pronation is 80° and the normal supination is also 80°;

(h) the elbow and shoulder functions were normal.

Dr. Neil reviewed the x rays and found the same injuries as stated by Dr. Dixon. Dr. Neil added that the fracture of the distal shaft of the left tibia had healed with 10º of lateral angulation. The fractured left distal radius had healed with irregularity of the joint surfaces and a slight shortening of the radius.

Dr. Neil's prognosis was that Mr. Gayle had a 10% chance of developing left hip osteoarthritis and a 20% chance of developing left wrist osteoarthritis within five years. When Dr. Neil testified he said that he examined Mr. Gayle again in August of 2004. He found signs of early osteoarthritis in the wrist but no sign of it in the left hip.

The doctor stated that the claimant now had permanent functional deficits in his upper limb. This was estimated at 15% upper limb disability which by itself is a 9% whole person disability. The leg has healed in a malunited manner causing a 20% lower limb impairment which by itself is an 8% whole person disability. These two disabilities have resulted in a 17% whole person disability which is expected to be permanent.

Mr. Bishop seized upon Dr. Neil's oral correction of his report to suggest that the doctor's credibility was undermined. The issue arose in this way. In the report Dr. Neil stated that the claimant could return to his "usual activities". Dr. Neil testified that by "usual activities" he meant bathing, brushing teeth, combing hair and such like. He did not mean that the claimant could return to this job as a side man. The doctor said that had Mr. Gayle been, for example, a person who earns with the pen and not with the brawn he could resume work with little difficulty but

since he is a sideman on a truck that career is no longer open to him. The doctor said this distinction should have been made in his report and it was not.

In my view the doctor's credibility was not impaired. He readily admitted that his report had omissions. He explained the nature of the omissions and their significance.

He stated that the irregularity of the healing of the joint surface of the wrist coupled with the slight shortening of the radius affects Mr. Gayle's ability to lift objects and do physical exercises such as push ups.

B. The nature and extent of resulting physical disability

Mr. Gayle said that he now suffers from residual pain in the wrist of his left hand. Whenever he works his hand pains him. He cannot now lift any heavy object. This was an activity he once did in his job as a side man.

He also claims that sexual relations with his wife are impaired because of pain in his left hip.

I have already set out the opinion of the doctors, specifically that of Dr. Neil, of the likely impact of the injuries on the claimant.

C. The pain and suffering

At the scene of the accident Mr. Gayle stated that he felt pain in his left hand, left hip and left foot. He described the pain as excruciating. At KPH he was given pain killers.

After three weeks at KPH his foot had to be broken again by the medical staff because it was not healing in a satisfactory manner. He

alleges that he was not given any anaesthetic or pain reliever during this rebreaking of his leg. Despite this his leg healed in a malunited manner.

He stated that he still experiences pain in his foot. He notes that whenever the temperature falls his left foot "don't move as first time" and it becomes cramped.

D. Loss of amenity suffered

Mr. Gayle stated that he is now deprived of the pleasure of walking long distances which was one of his favourite activities. He adds that he has now been deprived of playing as a defender in the Central United Football team. Particularly he cannot jump much, a critical thing all defenders must be able to do if they are to effectively deal with high balls coming into the eighteen yard box. The club has also been deprived of his services as a lower middle order batsman. He batted at either six or seven in the batting order.

He cannot any longer play and "rough house" with his four children.

He states that sexual relations with his wife are more difficult because of the hip injury.

E. Effect on pecuniary prospect

(a) special damages

i. pretrial loss of earnings

The pleadings did not contain a claim for pretrial loss of earnings. At the end of the evidence Mrs. Clarke-Bennett, in very subdued tones, sought an amendment to include this head of damages. Mr. Keith

Bishop objected. He submitted that because there was no claim for this head of damage he did not cross examine Mr. Gayle to explore this issue. Implicit in these submissions is the idea that pleadings should indicate to the opponent what case he is to meet. Thus based upon the absence of the claim the second defendant was not prepared to meet this claim. I agreed with Mr. Bishop and the application to amend to include this head of damage was refused.

ii. hospital, medical and related expenses

At the beginning of this trial the applicant applied for the following amendments. They were not opposed by Mr. Bishop and they were granted by the court.

(1)Deleting "transportation from KPH to home at $400 on 4 occasions and replacing it with "transportation to KPH and back at $500 on 6 occasions";

(2)Add "domestic assistance for 12 months at $2,500 per week at $10,000 per month";

(3)Delete

a. hospital stay $4,000
b. surgery $5,000
c. anaesthetic $2,500
d. laboratory services $ 800
e. cast (elbow& knees) $2,000
f. x rays ($2,000 per X ray x 10) $2,000

These amendments led to a reduction of the claim for special damages from $143,230 to $126,450.

When all the evidence had been tendered there was yet a further application by Mrs. Clarke-Bennett for an amendment to the statement of claim. Mr. Bishop did not oppose these further amendments. They were granted by the court. These are the additional amendments:

(1)Reduce

a. clothing, shoes lost in accident from $1,100 to $800

b. medical report from $1,750 to $1,500

c. domestic assistance (12 months at $2,500 per week at $10,000) from $120, 0000 to $20,000

(2)Add

a. police report $1,000

b. further consultation with doctor $1,800

c. radiographs $7,600

d. transportation from hospital to home $ 300

At the end of the evidence and the amendments the total special damages was $36,000.

(b) general damages

i. future medical care

This item was added after an amendment was granted to the statement of claim to include the sum of $70,000. Dr. Neil had testified

that the pin placed in the claimant's left thigh bone was now causing him problems and needed to be removed. Mr. Bishop said that Dr. Neil testified that the operation could be done more cheaply in the public health system. Regrettably no one explored the cost of treatment in the public health and so I am not able to say, based upon the evidence, that the claim for $70,000 is unreasonable. Consequently I allowed this item.

ii. pain, suffering and loss of amenity

Mrs. Clarke-Bennett submitted that the claimant should receive an award of $3,500,000 for general damages and the sum of $1,500,000 for handicap on the labour market. She sought to justify her figures by relying on four cases in respect of general damages. She relied on the multiplier/multiplicand approach for handicap on the labour market.

Her first case was that of ***Sydney Fearon v Fred Brown*** Suit No C.L. 1991/F132 (assessed April 1999), Khan, Ursula, *Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica, Vol. 5, at page 9.* The sum awarded was $1,250,000. The Consumer Price Index (CPI) then was 1179.9. The CPI for July 2004 (the most recent available) was 1872.8. The current value of the award is $1,984,066.45. The claimant in that case suffered fractures of the right olecranon bone, acetabulum and central dislocation of the head of the femur. There was a fracture of the superior and inferior pubic ramus of the right pubic bone as well as a 2cm laceration of the right elbow that was bone deep. There were abrasions to right eyelid and lateral aspect of right knee.

The doctor thought that there was a 50% chance of developing severe arthritis of the hip and that surgery might be needed in later life. There were other findings made but the crucial one for present purposes was that the permanent functional impairment was assessed at 20% of the right upper limb and 15% of the right lower limb. There was no whole person disability assessment.

The second case was that of ***Cecil Henry v The Attorney General and Keith Scott*** Suit No. C.L 1992/H128 (assessed between October 1995 and March 1996), Khan, Ursula, *Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica, Vol. 4, at page 34* I will use the CPI for March 1996 for the purpose of updating the award since that was the time the award was made. The CPI in March 1996 was 936.3. The July 2004 CPI has already been given. The award then was $1,250,000. The current value of that award is $2,500,267.01. Mr. Henry suffered from injuries to the forehead, right elbow and right thigh, blunt trauma to the chest and numbness in right upper extremity. He suffered slight impaired sensation and digital movement of right upper limb. For the purposes of this assessment the relevant injuries are

a. skeletal pin in right lower extremity in the proximal tibia;
b. comminuted fracture of the right olecranon;
c. comminuted segmental fracture of neck and shaft of right femur.

In terms of treatment he had surgery on the right elbow with bone graft of the right femoral fractures. The report of the doctor was that Mr. Henry had limited range of motion of this right elbow, mild sensory ulna paresis resulting in tingling in the digits, limitation in range of movement in knee and only 10º of internal rotation of the hip. The permanent disability was assessed at 16% of the whole person divided in this way: 10% whole person – upper extremity and 6% whole person – lower extremity.

The third case was ***Gladstone White v Dorrington Ellis and Aston Nairne*** Suit No. C.L. 1997 W042 (assessed February 2000) Khan, Ursula, *Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica, Vol. 5, at page 11.* The CPI then was 1273.1. The July 2004 index is as stated above. The award then was $3,000,000. The current value is $4,413,164.72. The claimant had received injuries to his arms, leg, chest, neck and right hip as well as fractures to the right arm and right leg. He was hopitalised for two months and had surgery on his right arm and leg. He resumed work but was impaired since he could no longer ride a motor cycle. His sexual relationship with his wife was affected and he was now unable to participate in cricket, football and other games. He could no longer do chores around the house. No whole person disability is stated in the report.

The final case was that of ***Michael Jolly v Jones Paper Co. Ltd. and Christopher Holness*** Suit No. C.L. 1996/J014 (assessed November 1998) Khan, Ursula, *Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica, Vol. 5, at page 120.* The

CPI then was 1173.2. The award at the time was $800,000. The current value, using the July 2004 CPI, is $1,277,054.21. The claimant in ***Jolly's*** case did not receive any fractures but he did receive injuries and lacerations to the forearm. The tendons of the right middle, ring and little finger at their musculo-tendinous junction were severed. As can be seen from this description of the injuries this case is not of much assistance. The claimant there had no fracture as in the instant case. I will not refer this case any further.

In the case under assessment not only does Mr. Gayle have a 17% whole person disability but he also has begun to show early signs of osteoarthritis in the left wrist. He has not yet begun to develop any arthritis in the left hip but it must be remembered that Dr.Neil's prognosis said that this may happen within five years. We are still within the five years and since Dr. Neil has been proven correct in his prognosis in relation to the left wrist it is more probable than not that the will be correct in respect of the left hip. I therefore make this assessment on the basis that his prognosis concerning the left hip will be fulfilled. In terms of the left wrist and left forearm, there is a reduction in the range of normal movement.

Mr. Gayle is now complaining of discomfort in his left hip/thigh region which Dr. Neil says is caused by the pin that was inserted when he was being treated for his fractures. This pin now needs to be removed and it is this further surgery that will cost $70,000. This is going to have its own discomfort. Mr. Gayle's sexual relations with his wife is now impaired. This is a significant loss of amenity particularly for a young man. His decreased enjoyment of life has been indicated. The

pain he experienced after the injury has been outlined. He has lost the benefit of good health. He has suffered objective losses which have translated into subjective losses. I think that the sum awarded in ***Fearon*** should be exceeded because here, unlike that case, there is evidence of sexual impairment. Also here the prognosis of arthritis in respect of the left wrist is coming to pass as predicted. In ***Fearon,*** there was no evidence that at the time of the assessment the prediction of arthritis was being fulfilled. Similarly with regard to ***Henry*** there was no evidence of even a prediction of to say nothing of actual evidence of the early stages of arthritis. There was as well no evidence of sexual impairment. Further the Mr. Gayle's dominant hand, his left hand, is the hand that was injured in the accident. There was also evidence that Mr. Gayle's leg had to be rebroken and reset. I take all these matters into account and using the cases of ***Fearon*** and ***Henry*** as guides I award the sum of $3,200,000.

(iii) handicap on the labour market

I now come to a more intricate part of this assessment. The submission has been made on behalf of the claimant that an award under this head of damages should be made. Mr. Bishop opposes this on the basis that there is no evidence that the claimant tried to find another job. Mr. Bishop's submission ignores the complete evidence. The complete evidence is that the claimant tried to burn coal and "chop one and two yard". This is in keeping with the level of education and abilities of the claimant. He said that he cannot read and write well. He said that he did not try to find any other work because he feels pain in

his wrist. This, incidentally, is consistent with Dr. Neil's prognosis of 20% chance of developing left wrist osteoarthritis. Further the doctor said that the claimant now had permanent functional deficits in his left upper limb. The full effect of the doctor's evidence is that his capacity to earn as a manual labourer has not just been impaired but perhaps destroyed.

There are cases here in Jamaica and the West Indies that speak to the circumstances in which this award is made (see ***Gravesandy v Moore*** (1986) 40 WIR 222; ***Campbell v Whylie*** (1999) 59 WIR 326; ***Johnson v Sterling Products*** (1981) 30 WIR 155; ***Alphanso v Deodat Ramnath*** (1997) 56 WIR 183). All these cases, without exception, are based upon the analysis and conclusion of the English Court of Appeal in ***Moeliker v Reyrolle*** [1977] 1 All ER 9.

The head note from ***Moeliker*** has accurately captured the opinions of the three Lord Justices of Appeal. The head note states

> ***In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life.*** *If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise. No mathematical calculation is possible in assessing and quantifying*

the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate.'

The first point to note about this passage (and all three judgments) is that it did not say that the award can only be made if and only if the claimant is employed at the time of the assessment. It provides signposts that ought to be followed if the claimant is still working at the time of the assessment. There is nothing in this passage that says that an award for loss of earning capacity cannot be made if the capacity of the person is destroyed. Where the person is employed it is entirely appropriate to speak of the risk of loss of employment but if the person is unemployed and that unemployment is the result of the injury it is no longer correct to speak of the risk of loss for the simple reason that the unemployment is now a fact. I am not alone in this since Courtney Orr J came to the same conclusion in ***Mark Scott v Jamaica Pre-Pack Ltd*** Suit No. S 279 of 1992 (October 26, 1993) at page 11. His Lordship found support from the same Browne LJ who authored the main judgment ***Moeliker***. Browne LJ is reported as saying in ***Cook v Consolidated Fisheries Ltd*** (The Times, January 17, 1977) that the plaintiff may recover under this head of damage even if he is unemployed at the date of trial. If the logic of the law is otherwise we would have a situation where a person is compensated for a future risk but if the risk has actually occurred he could not be compensated.

The argument that loss of earning capacity is compensated for whenever an award for loss of future earnings is made is inconsistent with the distinction made between the by Lord Denning MR in ***Fairley v***

John Thompson (Design and Contracting Division) Ltd [1973] 2 Lloyd's Rep 40 at page 42 and repeated in ***Moeliker*** (see page 15c per Browne LJ). This distinction has been accepted by the Court of Appeal in Jamaica in the ***Gravesandy*** case (cited above) (see Carey J.A. at page 224f-g). It necessarily follows from this that loss of future earnings and loss of earning capacity are two separate and distinct heads of damages and in appropriate cases both may be awarded (see Browne LJ in ***Moeliker*** at page 15g where he speaks of the claimant having "a claim, or an additional claim, for loss of earning capacity"). The fact that one method of computing loss of earning capacity (i.e. the multiplier/multiplicand method) is the same as computing loss of future earnings is not a basis for saying that they are one and the same(see ***Edwards v Pommells*** SCCA No. 38/90 (delivered March 22, 1991) for different methods of calculating loss of earning capacity). We ought not to confuse the method of computation with what is being assessed. Again this idea is not new. Barwick CJ of the Australian High Court demonstrated quite clearly (the views of Gibbs and Stephen JJ notwithstanding) the fallacy of the proposition that merges an award for loss of earning capacity with loss of future earnings (see ***Atlas Tiles Limited v Briers*** (1979-1980) 144 C.L.R. 202). The learned Chief Justice said at page 209-210.

> *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.

...

Some have thought the distinction I have drawn between loss of earnings and loss of earning capacity is illusory or insubstantial. But, in my opinion, it is real and radical. A capacity to earn which is not being exercised nor presently intended to be exercised has a value which can be estimated, though no current earnings are available to demonstrate its worth even with approximation. Again, the plaintiff may have been currently employed in an industry which, for some reason or other, was doomed to extinction or in a capacity which technology was likely to render redundant. Yet retrained, other and more remunerative employment may be available. Earning capacity may produce, not merely earnings, but a satisfactory way of life which, being denied or destroyed, may need to be reflected in the value of the capacity. In my opinion, the distinction I make is not a matter of semantics but basically conceptual: and being observed and applied goes far to solving the matter of principle here under discussion.

Fifteen years later McHugh J demonstrated in his judgment, once again, the error of merging loss of earning capacity with loss of future earning, an error to be deprecated (see ***Medlin v The State Government Insurance Commission*** (1995) 182 CLR 1, (1995) 127 ALR 180, (1995) Aust Torts Reports 81-322 Negligence) This way of looking at loss of earning capacity as an asset rather than being transformed into a claim for loss of future income is perhaps what influenced the view of Edmund Davies and Scarman LJJ in ***Smith v Manchester Corpn*** (1974) 17 KIR 1 at 6, 8 (cited by Browne LJ in ***Moeliker*** at page 16e-f) when they are reported as stating that the multiplier/multiplicand approach would be inappropriate. The impropriety of this method of compensation for a loss of earning capacity seems to be rooted in the idea that the earnings per se that are derived from the use of one's earning capacity are not strictly speaking the earning capacity but merely evidence of a capacity to earn. Thus separate and apart from what the earning capacity can earn, it has intrinsic value.

There is nothing in the West Indian cases cited earlier that is inconsistent with this analysis. Thus those cases are not a bar to the way I have approached this issue. This means that Mr. Bishop's submissions were not accepted.

It seems to me as it did to Courtney Orr J in ***Mark Scott*** (cited above) the best evidence of reduced earning capacity is the fact of seeking other employment and being unable to sustain them because of the injury received. I cannot think of any good reason why an award for loss of earning capacity should not be made in this case. Having

decided to make the award the only remaining question is the method of computing the award.

Mrs. Clarke-Bennett has urged the court to use the earnings at the date of the injury and apply the multiplier/multiplicand approach. I find that there is much merit in this approach. The reason why I accept this approach as conceptually sound is that the loss of earning capacity occurred at the date of the injury (see Barwick CJ in ***Atlas*** (cited above) at page 211). However I will not use this approach in this case since there is a claim for loss of future earnings which is based upon the multiplier/multiplicand approach. I will use the lump sum approach for the loss of earning capacity. The lump sum awarded here is a low and moderate figure of $300,000. The reason for this is to guard against over compensation. To Mrs. Clarke-Bennett I say that I recognise the logical problem here. It does seem odd that the award for a head of damage to which the claimant is legitimately entitled should vary according to the method of assessment but until this area is revised by a higher court I am bound by authority.

(iii) loss of future earnings

The undisputed evidence is that he was earning $3662 per fortnight. Barring the injury it is safe to assume that he would still be earning at least this amount. This assumption while not "scientific" is the best one to make in the circumstances. There was nothing in the medical evidence or the other evidence in the case to suggest that the claimant would by now have suffered any diminution of his capacity from any cause. To assume otherwise would be to create a windfall for the

tortfeasor. Equally there is no evidence that Mr. Gayle would have increased his earnings. His level of education and skills suggest that only wage increases prompted by inflation would actually increase the dollar amount he would earn. I recognise that there is certain lack of logic here because if it is that the damage to Mr. Gayle's earning capacity occurred at the time of the tort why shouldn't he be able to claim compensation for the pretrial period as well once it is accepted that it was the tort that led to the inability to work? Indeed one cannot resist the logic of Barwick CJ on this point in the ***Atlas*** case (see page 211). At this point I am bound by authority that suggests that pretrial earnings ought to be pleaded as special damages.

Mr. Gayle was born in 1966. This makes him 38 years old at the time of this assessment. I take it that he would have retired at age 65. His annual income would be $95,212. Using Mrs. Khan's Vols. 4 & 5 of *Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica* an appropriate multiplier is 10. This yields the sum of $952,120.

Conclusion

The award is as follows:

(a) special damages

$36,000 with interest at 6% from the date of November 25, 1999 to September 20, 2004;

cost of future medical care $70,000 - no interest

(b) general damages

pain, suffering and loss of amenity $3,200,000 with interest at 6% from date of service of the writ of summons to September 20, 2004;

loss of earning capacity - $300,000 – no interest;

loss of future earnings - $952,120 - no interest.

Costs to the claimant other than those costs which have already been awarded to the second defendant. The costs to be agreed or taxed.