



[2020] JMSC Civ 153

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 06292

BETWEEN	Damion Reid	CLAIMANT
AND	Attorney General of Jamaica	DEFENDANT

Personal Injury – damages for Assault and Battery – Claimant injured while in custody – Traumatic brain trauma – Neurological damage resulting in weakness to right side and slurred speech – claiming special damages, loss of income, general damages for pain and suffering and loss of amenities, disability on the labour market, psychiatric injury – exemplary damages

Tamara Francis Riley Dunn and Debra-Ann Matthews instructed by Nelson-Brown, Guy and Francis instructed by Nicole Allen for the Claimant.

Shaniel Hunter, instructed by the Director of State Proceedings for the Defendant.

Heard: January 24, 2020 and June 25, 2020.

PALMER, J

Background

[1] The claim filed on December 31, 2014 is for damages for assault and battery relating to an incident that the Claimant says occurred on or about May 4, 2012. Mr. Reid was taken into custody by the police on the night of May 4, 2012 for minor offences and while in the holding area, he received injuries to his head from a beating. When discovered in his cell, unconscious and foaming from the mouth, Mr. Reid was transported to the hospital where the full extent and impact of his injuries began to be discovered. He claims for damages for loss and injury suffered

from the incident. The Defendant admitted liability and acknowledged that Mr. Reid is entitled to damages, interest and costs, but makes no admission as to the quantum of damages. The submissions of both Counsel were extremely helpful in my findings and have been summarized and referred to below.

Evidence

- [2]** At the hearing on assessment of damages, Mr. Reid's witness statement was admitted as his evidence in chief, and he outlined that he is now thirty-five years of age and works once per week as a "clean-up man" with a meat shop located in Montego Bay, St. James. Up to the time of the incident in 2012, he was employed to the same meat shop and was able to take customer orders, cut and packaged meat and move goods in and out of storage.
- [3]** He recounts that on May 4, 2012 at about 10 pm he was on Barnett Street, Montego Bay in St James when 'plain-clothes' police officers wearing marked police vests approached him. The police officers searched him and found a small amount of ganja in his pocket, and a knife in his workbag. The officers placed Mr. Reid in the trunk of their vehicle and transported him to the Barnett Street police station where an officer he described as a "clear complexioned", tall police officer of slim build, asked him a question and the two shared a brief verbal exchange, the particulars of Which Mr. Reid said he could not recall.
- [4]** The police transported him thereafter to the Montego Bay police station for processing, during which Mr. Reid's cell phone rang and he answered the call. After his conversation on the cell phone, he said that the said "clear complexioned" police officer beat him to his head and back of his neck, and placed him in a cell. He recalled feeling pain to his head and neck and waking up the following day in the hospital. This was only the beginning of sorrows for Mr. Reid, as to his horror, he could neither speak properly, feel sensations to the right side of his body nor move his right hand or foot.

- [5] Upon his assessment, by a Neurosurgeon, Mr. Reid's rating on the Glasgow Coma Scale ("GCS") was at first 8/15 but later improved to 12/15. His GCS gradually improved over the time to 14/15, but during that initial admission to the hospital, it was determined that he had suffered brain damage. After his discharge from hospital, Mr. Reid was unable to care for himself and was heavily reliant on others for his care. The degree of his incapacity for a young man of just twenty-seven, to add insult to injury, caused him a great deal of embarrassment and plunged him into bouts of sadness, depression and suicidal thoughts. Prior to the incident he was quite an independent-minded individual and wholly self-sufficient, but after leaving the hospital, relied primarily on his then girlfriend to bathe, feed and clean up after him.
- [6] Due to the extent of the neurological damage, affecting his speech and causing a severe weakening of the right side of his body, Mr. Reid could no longer work to support himself or contribute to the care of his two (2) children. He also could not hug or play with them as he used to, nor participate in his local football league and in sports he loved to play.
- [7] Mr Reid said he began physiotherapy to help him to walk but due to the cost of sessions and the associated transportation costs, he discontinued the sessions after four to five months. Even after a year, though he was less reliant on a wheel chair to move around, he was not as strong as before the incident. His mobility and speech improved over time, but even at trial, he still walked with a limp due to weakness to one side of his body and had slurred speech.
- [8] The stress of his care took its toll on his relationship with his girlfriend. As soon as he was able to walk, she ended their relationship stating how difficult it was for her to continue to care for him. Being unable to pay for help, he was left to rely on the kindness of family and friends for food and care Mr. Reid described instances where he would be alone at home and fell down but had to help himself up.

- [9]** Despite the improvements, he detailed that he was left with slurred speech and the inability to read as well as he used to. His condition left him feeling very frustrated and embarrassed. This was exacerbated by the fact that he was sometimes teased and mocked in his community due to his disability. Additionally, his lingering weakness and difficulty walking, adversely affected his ability to find work.
- [10]** In 2014, he approached his former employer for work and received employment for which he was paid \$2,200 per week. Mr. Reid was relegated to clean-up tasks once per week, as he no longer had the strength or mobility to engage in the duties that he had prior to the incident. He was also unable to operate a motor vehicle, further impairing his employment prospects and quality of life.
- [11]** The medical report of Dr. Holness, dated December 28, 2012 described the Claimant's injuries and treatment as follows:
- On the May 5, 2012 the Claimant was found unconscious for an unknown period of time with froth coming from his mouth. Upon his examination he was found to have GCS assessment of 8/15 and he could not verbalize upon arriving at the hospital, but he woke up and sat up on various occasions;
 - Upon examination by a neurosurgeon Mr. Reid's GCS was 12/15 E4 M5 V2 and he had a laceration over his right eye with a sub-conjunctival haemorrhage with periorbital oedema (bloated eyes);
 - He was managed by the Neurosurgery Department and reviewed by the Ophthalmology Department as necessary;
 - He later commenced upper and lower limb physiotherapy, and he was mostly conscious and awake but disoriented and maintained a Glasgow Coma Scale of 11-12/15;
 - There was no active or passive movement to his right upper limb. Six (6) days after his admission it was observed to have weakness or hemiparesis to his right

side, right facial palsy and a deviating gaze to the left. However, he maintained normal movements on his left side;

- A CT Scan showed no haemorrhage or lesion but clinically the medical team suspected diffuse axonal injury (a brain injury in which damage in the form of extensive lesions in white matter tracts occurs over widespread area) ;

- Nine (9) days later the Claimant's right sided hemiparesis seemed to have been resolved, he had neurological improvement with GCS of 14/15 and a repeat CT scan revealed cerebella injury;

- He was discharged on the May 22, 2012. On examination at his clinical follow-up on January 7, 2013, he showed signs of significant impairment and permanent deficit as there was:

- (i) right sided weakness and incoordination;

- (ii) abnormal speech – (hardly intelligible due to neurological damages to cerebellum); and

- (iii) brain stem and abnormal gait (manner of walking) due to (ii) above.

- At the time of the medical report, December 2012, he was receiving physiotherapy and it was foreseen that he would be left with a significant disability which would severely limit his ability to have gainful employment.

[12] The further medical report of Dr. Holness, dated January 28, 2018, found that Mr. Reid had a Whole Person Impairment (WPI) of 65%:

- (a) 30% WPI with regards to Claimant's upper extremity coordination;

- (b) 20% WPI with regards to Claimant's gait; and

- (c) 15% WPI with regards to Claimant's speech

- [13] In the report of Dr. Goulbourne, Consultant Psychiatrist, he observed that Mr. Reid walked with a limp to his right side and though not clear, had comprehensible and coherent speech. While he complained of being depressed at times and having had suicidal thoughts after the incident, he denied at the time of examination that he was currently having suicidal thoughts or ideations. His primary preoccupation was with how he would provide for the welfare of his children.
- [14] Dr. Goulbourne concluded that Mr. Reid was significantly disturbed emotionally by the incident and its serious consequences, which resulted in suicidal intent. This suicidal intent was resolved by medical intervention and community support, a conclusion that Dr. Goulbourne seemed to have gleaned from Mr. Reid's report and not any medical record. Mr. Reid's mental status revealed that he did not have significant cognitive impairment due to the neurological injury. He was not assessed as displaying persistent signs of depression requiring medication but had periods of sadness due to the nature of his injuries and the limitations they imposed on him. Dr. Goulbourne stated, however, that due to his previous suicidal intent and chronic impairment, he had an increased risk of becoming significantly depressed and suicidal.
- [15] Dr. Goulbourne gave Mr. Reid a fair prognosis given his current level of functioning, and his improvement is linked to the degree to which he can address the welfare of his children. To address that issue would significantly reduce the risk of emotional disturbance and suicidality.

Special damages

- [16] The parties agreed on special damages for medical expenses and travelling in the sum of \$95,000.00. The following documents being tendered into evidence by agreement:

a) Medical report from Dr. Holness dated December 28,2012;

- b) Receipt dated January 23, 2013 from Cornwall Regional Hospital in the amount of \$1,000.00;
 - c) Medical report dated January 28, 2018, which was prepared by Dr. R. Holness from the Cornwall Regional Hospital;
 - d) Receipt dated January 25, 2018 for \$10,000.00 from Dr. Holness;
 - e) Receipt dated March 16, 2018 for \$20,000.00 from Dr. Holness;
 - f) Receipt dated August 22, 2019 for \$20,000.00 from Dr. Holness;
 - g) Medical report dated September 12, 2019 from Dr. Goulbourne;
 - h) Receipt for \$18,500.00 dated September 30, 2019 for medical report from Dr. Goulbourne;
 - i) Job letter from RR&R's Meat and More dated August 16, 2019;
 - j) Receipt and cheque dated September 10, 2019 for payment of \$7,000.00 to Dr. Kevin Goulbourne.
- [17]** The evidence of Mr. Reid's income prior to the incident, was that he was employed to RR&R's Meat and More in Montego Bay, Saint James as a meat cutter, with a weekly income of \$7000. This runs contrary to a job letter from his former employer showing earnings of \$10,000.00 weekly. His evidence was of obtaining limited employment 'early 2014', but he elaborated in cross-examination that the period referred to November 2014 when he received re-employment for one day per week. The letter also mentioned that he could no longer be a meat cutter but could do meat packaging, while Mr. Reid indicated that he did not do meat packaging but only did clean-up. The letter also does not corroborate his current weekly remuneration or that he was only re-employed for one day per week.
- [18]** I find the evidence of Mr. Reid more reliable on the issue of his current earnings. His lost earnings at a rate of \$7,000 per week for a total of 132 weeks from May 4,

2012, the date of the battery, until November 2014 when he was re-employed, is \$924,000. Counsel for the Defendant argued that as the job letter spoke to the larger remuneration of \$10,000 but not the current \$2,200 that Mr. Reid claimed to be earning, that the Court should find that he was still earning \$7000 per week.

[19] Mr. Reid's evidence is that upon his re-employment to do "clean-up", he received a reduced income of \$2,200.00 and that he was employed to work for one day per week. With his reduced capabilities, endurance and strength, I find his account in this regard to be entirely reasonable. I accept on a balance of probabilities that with his diminished strength, endurance and coordination that his duties would be limited and accordingly, so would his remuneration. I find the reduction of salary to a weekly rate of to \$2,200 is proven and that his net weekly loss of earnings was \$4,800.00. For the 270 weeks from the date of his re-employment to the date of the hearing on January 24, 2020 the total is \$1,296,000. Accordingly, the total sum for his lost income is \$2,220,000 for the period the May 4, 2012 to January 24, 2020. Inclusive of medical expenses, transportation expenses and loss of income, the total is \$2,315,000.

General damages

Pain and suffering and loss of amenities

[20] Counsel for the Claimant relied on the decision of ***Neinah Williams v Islandwide Concrete Company Limited and Bowen, Henry*** [2017] JMSC Civ. 37 a decision of Simmons, J, which referred to the dicta of Wooding CJ in ***Cornilliac v St. Louis*** (1965) 7 WIR 49 on the applicable guidelines in the assessment of damages:

- i. the nature and extent of the injuries sustained;*
- ii. the nature and gravity of the resulting physical disability;*
- iii. the pain and suffering which had to be endured;*
- iv. the loss of amenities suffered; and*

v. the extent to which, consequentially, the claimant's pecuniary prospects have been materially affected.

- [21] The nature and extent of his injuries are severe as Mr. Reid's GCS when admitted to hospital was 8/15 with him waking up and verbalising intermittently. It improved during his initial admission to 12/15 and he had a laceration over his right eye with redness and swelling over his right eye. His CT scan showed traumatic brain injury with possible cerebral anoxia (lack of oxygen to the brain). Though he was released as an outpatient to the Neurology Department on May 22, 2012, he was observed as exhibiting uncoordinated movement of both upper and lower limbs, particularly on his right side, as well as unintelligible speech due to lack of tongue and facial movement, and abnormal gait.
- [22] The nature and gravity of his physical disability became immediately manifest upon his release. He spoke of weakness and lack of sensation to the right side of his body which resulted in an inability to look after himself and the neurological damage impaired his speech. Upon his assessment by Dr. Holness on January 28, 2018 he was assessed as having a WPI of 65% and was unable to run, perform heavy labour or operate a motor vehicle. While the Claimant showed minor improvement in his orientation in person, time and place, Dr. Holness opined that he was highly unlikely to improve further, thereby permanently and negatively impacting his daily living, ability to participate in leisure and social activities, and his employability.
- [23] As it regards his pain and suffering and loss of amenities, Mr. Reid recounted that he was beaten repeatedly to his head and back of neck and later fell unconscious. He awoke in hospital with the inability to speak clearly, to move or feel sensations on the right side of his body. Upon his release, this formerly active twenty-seven year old became a virtual invalid, reliant on his then girlfriend and on his family to do such tasks as feed and clean him due to his inability to do so himself. He could no longer play the sports he loved, participate in the community "corner league", or play with his children due to the neurological damage and the weakness to the

right side of his body. Though he has come a far way since then, based on the report of his doctor, it seems unlikely that he will ever be able to return to playing those sports as he used to. Even at trial he still walked with a significant limp and had slurred, though coherent, speech.

- [24] Dr. Goulbourne said that Mr. Reid complained of suicidal thoughts and ideations that were addressed with medication and community support. He still however, contends with bouts of sadness and depression, which leave him at risk of a return to thoughts of suicide if his main concern regarding the welfare of his children, is not addressed.
- [25] Counsel for the Claimant cited the case of ***Ucal Simpson v Allied Protection Limited and Alva Watson*** 2007HCV00935 Delivered July 13, 2010 where the Claimant sustained severe injuries when he was struck by a motor vehicle whilst walking on the road. He was diagnosed with a head injury, injury to the left orbit and injury to the chest and has a permanent partial disability of ("PPD") of 40%. Three years post injury it was found that Mr. Simpson suffered severe impairment due to confusion, disorientation, and memory malfunction, as well as difficulty speaking. He also had psychological consequences that prevented him from functioning independently outside of his home. He required assistance with activities of daily living and had a reduction in the cognitive functions of his brain. In July 2010, the CPI was 161.3, Mr. Simpson was awarded \$12,000,000.00 which now updates in January 2020 to \$19,900,806.00 using a CPI of 267.5.
- [26] While there are certainly parallels to be drawn with the injuries received by Mr. Reid, there is no indication from the evidence that there was any psychological consequence that prevented him from functioning independently outside his home. Difficult as Mr. Reid says the journey was, he managed to eke out a meagre living from working at the meat shop and functions on his own to care for himself. It is noteworthy however, that his PPD was higher than the Claimant in the cited case.

- [27] Reference was made also to ***Norris Francis v UC Russal Alumina Jamaica Limited*** Claim No. 9007 HCV 03957 where the Claimant suffered injuries arising from a motor vehicle accident. These included cerebral oedema, brain contusion, loss of consciousness, severe head injury, weakness in all limbs and weakness predominantly in right side. He also had unsteady gait, which bears some parallel to Mr. Reid's limp and persistent weakness to his right side. His PPD rating was 50% of the whole person. While his overall judgment was reduced due to his contributory negligence, the amount of \$12,000,000.00 that was assessed for general damages in July 2010, updates to \$19,900,806.00 using a CPI of 267.5.
- [28] The Claimant's Counsel also referred the Court to the case of ***Neinah Williams*** (supra) where the Claimant was injured in a motor vehicle accident. She suffered cervical spinal cord injury, left spastic tetra paresis (cerebral palsy of the limbs) and urinary and faecal incontinence. Her PPD rating was 50% of the whole person. Counsel acknowledged that the injuries suffered by the Claimant in that claim, are distinguishable from those suffered by Mr. Reid but contended that the circumstances pertaining to her pain and suffering and loss of amenities are similar.
- [29] Ms. Williams had difficulty caring for herself and doing household chores. She could neither run nor walk fast, and recalled being in intense pain for a long time. Counsel argued that both Claimants suffered from post-traumatic stress and their injuries affected their ability to maintain intimate relationships with their respective partners and to enjoy other physical and leisure activities they once enjoyed. In March of 2017, using CPI of 238.7 Neinah Williams was awarded the sum of \$35,000,000.00 for pain and suffering and loss of amenities, which updates to \$39,222,874.00 using the above-mentioned CPI of 267.5.
- [30] Counsel for the Defendant also relied on the authority ***Norris Francis v UC Russal Alumina Jamaica Limited*** together with ***Neville Hamilton v Caleb Walford*** Suit No. CL 1989/H003 and argued that any award for general damages to Mr. Reid should be significantly less than that being sought. In ***Neville Hamilton***, the

Claimant sustained head injury with right hemiparesis, right facial palsy and he had a significant impaired language disability. He had weakness in the upper and lower right limbs, lacerations of right hip and right ear with abrasions over right knee and anterior abdominal walls. There was evidence of muscle wasting of the right upper limb and lower extremity and he walked with a limp on the right side. The Claimant also had a permanent injury to the left hemisphere of the brain and has 15% recent memory defect. His PPD was assessed at 50% and he was diagnosed as unlikely to resume physical work. In January 1991, the Court awarded \$150,000.00 for general damages and \$170,000 for loss of future earnings, which at a CPI of 7.003 update to \$5,729, 687.27 and \$6,493,645.59 respectively.

[31] As was noted by Counsel for the Claimant, the injuries suffered by that Claimant in **Norris Francis** were more significant than Mr. Reid's who was hospitalized for a shorter period and his Glasgow Coma rating improved to 14/15 by the time of his discharge from hospital. Also, unlike Mr. Reid, the Claimant in the cited case required the use of a walker and had air or blood in his chest cavity. Further, Mr. Reid only has weakness to his right side while the Claimant in the mentioned case suffered weakness in all his limbs. Notwithstanding those differences, Mr. Reid's PPD is greater than that of the Claimant in that case. Counsel argued that as the Claimant's injuries are more closely in line with the injuries which the Claimants sustained in both the **Norris Francis** and the **Neville Hamilton** case, that an average of the amount awarded in both cases would provide a reasonable amount for compensating the Claimant in the case at bar, for an award \$12,927,519.51.

[32] The award in **Neinah Williams** clearly took into consideration the extent of her injuries, which were more severe than those of Mr. Reid. The injuries of the Claimants in **Norris Francis**, **Ucal Simpson** and **Neville Hamilton** bore similarities to those of Mr. Reid and the awards made in those matters ranged from \$19,900,806.00 to \$5,729, 687.27. Notwithstanding, his PPD is greater than that of each of the Claimants in the respective cases. I believe given the nature and severity of his injuries and the extent of the loss of his amenities, a fair approach

would be to use a rough average of the awards made in each of the four cases. Accordingly, the award that I find reasonable in the circumstances is \$23,000,000.

Psychiatric Injury

[33] As it regards Psychiatric Injury, it was submitted by the Claimant's Counsel that Mr. Reid is also entitled to receive an award with regards to the post traumatic or psychiatric distress he suffered in addition to an award for pain and suffering and loss of amenities. In **Marva Protz-Marcocchio v Ernest Smatt** reported in Khan's Assessment of Damages. Vol. 5. at page 284, the Claimant suffered from post-traumatic stress disorder arising from injuries she sustained from dog bites. She was so traumatised by the incident, that she subsequently formed an extreme phobia of dogs and relived the incident from time to time. The Court awarded an additional sum of \$100,000 in April 2002 using CPI of 61.28, which updates to \$436,520.00 in January 2020.

[34] It was acknowledged by the Claimant's Counsel that psychological damage was not pleaded in the Particulars of Claim filed herein, but that the details of the negative psychological effects suffered by the Claimant were disclosed in the medical reports of Dr. Holness and Dr. Goulbourne, as well as the Claimant's witness statement. The Claimant's evidence, supported by the aforesaid medical reports, in particular that of Dr. Goulbourne, outlined that he had suffered from persistent feelings of low self-esteem due to his dependency on others for self-care, the inability to obtain a regular job and severe embarrassment associated with his facial appearance and difficulty speaking and walking. These feelings became so severe and debilitating that he suffered from depression and had suicidal ideations. It was submitted that an additional award be made for psychiatric injury in the sum of \$1,000,000.00, based on the more severe and extended nature of Mr. Reid's psychiatric injury.

[35] Counsel for the Defendant submitted that while the Claimant submitted a medical report from Dr. Golbourne, the medical report did not diagnose the Claimant with

any psychiatric ailment. It outlined how the injury has affected the Claimant to date, but was based on what the Claimant had told his doctor. Further, the medical report mentioned that at some point in time the Claimant was taken to the hospital and treated for suicidal ideations. Counsel contended that this was not supported by any medical report and is merely a history given by the Claimant to the doctor. Accordingly, Counsel for the Defendant argued, little or no weight ought to be attached to this medical report because it did not provide any diagnosis that would affect the amount to be awarded for damages. In any event, Counsel contended, the Claimant has not pleaded that he suffered any psychiatric injury and accordingly is not entitled to any compensation under this head of damages.

[36] While I found the evidence of Dr. Goulbourne to be useful in assessing the overall impact of the injuries on Mr. Reid's psyche, I found it limited in proving his case of psychiatric injury. The report was heavily reliant on Mr. Reid's account of his mental state at certain periods of his recovery, which I expect all such reports must to some degree, but is unsupported by other evidence of his examination and treatment for a psychiatric ailment prior to seeing Dr. Goulbourne. There is nothing from any other witness speaking to his need for community intervention at the points when he had the suicidal ideations or that he received any. Mr. Reid has pleaded nor proven that he suffered any psychiatric injury and I agree that the reports provided do not diagnose him with any identifiable psychiatric injury resulting from the incident. I therefore make no award under this head.

Handicap on the labour market

[37] As it regards handicap on the labour Market, Counsel for Mr. Reid submitted that he is currently 35 years old and employed as a Janitor earning \$2,200.00 per week. As indicated in the medical reports, the permanent disability arising from his injuries resulted in his inability to perform heavy labour, operate a motor vehicle, or perform other daily activities. This naturally impacts severely on his employability. Counsel submitted that the risk of the Claimant losing his present job before the end of his working life is more than fanciful, as it required heavy

lifting of boxes, precision and agility. His incoordination and impaired motor functions negatively and seriously impact his aptitude and suitability for work that involves these abilities.

- [38] If the risk of losing his current employment should materialise, then, Mr. Reid's competitiveness on the labour market would be manifestly diminished based on his impairments. Counsel cited the authority of **Smith v Manchester** (1974) 17 KIR 1, for the contention that even though handicap on the labour market has been described as a risk, there is, 'nothing notional about the damages to be awarded for this item of loss; and it is quite untrue to describe the loss of earning capacity as only a 'possibility'. Counsel submitted that this risk is the reality that Mr. Reid is living and will live with for the rest of his life; for which he must be compensated.
- [39] The Claimant placed reliance on the case of **Marcella Clarke v. Claude Dawkins and Leslie Palmer** Suit No. C.L. 2002/ C047 delivered on June 16, 2004, for the proposition of utilizing the multiplier/ multiplicand method in calculating the Claimant's entitlement under this head of damage. Using the Claimant's current earnings, his gross annual salary of \$144,400.00 would be used as the multiplicand. Next, using 65 years as the age of retirement, the Claimant's remaining work life as at the date of the hearing would likely be 50 years. The Claimant submitted that the case of **Imogene Jackson v. High View Estate and Nathaniel Byfield** reported at page 124 of the Khan's Assessment of Damages, Vol. 4, suggests that an appropriate multiplier of 13 should be applied to the instant case. Therefore, in utilizing the said multiplier/ multiplicand approach Counsel submitted that an award of \$1,487,200.00 for the Claimant's handicap of the labour market is suitable.
- [40] Counsel for the Defendant submitted on this issue that the job letter from Mr. Reid's employer advised that prior to the incident he was earning \$10,000.00 per week. As already noted, the letter does not state what the Claimant is earning today it only states that he is able to do packaging; which was a part of his job description prior to the incident based on his evidence. Counsel posited that given the lack of

reliability of the letter in this regard and there being no indication of him earning a reduced salary, that his income should be accepted at \$7,000.00 per week as pleaded and stated in his evidence. I have already stated my finding on the accepted weekly earnings for the relevant period.

[41] Counsel referred to ***Andrew Ebanks v Jephther McClymont*** Claim No. 2004 HCV 2172, a decision of Sykes J (as he then was), where he awarded general damages for loss of earning capacity of \$250,000 distinct from general damages for pain, suffering and loss amenities. Sykes J noted that this head of damages is distinct from loss of future earning and is designed to compensate for a loss that is permanent and affects the Claimant's ability to compete in the open labour market. His Lordship also noted the factors that established whether one should utilize a lump sum figure or apply the multiplicand or multiplier formula. In that case, there was evidence as to the Claimant's weekly income but no evidence regarding the Claimant's likelihood of finding work, his education, skills or training, though it was noted that the Claimant's earning capacity had been impaired.

[42] Sykes J also noted that in Jamaica there are three methods utilized to calculate a figure under this head of damages: the multiplier/multiplicand method, the lump sum method and increasing the award for pain and suffering and loss of amenities to include an unspecified sum for loss of earning capacity. The learned judge listed six (6) factors which are summarised below:

- i. if the claimant is working at the time of the trial and the risk of losing the job is low or remote, then the lump sum method is more appropriate and the award should be low;*
- ii. if the claimant is working at the time of the trial and there is a real or serious risk of losing the job and there is evidence that if the current job is lost there is a high probability that the claimant will have difficulty finding an equally paying or better paying job, then the lump sum method may be appropriate. This depends on when this loss is seen as likely to occur and the size of the award may be influenced by time at which the risk may materialise;*

- iii. *if the claimant is a high-income earner the multiplier/ multiplicand method may be more appropriate.;*
- iv. *the lump sum is not arrived by reference to and comparison with previous cases;*
- v. *if the claimant is not working at the time of the trial and the unemployment is the result of the loss of earning capacity then the multiplier/ multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind employment or if employment is found, that the job is likely to be less well paying than the pre-accident job, assuming that the person held a job;*
- vi. *if the person has not held a job but there is evidence showing the person is unlikely to work because of the injuries then the lump sum method is to be used.*

[43] Counsel for the Defendant submitted that Mr. Reid falls within category (a); that is, he is working at this time of trial and the risk of losing his job is low. Further, he is a low-income earner and thus it is more likely that the lump sum method would be appropriate. Further Counsel argued that there is some evidence of the Claimant's weekly income, and though the amount is disputed due to the conflicting evidence from the Claimant, there is no evidence that he would not find work for the rest of his life. Likewise, there is no evidence of his education, skills and training as in **Andrew Ebanks**.

[44] In the **Norris Francis** case, the Court awarded \$750,000 for handicap on the labour market in circumstances where there was no evidence as to the Claimant's capacity to work or otherwise, and his inability or lack of success in securing employment and other such necessary information. Counsel for the Defendant submitted that a lump sum \$750,000.00 is reasonable for the case at bar.

[45] I found the reasoning of Sykes, J in **Andrew Ebanks** to be a helpful guide in the factors to consider in making an award under this head. Mr. Reid, from all indications, was working at the time of trial, but he said (and I accepted) that he now only works for \$2,200 per week as his injuries have left him only able to

manage lightweight duties requiring less coordination and precision. He seems to have had a very good relationship with his employers, who told him to check with them as soon as he was better, but before he was able to attain his pre-incident work capabilities, was re-employed. As far as the evidence, even close to six (6) years after resuming work, the best that he can manage, is clean-up.

[46] I agree with Counsel for Mr. Reid that the risk of his losing this job before the normal age of retirement is more than fanciful. Following the reasoning of Sykes, J. in **Andrew Ebanks**, it is undisputed that he is in some form of employment, but it is not at his pre-incident level. The risk of losing even that limited employment is serious and it is highly likely that he is will have difficulty finding employment paying him at his current rate or better, due to his disabilities. He is still a relatively young man but that risk is likely to materialise by the time he attains 50 years of age, as the natural effect of aging amplifies his current challenges. I find that a lump sum of \$1,000,000 is reasonable to compensate for Mr. Reid's handicap on the labour market.

Exemplary damages

[47] It was submitted that an award of exemplary damages ought to be made in favour of the Claimant. In the case of **Rookes v Barnard** C 19642 AC 1199, at page 1221, Lord Devlin laid down that exemplary damages are distinct from aggravated damages and should only be awarded in two (2) specific categories one of which is when there is 'oppressive, arbitrary or unconstitutional action by the servants of government'.

[48] In **Maxwell Russell v. Attorney General for Jamaica and Corporal McDonald** Claim No. 2006 HCV 4024 the Court awarded exemplary damages of \$400,000.00, which updates to \$892,000.00. Mr. Reid says he was attacked by servants of the state, and though no factual determination was made on that issue and was denied by the Defendants, it is still sufficient to say that he was found in the beaten and unconscious condition while in the care of agents of the state.

[49] His Counsel described the attack as unprovoked, unjustified and so egregious, oppressive and arbitrary, as to warrant an award for exemplary damages. That he could be placed in a cell and found in that condition, would at very least have meant that persons in the cell had beaten him to that state with no intervention from state agents to protect him. There was no indication on the part of the Defendant that this occurrence was investigated and someone in the cell charged in relation to the assault. This all supports the Claimant's contention that he did not come by his injuries as mysteriously as is insinuated, but by agents of the state.

[50] Counsel submitted that Mr. Reid suffered, and continues to suffer, from irreparable impairments that have irreversibly damaged his life, work and relationships. The sum of \$1,200,000.00 for exemplary damages was submitted as reasonable in the circumstances.

[51] Counsel for the Claimants acknowledged that this head of damage was not pleaded and in that regard, relied on the dicta of Lewison, LJ in the case of **Whalley and others v PF Developments Ltd and another** [2013] EWCA Civ 306 for the contention that it ought not be a bar to an award. At paragraph 31 Lewison, LJ opined:

"The purpose of a statement of case is to define the issues and to warn each party what will be dealt with at the trial, but the flexibility of modern procedure is such that, provided the mechanics are fair, adequate notice of matters to be dealt with at trial can be given under the direction of the court otherwise than through the formal medium of a statement of case."

[52] This approach was adopted by McDonald-Bishop J (as she then was) in **Jehoida Buchanan v Adrian Smith and Phyllis Hinds** Claim No. 2010 HCV 04709, to depart from the general principle that special damages and heads of damages must be specifically pleaded. The learned judge opined that to depart from this principle in appropriate circumstances was in "keeping with a sense of justice reasonableness, logic and plain good sense rather than being strictly bound by precedent".

- [53] On this point, the Defendant's Counsel submitted that the guiding principle is found at rule 8.9 (5) of the **Civil Procedure Rules** ("CPR") which stipulates that a Claimant making a claim for exemplary damages must set out the grounds relied upon. Further, Counsel submitted, rule 8.7(2) of CPR requires a claimant seeking exemplary damages to say so in the claim form. Neither of the foregoing was done in the case at bar, therefore the Claimant, it was submitted, is not entitled to an award.
- [54] The requirements of the CPR are clear and the Claimant's Counsel acknowledged that the Claimant did not plead exemplary damages. While I agree that in an appropriate case a Court could use its discretion to allow an award for a loss suffered though not pleaded, I do not agree with the Claimant's view that this case presents sufficient circumstances for the exercise of that discretion. Aside from the clear and unambiguous requirements of the CPR, this assessment did not emanate from a trial but a judgment on admission following a defence filed limited to quantum. Were it pleaded, the Defendant could in the defence respond to it, which is especially important when one considers that the Defendant denied that the events that form the basis of the exemplary damages, i.e.the beating by its agent, even occurred. I therefore make no award under this head.

Conclusion

- [55] To describe the injuries inflicted on Mr. Reid and the impact they have had on him as severe, would be an understatement. That he could receive such injuries while in the custody of agents of the state was, on the one hand, in line with the Claimant's case that there was a beating by state agents; unjustified and unconscionable. On the other hand, if in line with the Defendant's position that state agents found Mr. Reid in his cell in that condition, at very least an egregious dereliction of duty that could have resulted in Mr. Reid's death.
- [56] Based on my findings above, I agree with the submissions of the Defendant regarding the exemplary damages. I believe especially in the context of judgment

being entered after the defence was filed limited to the quantum of damages, it would be unfair to the Defendant to make an award under that head of damages, when it was added at this late stage. Coupled with the stipulations of the CPR in that regard, I made no award under this head.

[57] I also made no award for psychiatric damage based on the insufficiency of evidence to support such a finding apart from the Claimant's 'say-so' regarding his condition and treatment. It is also clear that he seems to have adjusted to his disability and is mostly concerned about his ability to care for his children. The report does not support a finding that he has suffered a psychiatric injury.

[58] Accordingly, based on the foregoing, my judgment on the assessment of damages is as follows:

- (i) Special damages are awarded in the sum of \$2,315,000, (being \$2,220,000 for loss of earnings and \$95,000 for medical and transportation expenses), with interest at 3% per annum from May 4, 2012;
- (ii) General damages for pain and suffering and loss of amenities awarded in the sum of \$23,000,000 with interest at 3% from February 2, 2015;
- (iii) A lump sum is awarded for handicap on the labour market of \$1,000,000 with interest at 3% from the date of judgment;
- (iv) Costs to the Claimant to be taxed if not agreed.