BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2008/0183

BETWEEN

DAREL CHRISTOPHER

Claimant

-AND-

BENEDICTA SAMUELS dba SAMUELS RICHARDSON & CO

Defendant

Appearances:

Mr. Terrence A. Neale and Mr. Patrick Thompson for the Claimant
Mr. Sydney Bennett QC and Ms. Anthea Smith for the Defendant

2009: September 10, 11
2010: March 12, 18

CATCHWORDS

Professional Negligence by solicitor– failure to institute original claim for personal injuries against public body within the statutory limitation period of six months – Section 2(a) Public Authorities Protection Act, Cap 62 - summary judgment entered on issue of liability – duty of care of drivers of vehicles in using the road –contributory negligence

Quantum of damages – permanent disability - general damages- pain and suffering – future loss of earnings- future medical expenses- special damages- past earnings – pre-medical expenses –- interest - costs

HEADNOTE

On Sunday 10 June, 2007 at approximately 7.00 a.m., an accident occurred near the Footloose Marina on the James Walter Francis Highway, Road Town, Tortola. The accident occurred when Darel Christopher who was riding his bicycle in a westerly direction along the said highway, violently collided with a motor truck, owned by the British Virgin Islands Electricity Corporation ("the Corporation") and driven by Venton James, an employee of the Corporation. As a result of the collision, Mr. Christopher suffered severe injuries and had to be hospitalized for one month.

Whilst at the hospital, the defendant, Benedicta Samuels ("Mrs. Samuels-Richardson"), a lawyer by profession, paid a social visit to Mr. Christopher. They spoke casually and she agreed to act on his behalf concerning the collision, against the Corporation and Mr. James.

On 19 November 2007, the solicitors, acting on behalf of the Corporation and Venton James denied liability. Shortly after 17 December 2007, Mrs. Samuels-Richardson received a police report concerning the accident which she had requested on or about 20 September 2007. However, by then, the limitation period of six months for bringing a claim against the Corporation had expired. Mrs. Samuels-Richardson had not advised Mr. Christopher of the necessity for bringing a claim within six months of the date of the accident and had not commenced action on his behalf within that period.

On 25 June 2008, Mr. Christopher filed the present action against Mrs. Samuels-Richardson claiming damages for breach of duty and/or professional negligence. On 12 September 2008, Mrs. Samuels-Richardson filed her defence. She admitted that she visited Mr. Christopher at the hospital for the purpose of taking instructions but claimed that the instructions were preliminary instructions pending arrangements for her retainer and receipt of detailed instructions.

On 2 October 2008, Mr. Christopher filed an application against Mrs. Samuels-Richardson, pursuant to Part 15 of the Civil Procedure Rules 2000 seeking an order that summary judgment be entered against Mrs. Samuels-Richardson on the issue of liability, on the basis that she had no real prospect of successfully defending the issue in the claim. The application was heard by the learned Master on 2 December 2008. She ordered that judgment be entered against Mrs. Samuels-Richardson on the issue of liability.

The issue of quantum of damages was sent to be determined at trial. The present matter relates to the determination of the quantum of damages that Mr. Christopher is entitled to as a result of the negligent handling of his claim for personal injuries against the Corporation and Mr. James.

HELD:

[1] When a court is called upon to put a value on a claimant's lost claim against a third party, its task is not normally to determine definitively how the litigation would have been decided and not the hypothetical decision in the lost trial, but the prospects: Hanif v Middleweeks (a firm).

[2] The legal burden rests on the claimant to prove that in losing an opportunity to pursue the claim he had lost something of value i.e. his claim had a real and substantial rather than merely a negligible prospect of success: Hatswell v Goldbergs (a Firm). While the evidential burden lies on the defendant [legal practitioner] to show that the litigation was of no value to the client. This burden would be heavier where the defendant, having advised the client that there was a reasonable prospect of success or having failed to advise the client of the hopelessness of his situation, had acted for the client in the litigation and charged for his or her services.

[3] It is plain from the legal principles that all parties involved in the collision owed a duty to each other and to themselves so as to avoid the collision and the duty of care is not restricted to the driver of the truck alone.

[4] When a heavy truck, such as the electricity truck is involved, the Corporation should have taken some precautionary measures, either to have a police presence on the road diverting traffic or placing some warning signs on the road, to alert other road users. Not having done so the Corporation and Mr. James is liable in negligence for the collision.

[5] Mr. Christopher was also negligent in his use of the road and must take the greater blame for the accident for the following reasons, he rode his bicycle into the truck; the bicycle was ridden at significant speed; he did not keep a proper look-out as his head was down; he saw the truck at a distance of 150 feet but he failed to stop, slow down or do anything to avoid a potential collision until he got too close. Therefore damages awarded to him have been significantly reduced by 75% for Mr. Christopher's own contributory negligence.

[6] On assessing damages the leading West Indian authority is the case of Cornilliac v St. Louis. Mr. Christopher is entitled to total general damages of $735360, under the heads of pain and suffering, future loss of earnings, future medical expenses, and future miscellaneous expenses. In addition, he is entitled to special damages in the sum of $21441.15. The total amount of damages must be reduced by 75%, because of Mr. Christopher's contributory negligence in the collision.

[7] Interest at a rate of 5% is awarded on the general damages, from the date of service of the claim form to the date of judgment. Interest at a rate of 3% is awarded from the date of judgment to the date of payment: Alphonso v Ramnath.

The following cases were referred to in the judgment.

1. Alphonso v Ramnath 56 WIR 183.
2. Ashcroft v Curtin (1971) 1 WLR 1731.
3. Auguste v Neptune (56 WIR 229).
4. Berrill v Road Haulage Executive (1952) 2 Lloyd's Rep. 490.
5. CCAA Limited v Julius Jeffery Civ. App. No 10 of 2003, St Vincent
6. Cedric Dawson v Cyrus Claxton (BVIHCA 2004/0023)
7. Cornilliac v St. Louis(1965) 7 W.I.R. 491.
8. Daphne Alves v the Attorney General (BVIHCV2006/0306)
9. Gailius Mathurin et al v Andrew Paul Claim No. SLUHCV2002/0867 –Judgment delivered on 28 January 2004 (oral) and 13 July 2004 (written)-unreported
10. Haithwaite v Thomson Snell & Passmore (a firm) [2009] EWHC 647 at paras. 22 to 27.
11. Hanif v Middleweeks (a firm)[2000] Lloyd's Rep. P.N. 920.
12. Hatswell v Goldbergs (a Firm) (2002) Lloyds Rep. PN 359.
13. Ilkew v Samuels [1963] 2 All ER 879.
14. Lewis v Denye[1939] 1 All ER 310.
15. Livingstone v Rawyards Coal Company(1880) 5 App. Cas. 25 at 30, an appeal from the House of Lords from Scotland.
16. Nance v British Columbia Electric Railway Company (1951) A.C. 601.
17. Tart v G.W. Chitty and Company Limited [1933] 2 KB 453.
18. Page v Richards & Draper referred to in Tart v G.W. Chitty and Company Limited
19. Perestrello E Compania v United Pain Co Ltd (1969) 1 WLR 570
20. Tate v Lyle Food and Distribution Ltd & v Greater London Council & Anor (1982)1 W.L.R.

149.

21. The Mediana(1900) AC 113 at 116.
22. Tortola Yacht Services Ltd v Denroy Baptiste (BVIHCA 2008/016).
23. Ulbanna Morillo v Leanne Forbes (BVIHCV 2003/0005).
24. Jones v Livox Quarries Ltd [1952] 2 Q.B. 608.

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: On a bright and sunny morning in June 2007, when visibility was clear and weather conditions were good, a terrible accident occurred near the Footloose Marina on the James Walter Francis Highway, Road Town, Tortola. The Claimant, Darel Christopher, a cycling enthusiast, was riding his Trek bicycle in a westerly direction along the said highway when he violently collided with a motor truck, owned by the British Virgin Islands Electricity Corporation ("the Corporation") and driven by Venton James, an employee of the Corporation. As a result of the collision, Mr. Christopher suffered severe injuries and had to be hospitalized for one month. Whilst at the hospital, the Defendant, Benedicta Samuels ("Mrs. Samuels-Richardson"), a lawyer by profession, paid a social visit to Mr. Christopher. Mrs. Samuels-Richardson was an acquaintance of Mr. Christopher. At the hospital, Mr. Christopher informally explained to Mrs. Samuels-Richardson that he had been involved in an accident and she agreed to act on his behalf.

[2] On or about 20 September 2007, Mrs. Samuels-Richardson requested a police report of the accident from the Commissioner of Police. On 15 October 2007, she sent a letter to the General Manager of the Corporation on Mr. Christopher's behalf inviting the Corporation's proposal for settlement of the matter without litigation. On 19 November 2007, the solicitors acting on behalf of the Corporation and Venton James denied liability. Shortly after 17 December 2007, Mrs. Samuels-Richardson received the police report. By then, the limitation period of six months for bringing a claim against the Corporation had expired[1]. Mrs. Samuels-Richardson had not advised Mr. Christopher of the necessity for bringing a claim within six months of the date of the accident and had not commenced action on his behalf within that period. The failure by Mrs. Samuels-Richardson to institute

[1] See section 2(a) of the Public Authorities Act, Cap. 62 of the Laws of the Virgin Islands which places a limitation period of 6 months upon which relief is claimed against public bodies such as the Corporation.

a claim against the Corporation and Mr. James within the time limited for such actions by section 2(a) of the Public Authorities Protection Act, Cap.62 ("the Act") is the upshot of the present claim for professional negligence against her. Section 2(a) of the Act states as follows:

> "Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect-
>
> (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof…."

Background facts

[3] Most of what I now outline reflects uncontradicted and unchallenged evidence of the parties. To the extent that there is a departure from any agreed facts, then what is expressed must be taken as positive findings of fact made by me.

[4] The James Walter Francis Highway ('the highway") is a four lane dual carriage way with a median separating two east bound and two west bound lanes. The outer east bound lane is on the landward side of the highway and is contiguous with the Treasure Isle Hotel in Pasea. The outer west bound lane runs alongside the Footloose Marina and adjacent land on the seaward side of the highway. There is a break in the median which runs parallel to the entrance to the Footloose Marina from which it is separated by the two west bound lanes.

[5] On Sunday,10 June 2007 at approximately 7.00 a.m., a team of workmen, employed by the Corporation, were assembled in the vicinity of the Footloose Marina on the seaward side of the highway. Their mission was to carry out construction work on a utility pole/electrical installation situate at the side of the west bound lane on land next to the entrance of the Marina and directly across from the break of the median. Their work

involved the use of a heavy utility truck equipped with a crane and bucket. The motor truck, a Ford F550, was painted in the bright orange colour of the Corporation.

[6] Shortly after 7.00 a.m., the truck, driven by Mr. James, along the right inner east bound lane of the highway, arrived at the break in the median across from the entrance to the Marina, where it was stopped by Avery Percival, a meter foreman/linesman and the senior supervisor present. Mr. Percival had positioned himself to observe oncoming traffic with a view to carefully direct the passage of the truck across the west bound lanes. At one point in time, he directed it to stop so as to give way to a passing car which had been the only traffic on the west bound lanes at the time. After ensuring that the road was clear, he signaled the truck to proceed across the two west bound lanes to the area where the utility pole/electrical installation was situated. Whilst the truck was slowly proceeding across the lanes, it was violently struck at the rear of its cab by a bicycle, ridden by Mr. Christopher, along the left outer bound lane of the highway.

[7] As a result of the collision, Mr. Christopher sustained severe injury including a central injury at the level of the cervical spine and neurological deficit in the form of hyperthesia in both upper arms and weakness in the hand muscles. He was admitted to the Peebles Hospital and remained there from 10 June 2007 to 10 July 2007. He was diagnosed with Brown-Sequard Syndrome, a condition resulting from spinal injury and characterized by diminished sensation on one side of the body and weakness on the other side.

[8] On 12 June 2007, Mrs. Samuels-Richardson visited Mr. Christopher at the hospital. Mr. Christopher informally explained to Mrs. Samuels-Richardson that he had been involved in an accident. She informed him that he had a reasonable chance of success if he was to bring a claim against the Corporation and Mr. James. She also agreed to act on his behalf. On or about 20 September 2007, Mrs. Samuels-Richardson requested a police report from the Commissioner of Police and on 15 October 2007, she sent a letter to the General Manager of the Corporation on Mr. Christopher's behalf inviting the Corporation's proposal for settlement of the matter without litigation. On 19 November 2007, solicitors for the Corporation and Mr. James, Messrs. O'Neal Webster responded by denying liability.

[9] Sometime shortly after 17 December 2007, Mrs. Samuels-Richardson received a police report in the matter. The report together with the accompanying Statement of Mr. Percival, who witnessed the accident, indicated that Mr. Christopher was largely responsible for the accident. Indeed, having investigated the matter, the Police declined to prefer any charges against Mr. James or Mr. Christopher. Given those circumstances, on 24 December 2007, Mrs. Samuels-Richardson wrote to Mr. Christopher to advise that "*in making an assessment of the case, we are of the view of [sic] any claim made for compensation would be strongly resisted by the Electricity Department. In other words, as we see it, the Electricity Department can claim that you are mostly to be blamed for the accident. If you do not agree with the police statement, please let me know at your earliest convenience.*"

[10] In the intervening period and on 10 December 2007, the limitation period of six months upon actions in which relief is claimed against public bodies, such as the Corporation, had expired. Mrs. Samuels-Richardson failed to advise Mr. Christopher of the necessity for instituting a claim within six months from the date of the accident and had not commenced an action on his behalf within that period.

[11] On 7 February 2008, Mr. Christopher instructed Mrs. Samuels- Richardson to transfer his file to his new solicitors, Messrs. McW. Todman & Co. This was done on 8 February 2008. Subsequently, Messrs. McW. Todman & Co. advised Mr. Christopher that his claim against the Corporation and Mr. James was statute barred pursuant to section 2 of the Act. Mr. Christopher, nevertheless, instructed Messrs. McW. Todman & Co. to proceed with the filing of the claim. A claim against the Corporation and Mr. James was filed on 4 March 2008 ("the original action"). By application dated 16 May 2008, the Corporation applied to have the original action struck out on the ground that it was statute barred. On 20 May 2008, the Court struck out the original action against the Corporation and Mr. James with costs to be assessed if not agreed.

[12] On 25 June 2008, Mr. Christopher filed the present action against Mrs. Samuels-Richardson claiming damages for breach of duty and/or professional negligence. On 12 September 2008, Mrs. Samuels-Richardson filed her defence. She admitted that she

visited Mr. Christopher at the hospital for the purpose of taking instructions but claiming that these instructions were preliminary instructions pending arrangements for her retainer and receipt of detailed instructions[2].

[13] Mrs. Samuels-Richardson also admitted that she came under a duty of care towards Mr. Christopher and was required to exercise reasonable care and skill in the performance of her duties[3]. She admitted that she failed to contact potential witnesses or consult with a medical expert on Mr. Christopher's injuries.. However, she contended that all these steps were outside the scope of the very limited arrangements then existing between Mr. Christopher and herself[4].

[14] On 2 October 2008, Mr. Christopher filed an application against Mrs. Samuels-Richardson, pursuant to Part 15 of the Civil Procedure Rules 2000, ("the CPR") seeking an order that summary judgment be entered against Mrs. Samuels-Richardson on the issue of liability on the basis that she had no real prospect of successfully defending the issue in the claim. The application was heard by the learned Master on 2 December 2008 who ordered that judgment be entered against Mrs. Samuels-Richardson on the issue of liability. The issue of quantum of damages was sent to be determined at trial.

[15] The present hearing relates to the determination of the quantum of damages that Mr. Christopher is entitled to as a result of the negligent handling of his claim for personal injuries against the Corporation and Mr. James.

The evidence

[16] The evidence as to how the accident was caused is diametrically opposed. Mr. Christopher says one thing while Mr. James and his witness, Mr. Percival say something else. The account, as told by Mr. Christopher, is that on Sunday, 10 June 2007, he was cycling along the highway on the west bound carriage from the old Clarence Thomas Building in the

[2] See paragraph 2.2 and 2.3 of the Defence filed on 12 September 2008.
[3] See paragraph 3 of the Defence.
[4] See paragraph 5 of the Defence

junction of Wickham's Cay 2. There were no vehicles in front of him. As he approached closer to the Footloose Marina where there is a break in the east and west lane in the area of the Treasure Isle Hotel, he suddenly saw an electricity truck beginning to cross from the east lane to the west lane apparently heading towards the side of the road where Footloose Marina is located. Upon realizing that the truck was attempting to cross the two lanes of the highway and that he would collide with it, he applied brakes in an attempt to avoid the collision but it was too late and he crashed into the truck. Mr. Christopher said that Mr. James suddenly and without regard for him, who had the right of way on a major road, drove the truck across the road and into his path thereby causing him to violently collide into the left cabin of the said truck. He said that as he applied brakes he was still moving forward across the left lane and would crash into the truck so he veered towards the right lane of the road in order to avoid the collision but he nevertheless, collided with the truck. Under cross-examination, he stated that the truck had traversed the right lane but completely blocked the left lane. He also stated that the truck was moving very slowly across the road and that he was riding his bicycle at approximately 25 m.p.h.

[17] Mr. James and Mr. Percival gave evidence. Mr. James said that at about 7.20 a.m. on 10 June 2007, he was driving the electricity truck. He passed the traffic lights travelling towards Treasure Isle Hotel in the right inner lane. He indicated to turn right to go across the street to the area of the Footloose Marina. Mr. Percival, who had positioned himself at the median in order to direct the safe passage of the truck across the road, indicated with a hand signal and directed him to stop. He stopped and allowed a car, which was travelling in the west bound highway, to pass. Mr. Percival directed him that it was all right to turn. As he turned and crossed the highway and paused to go across the hump at the entrance of Footloose, there was no vehicular traffic. There was no bicycle in sight coming towards the truck.

[18] In his testimony, Mr. James said that after the two front wheels of the truck got up on the sidewalk to enter the Footloose Marina area, in his side view to his left, he saw something coming and he turned and noticed a cyclist coming towards the truck. The cyclist was about six feet away from him and he was riding along the outer west bound lane closer to

the sea. He saw the cyclist trying to stop and veer the bike away from the truck. At that stage, he pumped the accelerator to try to speed up over the hump to get out of the way of the cyclist who attempted to veer to the right but it was too late. The cyclist slammed straight into the end of the cabin of the truck on the right side.

[19] The next witness for the Defence was Mr. Percival. He was the supervisor of the assigned task that the electricity services were carrying out on the day in question. He arrived there at about 6.45 a.m. At about 6.58 a.m. he saw the electricity truck, driven by Mr. James coming from the direction of the traffic light heading east. He decided to stand in the area where he could clearly see the west bound traffic as he knew that Mr. James would need assistance to cross the highway so he positioned himself in the open space in the road where there is a break in the middle of the road. He said that there is a sign permitting drivers to turn right from the east bound lane across the west bound lane. Mr. James indicated to turn right across the west bound lane. Mr. Percival said that he stopped Mr. James because of an oncoming car. The car passed. Mr. Percival checked eastward to see if there was any approaching traffic. As the road was clear, he told Mr. James to go ahead. Mr. James crossed at a slow pace because it was a heavy truck. Mr. James was half way across the road as he had already crossed the right west bound lane going towards the Footloose Marina when he (Mr. Percival) saw "*the bikeman around the corner with his head down riding approximately 25-30 miles. When I first saw him he was about 250 feet away around the corner coming. The bikeman was riding in the seaward lane heading west. I was standing in the same place. When I realized that his head was down I shouted at him three times "watch out". On the third watch out he held his head up but he was already too close to the vehicle to stop. The bikeman collided with the rear of the cabin of the truck on the driver's side*."

[20] All these witnesses were extensively cross-examined. At the end of the day, I prefer the evidence adduced by the witnesses for the defence than that of Mr. Christopher. I also took into consideration the witness statements given to the police shortly after the accident as well as the police report. I did not believe Mr. Christopher's account especially when he said that "*the truck did not begin turning until he was a few feet away which gave me no*

time to avoid the collision. I did not expect the electricity truck to suddenly turn across the road into the path that I was cycling." By Mr. Christopher's account, the reason for the accident was that the truck had suddenly and unexpectedly turned into his path as he was riding quickly along the road.

[21] This conflicts in a material particular with Mr. Christopher's explanation given shortly after the accident[5] and his witness statement[6]. In his statement to the police he said:

> "…as I approached closer to Foot Loose Marina where there is a split between the east and west lane in the area of the Treasure Isle Hotel, suddenly I saw an electricity truck crossing from the east lane to the west lane, my first eye contact with the truck it was crossing the right lane of the west bound road, I was riding my bicycle on the left lane of the west bound lane. As I get closer to the truck I realized that it was going straight across the road towards Foot Loose Marina. At that point, I suddenly applied brakes trying to avoid the collision. At that point the lane that I was travelling on which is the left lane was blocked by the truck….I veered towards the right to avoid the collision but ended up colliding with the truck…." [emphasis added].

[22] Then, in his witness statement[7], he said:

> "As I approached closer to the Foot Loose Marina where there is a break in the east and west lane in the area of the Treasure Isle Hotel, I suddenly saw an electricity truck begin to cross from the east lane to the west lane apparently heading towards the side of the road where Foot Loose Marina is located. Upon realising that the truck was attempting to cross the two lanes of the highway and that I would collide with it, I applied brakes in an attempt to prevent the collision however this was futile and I crashed into the truck" [emphasis added].

[23] Under intense cross-examination by Mr. Bennett QC, Mr. Christopher testified that when he first saw the truck it was about 150 feet away give and take and that the truck was already in the process of crossing the road[8]. By his own account, Mr. Christopher had observed that the truck was in the process of crossing the lanes as he approached on his

[5] See Witness Statement dated 22 July 2007-Tab 6 of trial bundle.
[6] See Claimant's Witness Statement filed in this action on 29 January 2009 –Tab.11 of the trial bundle.
[7] Supra
[8] See Claimant's police statement at Tab 6 of the trial bundle.

bicycle from a distance of well over 150 feet but he did not stop, slow down or do anything to avoid a potential collision until he got really close to the truck.

[24] On the whole, I found Mr. James and Mr. Percival to be more credible. They both remained unfaltering and steadfast when they were intensely cross-examined by Mr. Neale, learned Counsel for Mr. Christopher. Mr. Neale made much about the fact that Mr. James' witness statement differed substantially from his evidence in this Court. First, he argued that Mr. James did not say in his statement to the police that Mr. Percival was directing him as he attempted to do in his witness statement. Secondly, that the radio was on which could have prevented him from hearing Mr. Percival shouting to Mr. Christopher, "watch out, watch out" on three occasions. Thirdly, Mr. James said to the police that he froze but at this trial, he said "I pumped the accelerator to try to speed up over the hump to get out of his way and he tried swaying his bike.

[25] Learned Counsel, Mr. Neale attempted also to discredit the evidence of Mr. Percival when he said to the police "Venton was driving in the right lane and indicated to turn right across the west bound lane, at the same time a car was coming from the east towards the west [emphasis added]. He said that the witness statement of Mr. Percival differed also in several material aspects[9].

[26] At the end of the day, I had the added opportunity of seeing and hearing the witnesses and observing their demeanour in the witness box. I believed Mr. James and Mr. Percival also because they have no axe to grind in this case of professional negligence against Mrs. Samuels-Richardson. I believed that they came to court to tell the truth. I also believed Mr. James when he said that he had already passed the right westbound lane and was going over the hump slowly when the collision occurred. Next, I believed Mr. Percival when he said that he was the one directing the safe passage of the truck on the day in question and when he was certain that the road was clear, he directed Mr. James to cross. A visit to the locus in quo was extremely helpful as the scene was re-constructed and the court got a better perspective of where and how this unfortunate accident occurred.

[9] See paragraphs 59 to 62 of Claimant's skeletal submissions on assessment of damages trial.

[27] Having come to that conclusion, it does not necessarily follow that I did not believe Mr. Christopher at all. I believed him when he said that he was cycling at about 25 m.p.h. and that he first saw the truck when he was about 150 feet away but applied brakes when he was about 50 feet away from the truck.

[28] Looking at the evidence, the facts as I found them are as follows: on 10 June 2007, a motor truck, owned by the Corporation, and driven by Mr. James, along the right inner east bound lane of the highway, arrived at the break in the median across from the entrance to the marina. Mr. Percival had positioned himself at the median to observe oncoming traffic with a view to carefully direct the safe passage of the truck across the west bound lanes. After ensuring that the road was clear, he signaled the truck to proceed across the two west bound lanes to the area where the utility pole/electrical installation was situated.

[29] The truck, being relatively heavy was proceeding across the two west bound lanes of the highway when the bicycle, ridden by Mr. Christopher, approached the truck from a right angle. It was the bicycle that violently collided with the truck and not the truck that collided with the bicycle. Mr. Christopher was riding the bicycle at approximately 25 m.p.h. with his head down. When the collision took place the truck was entirely in the left west bound lane of the highway having almost completed the crossing: its front wheels were off the road and onto the hump entering the marina premises. The right lane was entirely clear at the time. The collision took place on a Sunday morning at about 7.00 a.m. in conditions of clear visibility on a straight and unobstructed stretch of a four-lane highway with little traffic.

The issues

[30] Two main issues arise for determination namely:

1. Whether Mr. Christopher has suffered any loss as a result of Mrs. Samuels-Richardson's failure to bring an action against the Corporation and Mr. James within the statutory period permitted by statute and if so, the value of Mr. Christopher's lost chance of pursuing that claim?

2. What is the quantum of damages which should be awarded to Mr. Christopher for the failure of Mrs. Samuels-Richardson to prosecute his claim within the specified time, if Mr. Christopher had been successful in his action against the Corporation and Mr. James.

Applicable legal principles

[31] Both Counsel are agreed that the first task of the Court is to consider the value of Mr. Christopher's lost chance of pursuing the claim against the Corporation and Mr. James had he been permitted to do so. The law is that when a court is called upon to put a value on a claimant's lost claim against a third party, its task was not normally to determine definitively how the litigation would have been decided: it was the prospects and not the hypothetical decision in the lost trial that has to be investigated: **Hanif v Middleweeks (a firm)**[10]. Thus, the legal burden rests on the claimant to prove that in losing an opportunity to pursue the claim he had lost something of value i.e. his claim had a real and substantial rather than merely a negligible prospect of success. This principle was aptly explained by Sir Murray Stuart-Smith in **Hatswell v Goldbergs (a Firm)**[11]where Sir Murray Stuart-Smith stated at para 48:

> "...the process for the court is a two-stage process. First, the court must be satisfied that the claimant has lost something of value. An action which is bound to fail (or as it was put in this court in *Allied Maples Group Ltd v Simmons (1995) 1 WLR 1602 at 1614*, has no substantial prospect of success and is merely speculative) is not something of value. It is only if the claim passes that test that the court has to evaluate in percentage terms of the full value of the claim what has been lost..."

[32] Furthermore, the evidential burden lies on the defendant [legal practitioner] to show that the litigation was of no value to the client. This burden would be heavier where the defendant, having advised the client that there was a reasonable prospect of success or having failed to advise the client of the hopelessness of his situation, had acted for the client in the litigation and charged for his or her services. In **Hatswell**, at para 49, Sir Murray Stuart-Smith continued in this way:

[10] [2000] Lloyd's Rep. P.N. 920.
[11] [2002] Lloyd's Rep. P.N. 359.

> "...In many cases concerning solicitor's negligence the claimant will have no difficulty in surmounting this first stage. For example, if a case in which a solicitor has advised that there is a reasonable prospect of success is struck out for want of prosecution, it will be difficult or impossible for the solicitor to contend that there was no substantial prospect of success, at least in the absence of evidence which completely alters the complexion of the case and effectively torpedoes the claim. So too in a case depending solely on oral evidence which is in conflict, there being no independent or corroborative evidence, documentary or otherwise, to support either side...."

See also: Haithwaite v Thomson Snell & Passmore (a firm).[12]

The Duty of Care

[33] Here, the task of the court is to assess Mr. Christopher's prospects of establishing negligence against Mr. James and by extension, the Corporation. In this regard, Mr. Christopher must show that Mr. James owed him a duty of care and breached that duty. Learned Queen's Counsel Mr. Bennett helpfully referred to the Privy Council case of Nance v British Columbia Electric Railway Company[13] where Viscount Simon stated, at pages 611-612 as follows:

> "Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, e.g., if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with a risk of collision to exercise due care..."

[34] Further, the extent of the duty of care was discussed by Slade J in Berrill v Road Haulage Executive.[14] He stated at page 492:

> "Now, what is the duty of the driver of a motor vehicle? Paraphrasing the words of Lord Uthwatt in *London Passenger Transport Board v Upson and Anor (1949) AC*

[12] [2009] EWHC 647 QB at paras. 22 to 27.
[13] (1951) A.C. 601.
[14] (1952) 2 Lloyd's Rep. 490.

> *155,* it is really this. You are not bound to foresee every extreme of folly which occurs on the road. Equally you are certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. You are bound to anticipate any act which is reasonably foreseeable, that is to say, anything which the experience of road users teaches them that people do, albeit negligently."

[35] It is plain from these legal principles that all parties involved in the collision owed a duty to each other and to themselves on that day so as to avoid the collision. As Mr. Bennett QC correctly postulated, Mr. James had a duty to commence crossing the highway only when it was safe to do so. The evidence is that he did not commence crossing the highway precipitously or carelessly. On the contrary, the evidence is that he commenced crossing when it was safe to do so. Mr. Percival deposed that there was no traffic on the road at the time that he gave Mr. James the signal to go ahead. In fact, he accorded precedence to an approaching car and then directed Mr. James to proceed. It is not disputed that the truck was carrying out a legal maneouvre in a perfectly legal manner.

[36] So, the steps taken by Mr. Percival and by extension, Mr. James indicated that Mr. Christopher's bicycle must have come into view after the truck had commenced crossing the west bound lanes. Even if Mr. Percival had missed the vehicle on the road (not a finding of fact), the responsibility to observe the presence of other road users and so manouevre as to avoid collision is not restricted to the driver of the truck. That duty rests on both parties.

Contributory negligence

[37] Learned Queen's Counsel, Mr. Bennett submitted that even if Mr. Christopher's prospects of success in the lost action were held to be more than negligible it is likely that any damages resulting from a judgment in his favour would have been reduced by a significant amount on account of Mr. Christopher's contributory negligence.

[38] In order to establish the defence of contributory negligence, the defendant must prove, first that the claimant failed to take 'ordinary care of himself' or, in other words, such care as a reasonable man would take for his own safety, and second, that his failure to take care

was a contributory cause of the accident: du Parcq LJ in Lewis v Denye[15]. The standard of care in contributory negligence is what is reasonable in the circumstances, which in most cases, corresponds to the standard of care in negligence. It does not depend on breach of duty to the defendant. It depends on foreseeability. Mr. Neale has correctly set out the law on foreseeability of damages which I shall not repeat[16]. Denning L.J. said in Jones v. Livox Quarries Ltd.[17]

> "Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."

[39] In Tart v G.W. Chitty and Company Limited[18], the defendants' steam lorry was entering the town on a wild and stormy night when it was discovered that the tail light had gone out. The driver drew up at a dark spot in a street. The near side wheels were 9 inches from the kerb and the off wheels were just over the crown of the road which was 14 feet wide. Those in charge of the lorry tried to relight the rear lamp. While so engaged the plaintiff, who was riding a motor cycle, ran into the rear of the lorry and was seriously injured. He brought an action for damages for personal injuries sustained. The defendants alleged that the plaintiff's own negligence was the sole or contributory cause of the accident. It was held that on the facts the accident occurred either because the plaintiff was not keeping a proper look-out or because he was going too quickly and had not his motor cycle under such control that he was able to avoid the collision, and in either event he was guilty of negligence. Lord Swift at page 457 said thus:

> "I am fortified in the view which I take of this case by the judgments of Rowlatt and McCardie JJ in Page v Richards & Draper,[19] Rowlatt J. in that case said:

---

[15] [1939] 1 All ER 310
[16] See Paragraphs 33 to 44 of Claimant's skeletal submissions on assessment of damages trial.
[17] [1952] 2 Q.B. 608 at page 615
[18] [1933] 2 KB 453
[19] [unreported] referred to in **Tart v G.W. Chitty and Company Limited** [supra].

> "The plaintiff, who was walking along the road, knew nothing material to this case except that he was struck in the back by a motor car, and the driver of the motor car never saw the plaintiff until he struck him. That is all. Upon those facts, the county court judge has found that there was no negligence on the part of the driver, but I do not think he can possibly have found that without making a mistake on a point of law or misdirecting himself, as it is sometimes called - misunderstanding the law and misapplying the principles. It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he has seen it. If there is any difficulty in the way of seeing, as, for example, a fog, he must go slower in consequence. In a case like this, where a man is struck without the driver seeing him, the defendant is in this dilemma, either he was not keeping a sufficient look-out, or if was keeping the best look-out possible then he was going too fast for the look-out that could be kept. I really do not see how it can be said that there was no negligence in running into the back of a man. If he had had better lights or had kept a better look-out the probability is that the accident would never have happened" (emphasis mine).

[40] To paraphrase the dictum of Rowlatt and McCardie JJ, a driver must always anticipate that there may be some traffic on the road even if there was none at the material time. In the same way, Mr. James should have expected that at some point in time, another vehicle or a cyclist, as in the present case, may come along. So, in my view, when a heavy truck, such as this one is involved, the Corporation should take some precautionary measures, either to have a police presence on the road diverting traffic or some cones or placing some warning signs on the road, for example, by the Moorings Junction to alert other road users. Not having done so and conscious that this vehicle was a slow moving vehicle, I cannot see how the Corporation and Mr. James would not have been liable in negligence for the collision.

[41] However, and importantly, as I already stated, the duty of care is not restricted to the driver of the truck alone. Mr. Christopher was also negligent in his use of the road at the time of the accident. He also had a duty of care and safety for his own interest and that of other road users. Mr. Bennett QC submits that the damages which Mr. Christopher would have

been entitled to would, nevertheless, have been significantly reduced by his own contributory negligence.

[42] In Nance v British Columbia, Viscount Simon said (at page 611):

> "…when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the part sued, and all that is necessary to establish such a defence is to prove… that the injured party did not in his own interest take reasonable care of himself, and contributed, by that want of care, to his own injury. For when contributory negligence is set up as a shield against such obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

[43] In the present case, Mr. Christopher was undoubtedly the part author of his own injury. He rode his bicycle into the truck. The vehicle was ridden at significant speed. He did not keep a proper look-out as his head was down. He saw the truck at a distance of 150 feet but he failed to stop, slow down or do anything to avoid a potential collision until he got too close. He must take the greater blame for the accident.

Advice on prospects

[44] As Mr. Bennett QC correctly pointed out, this case is not one in which a solicitor, having advised his client of the viability of his claim and having acted for him in that litigation and charged for his services now seeks to convince a court that the litigation was of no value to the client. This is a case where Mrs. Samuels-Richardson, having received minimal instructions on the facts, requested a police report on the accident and sent a demand letter to the Corporation's General Manager inviting settlement of the matter. Upon receiving a letter from the Corporation's solicitors denying liability and subsequently, a police report, on 17 December 2007, she wrote to Mr. Christopher advising that:

> "…as we see it, the Electricity Department can claim that you were mostly to be blamed for the accident…If you do not agree with the Police Statement, please let me know at the earliest convenience."

[45] There was no reply from Mr. Christopher. But even if Mr. Christopher had replied, there was nothing much that Mrs. Samuels-Richardson could have done at this time since the time limited for such actions against public bodies had already expired.

[46] Thus, if a claim had been filed within the period of time limited for so doing, notwithstanding the fact that Mr. Christopher is part author of his own injury – in fact, a substantial part-author, he would nevertheless be entitled to some compensation by the Corporation and Mr. James.

[47] In the Saint Lucian case of Gailius Mathurin et al v Andrew Paul[20]. I found that the claimant, a healthy young man of 23 years, converted to a paraglegic after the accident, was more to be blamed for the accident than the defendant. I said that "*he was the creator of his own great misfortune. It was he who set in motion the whole train of events, by carelessly and unnecessarily stopping on a main road to catch a crab*". I apportioned liability for the accident at 25% to the defendant and 75% to the claimant.

[48] In the present case, even though the Corporation and Mr. James would have been liable in negligence of the collision, I find that there was significant contributory negligence and carelessness in the use of the road by Mr. Christopher. And for this reason, the damages that would have resulted in the original action would have been reduced by 75%, thus awarding to Mr. Christopher 25%.

Quantum of damages

[49] The next issue which falls to be determined is the quantum of damages which should be awarded to Mr. Christopher for the failure of Mrs. Samuels-Richardson to prosecute his claim within the time prescribed by the Act to do so.

[50] The assessment of damages for injuries sustained as a result of an accident falls under two generic heads, namely, general and special damages. The objective of the courts in

[20] Claim No. SLUHCV2002/0867 –Judgment delivered on 28 January 2004 (oral) and 13 July 2004 (written)-unreported

assessing compensation for a victim was stated by Lord Blackburn in Livingstone v Rawyards Coal Company[21] as follows:

> "I do not think there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

[51] The leading West Indian authority on assessment of damages is the case of Cornilliac v St. Louis.[22] Sir Hugh Wooding CJ listed the main considerations in assessing general damages as: (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 been endured;(iv) the loss of amenities suffered and (v) the extent to which pecuniary prospects are affected.

[52] In Cornilliac, at 494 G-H, the Court of Appeal reminded us that it is not the practice to quantify damages separately under each of these heads or to disclose the build-up of the global award. But, it is imperative to keep these heads in mind and make a conscious, even if undisclosed, quantification under each of them in order to arrive at an approximate final figure.

[53] In Alphonso and Others v Deodat Ramnath[23], our Court of Appeal appropriately referred to the exercise of assessment as the judge's discretionary quantification upon the application of the principles. There are instances, however, in which a court has disclosed amounts awarded under one or several heads. In Cornilliac, for example, the sum that was awarded for loss of pecuniary prospects was quantified because of the extent to which the parties differed on that head.

[21] (1880) 5 App. Cas. 25 at 30, an appeal from the House of Lords from Scotland. See also Kemp & Kemp, the Quantum of Damages, Vol. 1.
[22] (1965) 7 W.I.R. 491.
[23] [1997] 56 W.I.R. 183.

[54] The practice is to grant a global sum for general damages for pain and suffering and loss of amenities. These are considered against the backdrop of the nature and extent of the injuries sustained and the nature and gravity of the resulting physical disability. There is usually an attempt to calculate pecuniary loss and, in addition, loss of earning capacity where applicable.

The nature and gravity of the resulting physical disability

[55] The medical evidence came from three witnesses, namely: (i) Dr. Nagy Darwish, an orthopaedic surgeon, who practiced as a qualified orthopaedic surgeon for 20 years with specific training in spinal surgery for seven years; (ii) Tania Medley, a qualified physiotherapist for approximately 20 years. She has practiced in the BVI for approximately 18 years and (iii) Dr. Jeffrey Case, a medical practitioner specialising in Orthopaedics and Sports Medicine.

[56] Dr. Darwish attended to Mr. Christopher on the day of the collision when he was brought by an ambulance to the Emergency Room at the Peebles Hospital around 8:00 a.m. From his examination, Dr. Darwish concluded that Mr. Christopher suffered the following injuries as a result of the collision: (a) spinal injuries in the central cord compression at the C4 level of the spine, a condition known as Brown Sequard Syndrome, which is characterized by diminished sensation on one side of the body and weakness on the other side. According to the surgeon, there is little likelihood that Mr. Christopher will recover from his spinal injuries which would more than likely leave him with a permanent disability and (b) a left tibia fracture which has healed fairly well. However, Mr. Christopher still continues to experience difficulties with his left knee joint and left finger joints.

[57] Ms. Medley first saw Mr. Christopher in June 2007 when he was a patient at Peebles Hospital. After his discharge from the hospital in late July 2007, she commenced home based treatment with him from 21 August 2007 to present time. Her initial assessment of Mr. Christopher was that he had generalised muscle wasting and as a result, was unable to participate significantly in any physical activity. She stated that although there was some improvement in Mr. Christopher's condition, the weakness in the upper limbs, lower limbs

and trunk were marked. Mr. Christopher now ambulates with a walking cane and proprioception in that limb has improved however his left foot drops and this prevents him from positioning his heel to strike the floor while the weakness of the hamstring muscles, continue to hinder ambulation.

[58] Mr. Christopher is still significantly disabled and continues to exhibit signs of an upper and lower neuron injury with exaggerated tendon reflexes in the left upper and lower limbs; no proprioception in the left foot which is a basic requirement that enables the brain to be aware of the foot in space; no muscle power to raise the forefoot enough to initiate heel strike; spasms in the left arm, leg and right hip; perception of temperature, soft touch and pin point (pain) is to some extent diminished; and generally a permanent damage to the spinothalmic tracks (the pathways that mediate voluntary movement).

[59] Dr. Chase carried out an independent medical examination of Mr. Christopher relying on reports of Dr. Darwish and an MRI report of 6 August 2008 which was read by the Oakbrook Radiology Associates. In his report dated 19 January 2009, Dr. Chase concluded that Mr. Christopher had suffered a severe injury to his spinal cord in the cervical area and his left lower extremity and a closed left tibia fracture (which has now healed); significant functional disability from his spinal cord injury; Brown-Sequard type syndrome with upper motor neuron involvement; significant functional disability in terms of gait due to loss of knee flexion on the left and ankle motor and proprioception deficits and significant upper extremity dysfunction due to his left hand intrinsic neuropathy and contractures; extreme stiffness in the fingers and on the left hand (and therefore, there is very little function in the left hand) and stiffness in the PIP joint.

Pain, suffering and loss of amenities

[60] In Wells v Wells[24], Lord Hope of Craighead observed that:

> "The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in

[24] [1998] 3 All ER 481 at 507, HL.

comparable cases, as represents the court's best estimate of the plaintiff's general damages."

[61] It is obvious that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff's necessary medical care, operations and treatment.

[62] In the present case, I have no doubt that Mr. Christopher suffered severe pain and still does as a result of the accident. Having regard to the evidence adduced. I note particularly the evidence of Mr. Christopher and the medical doctors, particularly Dr. Chase and the physiotherapist. Dr. Chase concluded that Mr. Christopher's functional abilities have reached a plateau and are not subject to further change without possibly some surgery. He has significant functional disability in terms of gait due to his loss of knee flexion on the left as well as ankle motor and proprioception deficits and significant upper extremity dysfunction due to his left hand intrinsic neuropathy and contractures. He is extremely stiff in the fingers and on the left hand and there is very little function in the left hand due to this. His sensational difficulties on the right are bothersome to him and cause some functional disability as well.

[63] Dr. Chase also opined that some tendon transfers especially in the left upper extremities could possibly help Mr. Christopher. He diagnosed that Mr. Christopher is very stiff in the PIP joint and even with tendon transfers, functional improvement may be limited unless the contractures are addressed as well. Not only will this take some surgery but a long period of rehabilitation afterwards. Dr. Chase is of the belief that Mr. Christopher will need future medical care. His ability to work will be limited to just a light duty job.

[64] In terms of loss of amenities, it is settled that it is in respect of the objective loss of amenities that the damages will be determined. Hence, loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine

of life, with the probable effect on the health and spirits of the injured party, are all proper considerations to be taken into account. Amongst the loss of the amenities of life, there are to be considered: the injured person's inability to engage in indoor and outdoor games, his dependence, to a greater or lesser extent, on the assistance of others in his daily life[25]; the inability to cope by looking after, caring for and rendering the accustomed services to a dependent; his sexual impotence[26] and his inability to lead the life he wants to lead and was able to lead before the injuries.[27] In this regard, the age of the injured person must be taken into account, since an elderly person or a very young child will not suffer the same loss as a young adult.[28]

[65] Prior to the collision, Mr. Christopher worked as a plumber/plumbing supervisor. He was engaged in strenuous physical activities as he was a competitive cyclist, cycling at least once a day, swimming, walking and jogging. He also states that he was very active socially and attended various church and other social functions. He also enjoyed an active sex life with his wife. It is clear from the medical evidence, and uncontested by Mrs. Samuels-Richardson that, as a result of the collision, Mr. Christopher sustained severe injuries, both physical and neurological. Taking that into consideration and the guidance on the quantum of damages awarded in the court of similar cases, Mr. Christopher suggests that the appropriate figure for his pain and suffering and loss of amenities would be $150,000.

[66] I have considered the submissions of both Counsel and the plethora of authorities relied on. In Ulbana Morillo v Leanne Forbes[29], the court awarded $40,000 to the 50 year old claimant for pain and suffering and loss of amenities for spinal injuries to L5-S1 disc which disabled her from raising her hand fully, lifting moderate weights or doing housework.

[25] Heaps v Perrite Ltd [1937] a All E.R. 60, where a young labourer lost both his hands and would required daily assistance.
[26] Cook v J.L.Kier & Co. Ltd. [1970] 1 W.L.R. 774
[27] Heaps v Perrie (supra)
[28] Gray v Mid Herts Group Hospital Management Committee, the Times, March 30, 1974.
[29] BVIHCV2003/0005 –Judgment of Barrow J (as he then was) delivered on 16 March 2005- unreported

[67] In Cedric Dawson v Cyrus Claxton[30], the court awarded $36,000 to the 38 year old claimant for pain and suffering and loss of amenities for C3-C4, C4-C5 disc herniation resulting in severe back pain and his inability to work as a mechanic.

[68] In Tortola Yacht Services Ltd v Denroy Baptiste[31], the court awarded $45,000 to the 35 year old claimant for pain and suffering and loss of amenities for injuries to his right clavicle and shoulder, right index finger and lower back during the course of his employment.

[69] In Fenton Auguste v Neptune[32], the court awarded $74,000 to the 24 year old claimant for pain and suffering and loss of amenities, which rendered him a paraplegic confined to a wheelchair for the rest of his life.

[70] In Daphne Alves v the Attorney General[33] the Court awarded $35,000 to the 33 year old claimant for general damages for pain and suffering and loss of amenities for injuries to L4-L5 annular disc tear, S1 joint arthropathy- discongenic disease of the lumbar spine, lumbar facet joint syndrome, which left the claimant in constant pain and rendered her unable to walk for long distances, sit for long periods, lie on her back for more than 10 minutes or carry any weight in excess of 10 pounds.

[71] The only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords "with the general run of assessments made over the years in comparable cases.[34] It is important that conventional award of damages are realistic at the date of judgment and

[30] BVI Civil Appeal No. 23 of 2004, Judgment delivered on 23 May 2005 [unreported].
[31] BVIHCA 2008/016
[32] (2000) 56 W.I.R. 229.
[33] Claim No. BVIHCV 2006/0306, Judgment delivered on 25 November 2008 [unreported]
[34] See Bird v Cocking & Sons Ltd [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ.

have kept pace with the times in which we live.[35] There has been a gradual rise over the years of the "conventional" sum. Salmon LJ pertinently had observed in Fletcher v Autocar and Transporters Ltd,[36] "*the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant but would consider them to be sensible and fair in all the circumstances*."

[72] Taking all matters into consideration including the injuries suffered by Mr. Christopher, his age and the fact that he will no longer be able to enjoy his hobby of cycling and other physical activities, I make an award of $60,000 which in my view, represents fair and reasonable compensation for the injuries sustained by Mr. Christopher.

Future loss of earnings

[73] As regards the assessment of general damages in respect of future loss of earnings, there are a number of uncertainties, which have to be brought in and these, necessarily, make their calculations more imprecise. They include such matters as the probable length of time of the claimant's future incapacity, his prospects of obtaining employment and the normal hazards of life. To reach a figure for the award of a lump sum, the normal method of assessment which is used by the courts, is first to calculate, as accurately as possible, the net annual loss suffered, which is usually based on an average of the claimant's pre-accident "take-home" pay. This is to be used as the multiplicand.

The multiplicand

[74] Based on the medical evidence, it is easy to conclude that Mr. Christopher has not and will not be able to work again as a plumber as a result of the accident. Dr. Darwish concluded that Mr. Christopher's "*ability to work will be limited to just a light duty job at best*".

[75] Mr. Christopher deposed that at the time of the accident, he was a plumbing contractor for approximately 20 years. He was working at the Frenchman's Cay Project with Mervin Plumbing Service and was being paid approximately $7,000 a month as a plumbing

[35] Senior v Barker & Allen Ltd [1965] 1 W.L.R. 429.
[36] [1968]2 QB at 363, 364.

contractor. He was later advised by Mr. Mervin Thomas, the principal of Mervin Plumbing Services that the job was completed in February 2008 and that had it not been for the accident, he would have worked on the project to completion. At paragraph 36 of his witness statement, he said that over the last few years, his monthly income as a plumbing contractor averaged between $6,000 to $8,000 monthly depending on the nature of jobs and the frequency with which he obtained them.

[76] He brought Mr. Mervin Thomas to testify on this aspect of the case. Mr. Thomas said that in or about 2001, he started working closely with Mr. Christopher on all plumbing projects which he was engaged on as the plumbing contractor. He said that the arrangement he had with Mr. Christopher is that Mr. Christopher would accept responsibility for supervising and completing his plumbing project and he would pay him a salary of approximately $6,000 to $7,000 monthly. Under intense cross-examination from Mr. Bennett QC, Mr. Thomas said that the plumbing contract for Frenchman's Cay was $121,000 and that it lasted for 14 months. He also said that he received about $75,000 as he was the independent contractor. Using simple arithmetic, Mr. Christopher could only have received $46,000 for the project if he had completed it.

[77] There is no documentary evidence to prove Mr. Christopher's contention that he earns $6,800 per month. The only documents which were produced are those payments made by Mr. Thomas to Mr. Christopher during his employment with the Frenchman's Cay Project. However, these documents cannot be relied upon as they were for a specific period of time and do not represent Mr. Christopher's usual earnings.

[78] It is trite law that Mr. Christopher must prove his case and it is incumbent on him to provide the best evidence of which he is capable. As I see it, Mr. Christopher did not work 12 months a year. He was a sporadic worker and works when there are projects to do. In Cedric Dawson v Cyrus Claxton [supra], Gordon JA in delivering the judgment of the Court in a personal injury case said at para. 7:

> "I will, however make one comment in passing. It is the obligation of the claimant in any claim for damages to provide the best evidence of which he is capable."

[79] If I conclude that Mr. Christopher earns $7,800 per month, I will be speculating as the only documents produced in court shows that he would have earned $46,000 from the Frenchman Cay Project which lasted 14 months. However, the law is clear that the court ought not to speculate: see Ashcroft v Curtin[37] and Tate v Lyle Food and Distribution Ltd and Anor v Greater London Council and Anor[38].

[80] It seems more likely than not, that if I take this figure, Mr. Christopher earns about $3,300 per month. In the circumstances, I will fix the multiplicand at $39,600 annually. I am conscious of the principles enunciated in Cookson v Knowles[39] and followed in Alphonso v Ramnath and Auguste v Neptune[40], that for the purpose of arriving at the multiplicand, the basis should be the least amount that Mr. Christopher would have been earning if he had continued working without being injured.

The Multiplier

[81] In Alphonso v Ramnath, Singh J.A. said:

> "In determining the multiplier, a Court should be mindful that it is assessing general and not special damages. That it is evaluating prospects and that it is a once for all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident."

[82] Mr. Christopher was 44 years old at the time of the incident. He is now 46. He would have had a normal working life of 65 or about 21 more years. I take into account the many contingencies, vicissitudes and imponderables or uncertainties of life and the fact that the award is intended to compensate for money that he would have earned during his working life. I also take into account that damages will be a lump sum award.

[37] (1971) 1 WLR 1731.
[38] (1982) 1 WLR 149.
[39] (1979) AC 556
[40] [1997] 56 W.I.R. 229.

[83] Applying the principles laid down in the cases of Alphonso v Ramnath and Auguste v Neptune, I would give Mr. Christopher a working life of 65 years and fix a multiplier of 12.

[84] Using a multiplier of 12 and a multiplicand of $39,600, the award under this head is $475,200.

Future Medical Expenses

[85] It is clear from the unchallenged medical evidence that Mr. Christopher will be faced with future medical expenses. This is borne out in the medical reports. Ms. Medley opined that Mr. Christopher will have to continue with the physiotherapy treatments[41]. She stated that Mr. Christopher "*will require continued physical therapy focusing on maintaining joint range in the limbs and muscle re-education/strengthening for the rest of his life...the optimum frequency of physiotherapy sessions is two to three times per week while the costs per session are approximately $120*".

[86] Dr. Chase shared the same view stating as follows:

> "It is possible that some tendon transfers especially in the left upper extremities could possibly help him. However, he is also very stiff in the PIP joint. So even with tendon transfers, functional improvement may be limited unless the contractures are addressed as well. Not only will this take some surgery, but a long period of rehabilitation afterwards. I do believe he will need future medical care, as I said in terms of possible tendon transfers as well as therapy throughout his life to prevent contractures."

[87] Mr. Christopher claims for future medical expenses -the costs of physiotherapy sessions and the costs of miscellaneous medical expenses- and I find this claim to be established as the need for medical care will continue throughout his life. With respect to the future physiotherapy sessions, Mr. Christopher stated that such costs for one year with approximately three sessions per week at $120 per session would be $18,720. Further, Mr. Christopher claims the costs of physiotherapy for approximately 20 years in the future, with 2 sessions per week at $120 per session which aggregates $249,600.

[41] See paragraphs 22 to 28.

[88] However, Mr. Bennett QC submitted that the Court should award a more reasonable multiplier of 12 rather than 20, taking into account the many contingencies, vicissitudes and imponderables of life, as judicially pronounced by the Court of Appeal in Alphonso v Ramnath and that this will have to be a lump sum payment.

[89] Mr. Neale argued that the court must give credence to the fact that the natural life is longer than the working life and suggests a multiplier of 20. This argument is a fallacy as in determining the multiplier, a court is compensating a claimant for the money he would have earned during his normal working life but for the accident and not for his natural life: see Alphonso v Ramnath where Singh JA said:

> "It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident."

[90] Having regard to these principles and Mr. Christopher's age (now 46) and to his normal working life of 65 had it not been for the accident, I am of the view that a multiplier of 12 would be appropriate. Therefore, I make an award of $149,760 for future medical expenses.

Future miscellaneous expenses

[91] In addition, Mr. Christopher claims the sum of $20,000 for future miscellaneous medical expenses and $50,400 for housekeeping i.e. 6 years at $700 per month. Mr. Christopher states that it is clear from the medical report of Dr. Chase that it would be necessary for him to consult with medical practitioners from time to time.

[92] However, as admitted by Mr. Christopher, he led no evidence on these costs and so, he submitted that the Court should award a relatively small sum as nominal damages of $2,000, based on the evidence before the court for medical treatment thus far. I agree. After examining the miscellaneous medical documents presented, I will make the award of

$2,000 for future miscellaneous medical expenses and $50,400 for future housekeeping making a total of $52,400 under this head.

Special damages

[93] Special damages are quantified damages of which a claimant has already spent as a result of the damage and loss suffered. This type of damages must therefore be pleaded for, particularized and proved. This was the view of Lord Diplock in Ilkew v Samuels[42] where he said:

> "Special damage is the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized…it is plain law…that one can recover in an action only special damage which has been pleaded, and of course, proved."

Past Earnings

[94] Mr. Christopher has a trade license from the BVI Trade Department to practice plumbing in this Territory. At the time of the accident, he was working as a plumber with Mervin Thomas on a house at Frenchman's Cay. He claimed to have been earning approximately $7,000 per month.

[95] To evidence these payments, five documents from Mervin Thomas to Mr. Christopher were exhibited, which stated the amounts of payments which had been paid to Mr. Christopher from 20 February 2007 to 5 June 2007. (None of the documents spoke to the months of December 2006 and January 2007, when the project apparently began). Mr. Christopher submitted that all his payments were made in cash. This project was completed in February 2008 and Mr. Christopher would have continued to work on this project if the collision had not prevented him from doing so. This meant that he lost approximately $56,000, being 8 months' salary ($7,000 x 8) for the period of June 2007 to February 2008. However, in the particulars of the Statement of Claim, Mr. Christopher pleaded only $51,200. Mr. Thomas confirmed that Mr. Christopher was paid $7,000 for the

[42] [1963] 2 All ER 879, [1963] 1 WLR 991.

Frenchman's Cay Project. However, he stated that these documents signified that Mr. Christopher was paid by cheques.

[96] All, but one, of these documents state that Mr. Christopher was paid $6,400. The document dated 5 June 2007 states that Mr. Christopher had been paid $8,760. I agree with Mr. Bennett QC that it is not known how much of that payment, or in fact, how much of all the payments represented a current payment as opposed to payment of arrears.

[97] More importantly, according to Mr. Thomas, the entire contract was valued at $121,000 and he submitted that, as the contractor, he received $75,000 on that contract. For this I am of the view that either these payments to Mr. Christopher are grossly exaggerated or that the value of the entire contract was understated. I am unable to believe that Mr. Thomas would have paid Mr. Christopher the sum of $98,000 ($7,000 x 14 months) had he worked there for the entire duration of the project. The numbers do not add up. If Mr. Thomas received $75,000 and the entire project was valued at $121,000, he could have only paid Mr. Christopher $46,000.

[98] However, as I stated earlier, the payments of February, March, April and May of $6,400, are all the same and so I find that this sum can represent what Mr. Christopher was paid during his employment with the project. I also find that he would have been paid for December 2006 and January 2007, a similar sum of $6,400 making an aggregate of $38,400. As he was to receive $46,000 for the entire project, then the amount which he lost was $46,000 - $38,400. For this reason, Mr. Christopher is awarded $7,600.

Pre-Trial Medical and Miscellaneous Expenses

[99] Mr. Christopher claims his entitlement to the medical expenses for which he has already paid, arising out of the injuries he sustained in the incident, which includes physiotherapy treatment and consultation, doctor visits and other general medical expenses making an aggregate of $13,841.15. He produced documentary evidence which were uncontested. I therefore award Mr. Christopher the sum of $13,841.15 for pre-trial medical expenses.

[100] In addition, Mr. Christopher claims for miscellaneous expenses, including petrol, telephone, exercise equipment and a wheelchair, totalling $1,400. None of these expenses have been documented as invoices or receipts. On this issue, Lord Donovan in Perestrello E Compania v United Pain Co Ltd[43] had this to say (at page 579):

> "The same principle gives rise to the plaintiff's undoubted obligation to plead and particularise any item of damage which represents out of pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded.
>
> The obligation to particularise in this latter case arises...because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant the access to the facts which make such calculation possible."

(1) For this reason, I make no award to Mr. Christopher for miscellaneous expenses.

Interest

[101] It is not disputed that Mr. Christopher is entitled to interest on the sums awarded. An award for interest is generally made on the sum awarded for general damages at a rate of 5% from the date of the service of the claim to the date of judgment. For special damages, it is at the rate of 3% from the date of judgment to the date of payment: see Alphonso v Ramnath. I will therefore award these percentages as interest.

Costs

[102] Under this head, Mr. Christopher is claiming that he is entitled to recover the monies he expended, being legal costs totalling $16,650, in pursuing the original action against the Corporation and Mr. James. This is evidenced by the fee note of Mc W Todman & Co. That action was struck out on the ground that it was statute- barred.

[103] In addition, Mr. Christopher claims that he is entitled to recover costs ordered against him in the original action. These costs are yet to be agreed between the parties and in default, to be assessed. According to Mr. Neale, the entire original claim was for approximately

[43] (1969) 1 WLR 570.

$1,633,531 and under the scale of fees in CPR 65.5, the Corporation and Mr. James would be entitled to legal costs of approximately $60,000.

[104] However, I accept the contention of Mr. Bennett QC that Mr. Christopher was advised by his new lawyers, prior to filing, that the original claim was statute barred. This was admitted by Mr. Christopher in his Statement of Claim[44]. Therefore, Mr. Christopher knew that the original action would more than likely be dismissed because it was being filed out of time. Mr. Christopher, nevertheless, instructed his lawyers to proceed with filing the claim against the Corporation and Mr. James and consequently, incurred costs. In those circumstances, I find that Mr. Christopher is not entitled to claim those costs from Mrs. Samuels-Richardson but will personally bear them.

Costs in this action

[105] Mrs. Samuel-Richardson will pay Mr. Christopher the costs of this action. Such costs will be prescribed costs under CPR 65.5 (3) Appendix B which amount to $37,570.12.

The Outcome

[106] The outcome is as follows:

General Damages

a)	Pain, Suffering and Loss of amenities	$60,000	Interest at the rate of 5% per annum from the date of service of the statement of claim to the date of trial: 11 September 2007
b)	Loss of Future Earnings	$475,200	No Interest before Judgment
c)	Future Medical Expenses	$149,760	No interest before Judgment
d)	Future Miscellaneous Expenses	$52,400	No interest before Judgment

[44] See paragraph 16.

Total General Damages are in the amount of $737,360.

Special Damages

1.	Past Earnings	$7,600
2.	Pre-trial Medical and Miscellaneous Expenses	$13,841.15

Total Special Damages are in the amount of $21,441.15 with interest at the rate of 3% from the date of judgment to the date of payment.

Total global sum of damages, interest and costs

[107] The total global sum of damages awarded to Mr. Christopher is $756,801.15 less 75% which is $189,200.29. The total interest awarded is $1,258.10 making a grand total of damages and interest as $190,467.39. Prescribed costs on that sum are $37,570.12 making a grand total of $228,037.51. I make no deductions for Income Tax or NIS Contributions as no evidence was adduced in that regard.

[108] Last but not least, I am grateful to all Counsel and to the parties for their valuable assistance to this Court and their patience in awaiting this judgment.

Indra Hariprashad-Charles

High Court Judge