IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 511 OF 2009

BETWEEN:

GARY JAMES

PLAINTIFF

AND

WOODS FURNITURE & DESIGN LTD.
(In Voluntary Liquidation)

DEFENDANT

Appearances:

Mr Clyde Allen of Chambers on behalf of the Plaintiff

Ms Alice Carver of Nelson Law on behalf of the Defendant

Before:	The Hon. Justice Kawaley
Heard:	**27 August 2019**
Draft Judgment Circulated:	**30 September 2019**
Judgment Delivered:	**4 October 2019**

HEADNOTE

Personal injury claim-liability admitted-assessment of damages-injury at work-whether plaintiff contributorily negligent-impact of injury on employment prospects-measure of general damages-special damages-interest-accidental disclosure of fact and amount of payment into court

JUDGMENT ON QUANTUM

Introductory

1. The Plaintiff was injured by a forklift truck while employed by the Defendant as a floor installer on November 14, 2008. The forklift truck stopped working and a colleague called by the Plaintiff to assist released a valve which caused the load to fall onto the Plaintiff's left arm which was crushed. A Jamaican, he returned home after his employment in the Cayman Islands was terminated on grounds of redundancy on May 1, 2009. He filed a Specially Endorsed Writ of Summons on October 14, 2009 seeking damages for negligence in relation to the injuries he sustained.

2. The Defence denied liability and asserted that the injuries were caused or contributed to by the Plaintiff's own negligence in that he ought to have anticipated that his co-worker would release the automatic release valve because he was in a position to see him going to the front of the forklift truck where the release valve was before the Plaintiff placed his own arm under the load. He still requires remedial surgery which he is hoping will be funded by the damages he is awarded.

3. On January 14, 2011, on the Plaintiff's application, the Chief Justice ordered that liability should be tried separately and before the issue of quantum. He apparently encouraged the parties to settle the matter. The reasons for the delay thereafter are somewhat unclear but will be considered further below. At first blush, the delay appeared to a significant extent to be attributable in part to the fact that the Defendant entered voluntary liquidation and retained fresh legal representation. How vigorously the Plaintiff pursued the action is unclear. However, his main Medical Reports were obtained in March to April 2009. The Plaintiff prepared Legal Submissions on liability and signed a Witness Statement on March 12, 2012 and was seemingly ready for the trial on liability at that point; the Defendant did not apparently admit liability until a hearing before Williams J in August 2018, some six years later. The Defendant's second attorneys were replaced by its third set of attorneys after the directions hearing before me on May 17, 2019.

4. This left the issue of quantum to be determined. The main issues in dispute were:

   (a) the appropriate general damages award for pain and suffering and loss of amenity;

   (b) whether the Plaintiff was entitled to an award for loss of earnings and/or to a *Smith-v-Manchester* and/or *Blamire* award;

   (c) whether and if so to what extent the Plaintiff was contributorily negligent.

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5. Only the Plaintiff gave oral evidence. The Defendant adduced no evidence and sought to undermine the Plaintiff's case and advance its case on contributory negligence through cross-examination.

The Plaintiff's evidence

Overview

6. The Plaintiff's evidence covered two main areas. His evidence about the accident in which he sustained his injury and his evidence about the impact of the injury on his ability to find work since returning to Jamaica after his employment with the Defendant was terminated on or about May 1, 2009. I found him to be generally a credible witness, but his evidence about the accident, which was supported by nearly contemporaneous documentation, was more convincing than his somewhat vague evidence about his post-accident employment and income which he appeared to me to be generally seeking to minimize. However, he broke down in tears under examination by his own counsel when blaming his inability to generate the same income as he earned in the Cayman Islands before the accident for the departure of his wife to North America. Accidents at work can clearly set off a series of unfortunate events which have implications beyond the scope of legally recoverable damages flowing from the relevant injury itself.

Contributory negligence

7. The best available documentary evidence of what occurred on November 14, 2008 is the Defendant's own '*Report of an injury or dangerous occurrence*' which on its face appears to be a Department of Employment Relations form which employers are required to complete following an accident at work (the "Incident Report"). The relevant form signed by the Plaintiff and Mr Brian Stacey as a representative of the Defendant and dated November 24, 2008 states the following in a box headed '*Clear concise description of the Incident*':

> "*Gary James was operating a stockpicker forklift on the loading bay at Woods Furniture. The lift became unoperable and suspended 1-2 feet in the air. Troy Roland and Mr James pointed out a malfunction with the foot pedal. Mr James bent down and placed his left forearm underneath the foot pedal to demonstrate the problem. Unknown to Mr James at this time Mr Roland had moved to the*

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front of the stockpicker and opened the front of the machine and used the manual lowering valve. The lift lowered onto Mr James arm and trapped it."

8. This is the Defendant's own document, created 10 days after the accident, after it had been afforded a reasonable time to conduct its own investigations as to what had occurred. The Defendant critically admitted that the Plaintiff did not know that Mr Roland was near the lowering valve when he placed his arm in harm's way to demonstrate the problem with the forklift. The Plaintiff's pleaded account of the accident filed one year after the indent occurred (Statement of Claim, paragraph 6) was materially consistent with the Defendant's own Incident Report:

> "*The Plaintiff went inside the office to call the Defendant's servant or agent, Leroy aka Troy, who was a co-worker, to let him know that the forklift truck was not working properly and had stalled. Whilst investigating the problem with Leroy Rolando the Plaintiff bent down and was examining the forklift truck and in particular but including the foot-pedal. The Plaintiff had placed his left arm under the lift to point out to Leroy Rolando what he considered was the problem. Unbeknownst to the Plaintiff, Leroy Rolando had moved to the front of the forklift truck and opened the front of the machine. Leroy Rolando, without any notice to the Plaintiff, used the manual lowering valve which released the lift and caused it to come down and crush the Plaintiff's arm. The Plaintiff's arm was trapped under the lift for at least 20 minutes. The Plaintiff had to tell the co-worker what to do in order to release his arm. Whilst the co-workers were trying to lift the lift off the Plaintiff's arm it slipped and trapped his arm a second time. Eventually a second forklift truck had to be used to lift the lift off the Plaintiff's arm.*"

9. The Plaintiff's Witness Statement, which he confirmed under oath to be true, expanded upon his pleaded account of how the accident occurred. It was broadly consistent with the Incident Report and his pleaded case. In these circumstances I found his account of how the accident occurred to be credible and reliable and not to any material extent discredited, despite a careful and probing cross-examination.

10. The Defendant's starkly different pleaded alternative version of events, according to which the Plaintiff should have been aware that Mr Rolando could or might release the automatic release valve, was not only not supported by any positive evidence,it was inconsistent with admissions contained in its own Incident Report compiled 10 days after the accident. If the Defendant's initial investigations suggested, even inconclusively, that the Plaintiff had contributed to his injuries to a material extent, such a conclusion (even if only preliminary or tentative) ought to have been recorded in the

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employer's official record of the incident. According to paragraph 7 of the Defence (dated November 24, 2009, a year after the accident), however, any injury was "*caused or contributed to by the Plaintiff's own negligence*" in that:

> "*(a) He asked for assistance from Leroy Rolando in order to fix the forklift.*
>
> *(b) Leroy Rolando attempted to start the forklift by standing on the platform and restarting it.*
>
> *(c) When this proved unsuccessful, Leroy Rolando moved to the front machine and opened the cage at the front of the machine where the automatic release valve was positioned.*
>
> *(d) At the time that Leroy Rolando went to the front of the machine, the Plaintiff was standing on top of the platform.*
>
> *(e) The Plaintiff was or should have been aware that Leroy Rolando was going to release*[1] *the automatic release valve.*
>
> *(f) Without warning and negligently the Plaintiff stepped off the machine and placed his hand underneath the platform.*
>
> *(g) Leroy Rolando with due care and attention slowly lowered the platform.*
>
> *(h) The Plaintiff with full sight of the platform lowering and knowledge of the actions of the Defendant left his arm in a position whereby injury was to be caused.*
>
> (i) *The Plaintiff failed to alert the Defendant, his servants or agents to his actions, which would have averted the action.*"

11. Nearly 9 years after the Defence was filed, in the course of cross-examination, the Defendant advanced (seemingly for the first time) two further allegations of contributory negligence. Firstly, and most broadly, it was suggested that it was inherently risky for the Plaintiff to place his harm underneath the raised platform when it was carrying a load. Secondly, and more specifically, it was suggested (by reference to a generic safety manual) that it was contrary to recognised safety standards to park the forklift with the loaded platform raised as the Plaintiff clearly had done.

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[1] Ms Carver accepted during the hearing that this plea could not be maintained and accepted the lower threshold of establishing that the Plaintiff knew that his co-worker "could have released" the valve.

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12. As regards the first point, the Plaintiff appeared to me to acknowledge that his actions were in an abstract sense risky, but insisted that when he bent down to point out what he believed to be the problem to Mr Rolando, his colleague was standing next to him and he did not see him moving in front of the forklift to where the valve was located. As regards the second point, the Plaintiff accepted in general terms that it was dangerous to park the loaded forklift with the forks raised. He also admitted receiving some initial training but did not admit that he had contravened any relevant operating rules laid down by the Defendant. No evidence was adduced of any safety rules in force at the time of the accident by the Defendant. The evidence clearly supported a finding that if the Plaintiff had lowered the forks before seeking assistance in relation to the truck which had suddenly stopped the accident would not have occurred in the way which it did. The critical question was whether or not he was negligent in all the circumstances including in particular (a) the involuntary stopping of the vehicle, as opposed to a voluntary parking of it, and (b) the Plaintiff's uncontradicted evidence that he did not expect Mr Rolando to release the load while the Plaintiff was pointing to what he believed to be the mechanical problem.

Quantum

13. The Defendant did not challenge the Plaintiff's medical reports. The Plaintiff is right-handed. Dr Quartly's March 6, 2009 Report records that he sustained fractures of the radius and ulnar bones and a crush injury to the left forearm. It is common ground that the Plaintiff had two plates inserted and received 21 stiches, although the Report only refers to "*internal fixation*". He complained of pain in the left forearm and had two scars, one "*well healed*" 11cm and another 9cm. Dr Quartley recommended that consideration be given to "*exploration and decompression of the median nerve within the carpal tunnel*". This seemingly prompted a specialist examination.

14. Orthopaedic surgeon Dr Bailey prepared a Report dated April 24, 2009 based on examining the Plaintiff on that date. Dr Bailey did not operate on the Plaintiff. He indicated that "*the bones have gone on to heal satisfactorily with excellent alignment. Dr. Sekhar performed the procedure.*" The Plaintiff's strength in the injured hand appeared to be recovering steadily, but numbness was a problem:

15.

> "*He does have persistent sensory discomfort in the median nerve distribution. This does not offer him any major functional difficulties although it does appear to be more of an aggravating problem...*
>
> *I would suggest that he delay a carpal tunnel release at this time in that he has demonstrated improvement. If however he still has dyesthetic*

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discomfort in the hand at year mark then we could do a decompression of the carpal tunnel as well as remove the plates in his forearm."

16. The Plaintiff testified that, over 10 years later, his left arm had not recovered full strength[2]. This was unsupported by any expert medical evidence. Dr Bailey in April 2009 felt that if he continued with his physiotherapy for another month to six weeks, he should be able to return to work. The only other medical evidence was Dr Waite's agreed costs estimate for "*Removal of Implant*", which also stated: "*Period of incapacitation: 1-3 months*". Under cross-examination, the Plaintiff agreed that he felt at the time that he was fit to return to work on May 1, 2009 and that even if he had not been made redundant when he was his contract expired in July 2010 in any event. The Plaintiff complained of continuing discomfort in his injured arm which he treated with Advil and which did not result in more than one doctor's visit and suggested that it impaired his ability to take jobs as a driver for more than limited periods of time. Without the requisite evidential support for damages based on being handicapped in the labour market and in the absence of a claim for wrongful dismissal, it was difficult to identify what legally recoverable head of loss the Plaintiff's evidence about his post-redundancy employment record in Jamaica properly addressed.

17. The Plaintiff did address in his oral evidence his travel expenses claim of $1350. He explained that this was the airfare for his children travelling to Grand Cayman from Jamaica to spend Christmas 2009 with him because he had to attend physiotherapy. They stayed for 2-3 weeks. Referring to the records of his physiotherapy treatment which recorded semi-supervised rehabilitation sessions on December 17, 19 and 29, Ms Carver suggested that the Plaintiff could have travelled to Jamaica himself for Christmas.

18. As far as his loss of earnings claim is concerned, the Plaintiff confirmed that his claim related solely to after his May 1, 2009 redundancy. He seemed keen to create an impression that he was only intermittently employed because of his accident-related incapacity. However, he stated that in a good week he could earn J$25,000-J$30,000.

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[2] In commenting on a draft of this Judgment, the Plaintiff's counsel fairly pointed out that no mention had been made of Dr Waite's September 6, 2018 Report. Reference was made at trial to that portion of the Report which confirmed that the Plaintiff was when examined in 2018 suffering the continuing symptoms of discomfort identified in Dr Bailey's Report and which the second operation would address. I did not understand that any positive reliance was placed on the further segment of the said Waite Report which attributed a 2% whole person impairment to those continuing symptoms. Paragraph 10 of the Plaintiff's Supplementary Legal Submissions makes no reference to the Report of Dr Waite as supporting the Plaintiff's loss of earnings claim. Counsel did not explain to the Court how the impairment opinion should be used to support a finding of reduced earning capacity. Nor did the Plaintiff's Quantum of Damages Schedule suggest that Dr Waite's Report was relied upon as supporting a finding that the Plaintiff had been temporarily handicapped in the labour market until the second operation occurred to any quantified extent. I will permit counsel to address me on the question of whether some modest award should be made for loss of earnings due to this medically supported "impairment" which was not canvassed at trial, at the hearing when this Judgment is formally handed down.

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The record and delay

19. The Defendant complained that it should not be penalised in damages for delay caused by the Plaintiff. The Court file reveals the following pertinent timeline:

- October 14, 2009: Writ filed;
- November 14, 2009: Defence filed;
- June 23, 2010: Plaintiff's attorney gives notice of intention to proceed and argues for a split trial;
- November 2, 2010: Summons seeking trial of preliminary issue filed. Plaintiff's attorney also swears Affidavit exhibiting medical reports, requesting a trial of a preliminary issue and explaining that the Plaintiff is impecunious and cannot have the plates removed from his arm until he recovers damages;
- January 14, 2011: CJ orders split trial over Defendant's objections;
- December 3, 2011: the trial on liability was fixed for hearing on March 13, 2012;
- March 12, 2013: Plaintiff signs his Witness Statement on liability and his attorney signs his Legal Submissions on liability;
- May 10, 2013: Samson and McGrath formally apply for leave to come off the record as attorneys for the Defendant;
- May 3, 2013: Samson & McGrath come off the record;
- December 19, 2014: Plaintiff issues[3] Notice to Fix Trial Date;
- October 27, 2016, Plaintiff issues second Notice to Fix Trial Date;
- November 18, 2016: Diamond Law Attorneys give Notice of Change of Attorneys replacing Samson & McGrath on behalf of the Defendant in voluntary liquidation;

[3] The Court stamp suggests this only officially received by the Court on January 30, 2015.

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- September 18, 2017: Plaintiff gives Notice of Intention to Proceed;

- March 21, 2018: Defendant files Summons to dismiss for want of prosecution;

- May 11, 2018: Plaintiff gives Notice of Intention to Proceed;

- August 29, 2018: the Defendant having admitted liability, Williams J gives directions for the trial on quantum which contemplate the Plaintiff filing a medico-legal report by September 21, 2018;

- March 20, ~~2018~~ 2019: McMillan J orders that unless the Plaintiff does all things necessary to progress the case to trial on May 21-22, 2019, the Plaintiff's case shall be dismissed for want of prosecution;

- May 23, 2019: the matter being listed as Case Management Conference, I ordered the trial to take place on August 27, 2019 when it did finally proceed.

20. In summary, the Defendant was on notice from November 2010 that the Plaintiff was impecunious and unable to fund the completion of his treatment unless in receipt of a damages award. The trial on liability was fixed for hearing on March 13, ~~2013~~ ~~2013~~ 2012 and there was no significant unexplained delay before then. The Plaintiff was ready to proceed on March 13, ~~2013~~ 2012 but it appears that the Defendant (perhaps due to the onset of insolvency) was not[4]. The Defendant did not admit liability until over 5 years later. The Defendant, which could only sue and be sued through an attorney[5], had no attorney of record between May 2013 and November 2016. Thereafter the Plaintiff did not vigorously pursue his claim, but settlement correspondence was exchanged and the Defendant's second set of attorneys sought in March 2018 to dismiss for want of prosecution before eventually capitulating by conceding liability in August 2018. The Plaintiff, not unsurprisingly for an impecunious foreign claimant, was unable to obtain the further expert medical evidence he desired and was forced to proceed without it at the quantum stage. Of course it is also possible that no doctor he approached was willing to provide a favourable opinion on the issue of incapacity.

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[4] In commenting on a draft of this Judgment, the Defendant's counsel fairly noted the formal record of the March 13, ~~2013~~ ~~2013~~ 2012 hearing does not record which party sought the adjournment. I infer that the Plaintiff was ready to proceed from the fact that both his Witness Statement and his counsel's submissions are dated March 12, ~~2013~~ 2012 ~~the day before the adjourned hearing~~. and the Defendant's attorney applied for leave to ~~leave~~ to come off the record in May ~~2013~~ 2013.

[5] GCR Order 5 rule 6.

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21. Taking a high level view of the course of the litigation as a whole, there is no justification on the face of the record for the Defendant's broad complaint that the Plaintiff is to mainly blame for the trial taking place almost 10 years after his claim was filed.

Findings: contributory negligence

22. The Defendant's pleaded case on contributory negligence must be decisively rejected because it was not supported by any positive evidence and was most convincingly contradicted by the Defendant's own Incident Report prepared on November 24, 2008, only 10 days after the accident in question occurred. This supported the Plaintiff's central thesis that the forklift truck he was driving broke down, he called a colleague for assistance in identifying the problem and while pointing out a loose wire the colleague unexpectedly released a valve causing the load to fall onto the Plaintiff's left hand, crushing it. I accept the arguments advanced in the Plaintiff's March 12, 2012 Legal Submissions, summarised in paragraph 24, in this regard.

23. An entirely new allegation was advanced, seemingly for the first time, in cross-examination. Ms Carver, undaunted by me provisionally pouring scorn on the point, advanced it with great conviction in closing argument. In a nutshell, the Plaintiff was said to have been contributorily negligent by failing to lower the load when he "parked" the forklift truck, as the Plaintiff frankly conceded would have been the safest course to follow. The starting point in the analysis is to identify the legal principles governing contributory negligence.

24. The governing statutory provision which was placed before the Court is section 8 of the Torts (Reform) Law (1996 Revision) which provides in salient part as follows:

> "*(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share of the responsibility for the damage…*"

25. The Defendant relied upon *Brian Smith-v-James Strang Limited* [2012] CSOH 173 as an illustration of the application of these legal principles to facts analogous to those of the present case. The claimant was injured when operating a post driver machine. His

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left jacket sleeve became caught in the machine and his right hand, which he was using to manually align a fence post, was seriously injured. Had a post cap been attached to the machine, the claimant would not have had to manually align the post and would not have been injured. The claimant was found by Morag Wise QC (sitting as a temporary judge) to be 50% contributorily liable because:

> "*[21] ...it is important that the pursuer was well aware of the extreme danger involved in placing his hand on a post while operating the post driver and it is not seriously disputed that his actions contributed to the accident...*
>
> *[22] ...The pursuer was an experienced fencer and owned and operated his own post driver machine. He had failed to read the instruction manual which gave clear warnings about the danger of placing any body part under the raised hammer. His actings* [sic] *were extremely careless and he accepted in evidence that what he had done was extremely dangerous...*"

26. The present facts are very far removed from those of the latter case, and indeed *Walker-v-Chruszcz and another* [2006] All ER (d) 224 (January) where the claimant was advised that he would have been held to be 50% contributorily negligent for placing himself in harm's way. Here, there was no evidence that the Plaintiff had been supplied with any manual and ignored its warnings about parking a loaded forklift truck with the forks raised. He had not parked the truck; it broke down and stopped. More importantly still, the Plaintiff's injury did not occur through his operating the machine in a prohibited or dangerous manner. It occurred when the Plaintiff was seeking to identify why the vehicle had broken down and because a fellow employee unexpectedly lowered the forks. The causal connection between leaving the loaded forks raised and the injury which was sustained is far from obvious. Nor is reasonable foreseeability of loss clear. Ought the Plaintiff reasonably to have foreseen, when he left the forklift truck after it had unexpectedly broken to summon a colleague to fix it, that the colleague might release the forks while he was showing him a broken wire in a completely different part of the machine from where the release valve was?

27. Having admitted in the November 24, 2008 Incident Report that what Mr Rolando did was unexpected, it is impossible to see how the Defendant can be said to have proved, without adducing any evidence, that the Plaintiff's injury was partly caused by his own negligence. Modern civil litigation does not permit trial by ambush. The suggestion that leaving the forks raised constituted contributory negligence was not foreshadowed in the Incident Report, was un-pleaded and was first raised orally in cross-examination over 10 years after the accident occurred. In these circumstances, the oral admission by the Plaintiff that it was in general terms dangerous to park the forklift truck when loaded

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with the forks raised falls well short of establishing that his injury was partly caused by his own negligence in all the circumstances of the present case.

28. The predominant cause of the injury was the admittedly negligent actions of the Defendant's employee which the Incident Report admitted were unexpected. The Defendant's contributory defence claim is dismissed.

Findings: general damages (pain and suffering and loss of amenity)

29. Mr Allen submitted that the appropriate award was CI$33,751.50 or £25,000 as the injury fell within category 6(F)(c) of the Judicial Studies Board Guidelines ("JSB Guidelines"). £11,000 or CI$ 14,850.66 was claimed for the single disfiguring scar based on paragraph 8 of the JSB Guidelines. Ms Carver submitted the injury fell within category F(d) of the JSB Guidelines (£5,810-£16,830 (CI$5,393.85-CI$17,192) CI$2,500 was appropriate for the scars bearing in mind the Plaintiff's occupation and the fact that both had healed well. In fact it was clear that one permanent visible scar remained. The Defendant accepted that the Plaintiff at trial still suffered from carpal tunnel syndrome (and mild discomfort) which could be addressed when the plates were removed in an operation which had yet to take place.

30. In my judgment the Plaintiff's injury potentially straddles the top of the "*Simple Fractures of the Forearm*" range (category F(d)) and the bottom of the "*Less severe injury*" range (category F(c)). The latter category appears generally inappropriate because it requires there to have been at some point "significant disabilities". This requirement has not been made out. On the other hand, the pain and suffering has clearly been aggravated by the fact that the Plaintiff has had plates in his arm for over 10 years in circumstances where the Defendant belatedly admitted liability having been requested in 2010 to expedite payment of damages so the Plaintiff could fund the needed surgery.

31. The Defendant's counsel placed various cases before the Court. In my judgment the most pertinent case was *A (A child)-v-Southside Tyneside MBC* (Kemp and Kemp, G5-013). There the claimant was an 8 year old injured while roller-blading. He fractured his right forearm and had plates inserted in a first operation, a second skin graft operation 2 days later and a third operation to remove the plates. He was left with a permanent scar which was expected to become increasingly pale over a two year period. At trial 4 years after the accident, he was awarded £14,915 or CI$ 15,236.60. The Plaintiff in the present case will only require two operations, and did not require a skin graft. He has suffered mild discomfort and/or impairment for over 10 years and will possibly require decompression in addition to late removal. There is no suggestion that

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his permanent dark scar, still visible at trial, will fade (as in the case of A). The Plaintiff's counsel referred the Court to various quantum cases, but submitted that *Kirkpatrick-v-Todd* (£21,000) was most similar. The injuries in that case were clearly more severe with evidence that the claimant would suffer permanent impairment to his dominant arm, prompting an additional *Smith-v-Manchester* award. An award at this level is clearly not justified in the Plaintiff's case.

32. On the other hand I accept that a separate award for the permanent scar is required, and accept that it falls in the single disfiguring scar category as Mr Allen contended. The JSB Guidelines suggest a range of £6,870-£19,930. The Plaintiff sought £11,000 or CI$ 14,850.66. I was able to see the scar from the Bench. The scar was a distinctly raised strip of flesh slightly darker than the Plaintiff's natural skin colour. It was more than superficial and would be visible to anyone coming into close contact with the Plaintiff who lives in a country where short sleeves are ordinarily worn. On the other hand the Plaintiff did not claim to be particularly distressed by it. An award at the bottom of the 'disfiguring scar' range is clearly appropriate, bearing in mind the need to avoid double counting and a total award that is inappropriately high.

33. The parties were not agreed on the appropriate exchange rate for converting sterling to Cayman Islands dollars. The Defendant used the rate of 1.02 (GBP to KYD); the Plaintiff used the 2011 conversion rate of 1.35006. The Cayman Islands Court of Appeal used the conversion rate of 1.35 in *Chin-v-Yates* [2014 (2) CILR 196]. Subject to hearing counsel on a point which was not addressed in argument at trial, the Plaintiff's proposed rate should be used even though I accept that the Defendant's lower rate appears to reflect the market rates at the date of the trial. Legal policy in this area generally favours using fixed conversion rates, reviewed from time to time, to promote settlement through increased certainty as what conversion rates apply.

34. Using the GBP figures, I find that the Plaintiff is entitled to an award equivalent to £15,000 for pain and suffering and loss of amenity and £5000 for the single disfiguring scar or a total of £20,000 for pain and suffering and loss of amenity. Subject to further argument if required, this would generate an award of CI$27,000 for pain and suffering and loss of amenity.

Findings: Blamire/Smith-v- Manchester award

35. I summarily refuse these limbs of the Plaintiff's claim. There was no, or no reliable, evidence of handicap in the labour market after the Plaintiff felt he was able to return to work on May 1, 2009 when he was made redundant. Medical evidence was needed to substantiate such a claim. It is to be regretted if the Plaintiff could have obtained such evidence but was unable to do so because of a lack of financial resources. However, the

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medical evidence he did produce did not suggest that he would suffer more than discomfort until the plates were removed and any enduring carpal tunnel syndrome was decompressed. He has suffered that discomfort for far longer than should have occurred in large part because the Defendant contested the Plaintiff's compelling case on liability for almost 10 years. That particular item of damage has been addressed in the pain and suffering award. His own evidence as to incapacity, even assuming it to be true, fell short of proving, on a balance of probabilities, that he suffered financial loss in terms of lost earnings because of the injuries he sustained as a result of the Defendant's admitted negligence. The nature of the alleged impairment was not sufficiently simple and obvious as to justify the Court making its own independent assessment, particularly as no permanent impairment had been identified by the specialist who had examined him. I entirely accepted that the Plaintiff was genuinely deeply distressed (and possibly depressed) by the understandable perception that the accident and his redundancy had cost him not only lucrative and steady employment, but his wife as well.

36. In *Blamire-v-South Cumbria Health Authority* [1993] P.I.Q.R Q 1, a global assessment of future financial loss in the absence of clear evidence was approved by the Court of Appeal in relation to the claim of a nurse injured at work in circumstances where it was "*clearly established that that injury made her back vulnerable and that is a condition which persists to this day and will endure in the future*" (per Steyn LJ, as he then was, at q2). An award for future loss of earnings based on the claimant being handicapped in the labour market by her injury was approved by the Court of Appeal in *Smith-v-Manchester* 1974 WL 41295, but this handicap was addressed by some five medical reports. The principles established by these authorities were not engaged in circumstances where no injury impairing the Plaintiff's earning capacity could be proved.

37. Mr Allen also relied upon authority supporting the principle that damages for loss of earnings can be assessed based on the Plaintiff's oral uncorroborated evidence as to what his earnings were: *Carter-Ebanks-v-Jefferson's Pizza Limited* [2004-05 CILR Note 21] (Henderson J). This was potentially relevant to the Plaintiff's evidence as to how much he earned after his return to Jamaica. The evidential lacuna which was problematic for this limb of the Plaintiff's claim was not the absence of documentary support for the Plaintiff's evidence, which he to some extent adequately explained. The problem was the absence of medical evidence confirming that his ability to work was adversely affected by his injury.

Findings: loss of earnings

38. As regards lost earnings for the 21 weeks the Plaintiff was out of work, the Plaintiff claimed $9,450 based on what he was paid while employed by the Defendant ($450 per week). It was clear on the face of the pleadings that the claim was for a period

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commencing after May 1, 2009. The Plaintiff's Quantum of Damages confusingly implied the claim related to the period of his employment rather than after it ended by stating that he "*was absent from work for 21 weeks due to the accident*".

39. When the Plaintiff gave his oral evidence at trial on the issue of quantum, it became clear that no claim was made in relation to lost earnings during the course of his employment. The claim solely related to the period after he was made redundant when he was unable to find employment. The difficulty with this head of claim is the lack of any evidential connection between his injury and his post-redundancy unemployment after May 1, 2009. His medical evidence did not support a finding that he was unfit for work for 21 weeks after May 1, 2009 and he had himself reported for work on that date, although it seems to me to be clear that he was an enthusiastic worker who might well have returned to work sooner than he should have done. By his own admission, however, it was only later that he realised he had enduring problems with his injury.

40. Dr Bailey opined on April 24, 2009 that it "*appears that he is getting close to being able to return to his previous job in carpet installing although at this particular point he may require another month to six weeks of physiotherapy.*" The Plaintiff was paid for the week between the date of this Report and his return to work on May 1, 2009. The Report suggested that he would be unfit for work for an additional 3-5 weeks. His severance letter indicates that he was paid "*4 weeks wages at $450.00 per week*". In these circumstances it would amount to double recovery to make any award for loss of earnings for a period when he may have been unfit but was actually paid by the Defendant. This head of claim fails, save to the following extent.

41. It is common ground that the Plaintiff must undergo a second operation at the Defendant's expense. Dr Waite opines that he will be unfit to work for between 1 and 3 months. Bearing in mind that no award is being made to meet the contingency that the second operation may not be successful (ordinarily it would by trial have already taken place), I consider it appropriate to assume that the Plaintiff will be incapacitated for 3 months or 12 weeks. I accept his evidence that he earned between J$25,000 to J$30,000 in a good week. I award him J$25,000 x 12 weeks= J$300,000 (roughly CI$1,850 at current exchange rates) for loss of earnings during the post-operative period.

Findings: medical expenses

42. The Plaintiff claimed CI$ 5,609.78 for past medical expenses and CI$3,077.32 in relation to the operation the Plaintiff is required to undergo as soon as possible. This

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21], referred to above, is also authority for the proposition that pre-judgment interest on special damages should be awarded at half the prescribed rate for special damages, not general damages, under the Judgment Debts (Rates of Interest) Rules. Section 34 of the Judicature Law (2017 Revision) provides:

> "*(1) Subject to rules of court, in proceedings (whenever instituted) before the Grand Court or the Summary Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest at such rate as the court thinks fit, not exceeding the rate prescribed from time to time by rules of court, on all or any part of the debt or damages in respect of which judgment is given or payment is made before judgment, for all or any part of the period between the date when the cause of action arose, and –*
>
> > *(a) in the case of any sum paid before judgment, the date of payment; and*
> > *(b) in the case of the sum for which judgment is given, the date of the judgment.*"

47. It does not appear that a formal order granting judgment on liability has yet been drawn up, but it seems that judgment ought to be regarded as being entered with effect from on or before August 29, 2018. It appears that liability was first formally admitted in Chambers before Williams J on that date. Because (as regards general damages) the cause of action arose on November 14, 2008 and the incurred special damage claims relate to expenses incurred after that date and before December 24, 2008, the following rates applicable to Cayman Islands dollar awards are seemingly relevant to the pre-judgment period:

(a) (from November 14, 2008), 8 3/8 % (Judgment Debts (Rates of Interest) Rules 1995);

(b) (from December 1, 2008), 5% (Judgment Debts (Rates of Interest) Rules 2008;

(c) (from November 1, 2010), 2 3/8 % (Judgment Debts (Rates of Interest) Rules 2010);

(d) (from February 1, 2013), 2 3/8 % (Judgment Debts (Rates of Interest) Rules 2012), which appears to be the latest prescribed rate.

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48. It is to be hoped that counsel will be able to agree the issue of interest, but I will hear counsel if required.

Accidental disclosure of the fact of payment into Court and corresponding without prejudice settlement offer

49. When reviewing the file to gain an overview of the course of the litigation with a view to assessing the respective complaints of delay raised by counsel at trial, I had sight of:

(a) an email from the Defendant's then attorneys, prior to Ms Carver's instruction, dated December 11, 2017 which referred to a settlement counter-offer by the Defendant of $35,000 being made and open for 7 days. An imperfect attempt to redact the amount had been made. The document was exhibited to the First Affidavit of Russell Smith sworn on March 2, 2018 in support of the Defendant's Summons to Dismiss dated March 20, 2018; and

(b) a Notice of Payment into Court dated November 21, 2018 recording the fact that the Defendant had paid the sum of $35,000 into Court[6].

50. Only (b) involves a formal procedural irregularity. GCR Order 22 rule 7 provides:

> "*(1) Except in an action to which a defence of tender before action is pleaded, and except in an action all further proceedings in which are stayed by virtue of rule 3(4) after the trial or hearing has begun and subject to paragraph (2), the fact that money has been paid into Court under the foregoing provisions of this Order shall not be pleaded and no communication of that fact shall be made to the Court at the trial or hearing of the action or counterclaim or of any question or issue as to the debt or damages until all questions of liability and of the amount of debt or damages have been decided.*"

51. Paragraph 22/7/1 of the Supreme Court Practice 1997 provides:

> "*It is the duty of both Judge and counsel to observe this rule, but if, by inadvertence or otherwise, it is broken, it is a matter for the trial Judge to determine what shall be done. If he thinks it proper, or necessary for the due administration of justice, he may refuse to hear the action further, and direct it to be heard by another tribunal. But if he is satisfied that no injustice will be*

[6] Administrative steps are being taken to prevent the recurrence of such slips in the future.

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done he may allow the cause to proceed; this of course, if taken, in itself affords no ground for an appeal (Millensted v. Grosvenor House (Park Lane) Ltd [1937] 1 K.B. 717, CA). See too Re an Action for Negligence (1992 C No. 3063), The Times, March 5 1993, where during the course of a trial a journal revealed not only the fact of payment-in but also the amount thereof, court held that it was open to judge to continue the hearing if he could put such knowledge to one side for the purpose of making his decision at the end of the trial."

52. This is a case which is cost-sensitive for both parties, the Plaintiff being impecunious and the Defendant being in liquidation. The trial took place over 10 ½ years after the injury was sustained. Clear grounds of a risk of injustice would be required for me to recuse myself having reserved judgment because the fact and amount of a payment in accidentally came to my attention after I had heard submissions on quantum and further considered them having reserved judgment. Because of the way in which the quantum issues were argued and the strong provisional conclusions I had arrived at before becoming aware of the payment-in, I am satisfied that I am able to "*put such knowledge to one side*" for the purposes of the findings recorded in this Judgment. I also consider that it would not be proportionate to invite counsel to address me on this issue which appears to me to be quintessentially a matter for my own judgment.

Conclusion

53. The Defendant having admitted liability, the first issue to be resolved was whether the Plaintiff's claim was liable to be reduced on the grounds of contributory negligence. The Defendant's contributory negligence plea, which was unsupported by any positive evidence and inconsistent with the evidence before the Court is dismissed.

54. The Plaintiff suffered a crush injury to his wrist which required the insertion of metal plates shortly after the accident in mid-November 2008 which plates have yet to be removed. He has a permanent disfiguring scar on his lower left arm. He was off work for 5 ½ months, received physiotherapy and will continue to experience some discomfort until the second operation occurs. Based on the respective authorities cited, general damages for pain and suffering and loss of amenity are assessed at UK£20,000 or (subject to hearing argument if required as to the appropriate conversion rate) CI$27,000.

55. The Plaintiff's medical expenses special damages claim (CI$5,609.78 and CI$3,077.32 = CI$8,687.10) were agreed. His post-redundancy loss of earnings and handicap in the labour market and claims are refused because they are unsupported any sufficient expert medical evidence, subject to one caveat[7]. The Plaintiff is awarded J$300,000

[7] As noted in paragraph 16 above, I will hear counsel on the question of whether or not an additional loss of earnings award should properly be made based on Dr Waite's terse written opinion that until the second operation the Plaintiff is 2% impaired. I did not understand that reliance was being placed on this opinion and, if so, to what extent but had the point been brought to my attention expressly at trial, I would have considered making a further modest loss of earning award. I should add, that expert evidence is ordinarily adduced to explicitly quantify the impact of a physical impairment on the claimant's

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(approximately CI$1,850) for loss of earnings during his anticipated post-operative period of incapacity which I find will last for three months or 12 weeks. The Plaintiff's claim for travel expenses incurred by his wife and children travelling to Cayman for approximately 2 to 3 weeks over Christmas 2008 while he was attending physiotherapy sessions is allowed in the reduced amount of CI$1,012.50. The question of interest was not addressed by counsel, but I have set out above my provisional views on, *inter alia*, the applicable statutory rates over the many years since the injury occurred in the hope that this may save costs and facilitate an agreement.

56. I will hear counsel as to costs, interest, the terms of the final Order and any other matters arising from the present Judgment.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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earning capacity based on the expert's assessment of a particular market. No such evidence was adduced in this case, one assumes because funding was not available.