

**IN THE SUPREME COURT OF BELIZE A.D. 2015
(CIVIL)**

**CLAIM NO. 4 of 2015
BETWEEN**

Francis Gill

Claimant

AND

Devon Dale Jones

Defendant

Before: The Honourable Madame Justice Griffith
Date of Hearing: 15th January, 2016; 29th January, 2016 (on written submissions)
Appearances: Mr. Kareem Musa, Musa & Balderamos for the Claimant; Mrs. Tricia Pitts-Anderson, Pitts & Elrington, for the Defendant.

DECISION

Assessment of Damages – General Damages – Quantification – Above knee amputation in adult male – Future loss of earnings – Disability in the labour market.

Introduction

1. On 18th June, 2015 the Claimant Francis Gill obtained a judgment in default of acknowledgement against the Defendant Devon Dale Jones in respect of a claim for damages for personal injuries. The claim was one of negligence arising out of a motor vehicle accident which alleged that shortly after midnight on the 30th August, 2014 the defendant drove his vehicle onto the sidewalk where the claimant was standing on Freetown Road, Belize City, pinning him against a wall. The claimant received a crush injury to his right leg which resulted in an above the knee amputation. This is the assessment of damages following the default judgment.

Issues

2. (i) What is the quantum of general damages to which the claimant is entitled?
(ii) What special damages has the claimant proven?

Analysis of Issues

3. The principles upon which damages are assessed are well known. Short of acknowledging that damages are compensatory and that the object of an award is to seek to place the claimant in as close a position as he would have been but for the defendant's negligence, there is no need to restate such principles. This Court has made wider reference to these principles in its decision **Kelvin Aguilar v David Wang**¹. Also, both Counsel for the Claimant and Defendant also referred to the classic decision of **Cornelius v St. Louis**² from which the heads of general damages are accepted for purposes of quantification as (i) pain and suffering, (ii) loss of amenities and (iii) loss of future earnings or earning capacity. Special damages on the other hand are required to be specifically pleaded and proven. Before considering the appropriate quantum in this case the Court examines the evidence.

The Evidence

4. The evidence in this case consisted of the sole testimony of the Claimant, supported by a medical report as to his injuries. According to the Claimant, shortly around midnight on the 30th August, 2014 he was on the pavement by Key Li Restaurant on Freetown Road, Belize City when someone pushed him, then a vehicle struck him, pinning him against the wall. He felt terrible pain and screamed but that was the last he knew. When the Claimant next became aware it was mid-morning, he was in a bed at the Karl Heusner Memorial Hospital with needles in him and bandages around him and on his leg. He couldn't move, he felt a lot of pain and started to panic and after his girlfriend spoke to him he realized he had no leg. The Claimant never saw how badly injured his leg was as he was unconscious from the time he was hit and thus also knew nothing of how he was transported to the hospital and events leading up to his surgery.

¹ Belize Supreme Court Claim No. 550 of 2014

² [1965] 7WIR 491

Aside from the amputation of his leg he was otherwise unharmed and was discharged from hospital on the 1st September, 2014. The medical report submitted on behalf of the Claimant was by Dr. Idelfonso Roberts, Orthopaedic Surgeon which confirmed that the Claimant sustained a '*crushed injury to his lower limb with an open fracture to the proximal tibia gustillo*'. The Report also stated that the seriousness of the injury could not be repaired thus an above the knee amputation was performed. The Report concluded that the Claimant should seek physiotherapy and assistance for a prosthesis for his lost lower right limb.

5. With respect to the effect of the accident and loss of his leg, the Claimant said he tried not to dwell on the loss of the limb and to forgive the person who caused it. As far as the pain goes, the Claimant says he still feels pain from the stump that remains where his leg was amputated. He feels pain he says primarily because the stump is mostly bone without a lot of flesh covering it. The Claimant says he was the only bread winner for his family and is now unable to work. He was previously employed by a company, making and putting up signs and posters where he earned \$200 per week plus overtime. The work was physical, requiring him to climb ladders and use his legs. He cannot possibly continue to do that work without a leg. The Claimant shared that he has read a lot to educate himself on the loss of a limb so that he would know what to expect and how to try to help himself and avoid getting depressed. From the time he was discharged from the hospital he required help only for a few days as he tried to help himself and so ensured that he would go to the bathroom, get in and out of bed, get dressed and get around the house by himself.
6. The Claimant described that he was no longer able to take his dog for a walk or run, to play with his children, or enjoy football or cycling - but what he missed the most was being able to work. As a result of him being unable to work his wife is the one who now works to support their family. He maintains that if he were to get a prosthetic leg he would do whatever work he could find, but finding work without the leg is impossible.

Under cross examination the Claimant revealed that he didn't go to physiotherapy but would have gone were he so advised by the doctor. Because of his lack of funds, the Claimant has been unable to source a prosthetic leg. He has made inquiries within Belize but lacks the resources to go over to neighbouring Chetumal or Guatemala. The most he has been able to do is make enquiries. The Claimant was able to obtain a prosthetic leg through the assistance of a foundation, but that leg did not fit properly and ended up being a waste of money.

Submissions on Quantum

7. Learned Counsel for the Claimant referred to the Belizean decision of **Norberto Castanaza v Oscar Tzib & Plastic World Ltd**³ and Jamaican decision of **Courts Jamaica Ltd v Kenroy Biggs**⁴ as comparables for the instant case. In **Castanaza** there was a below knee amputation of the leg and general damages were quantified by the then Chief Justice of Belize in the sum of \$180,000. Learned Counsel states that this decision was 14 years ago and should be adjusted upward to take account of inflation. In **Courts Jamaica**, the Respondent therein sustained an above the knee amputation of his left leg, along with other injuries. The general damages award therein of the equivalent of \$302,400 was upheld on appeal. Learned Counsel for the Claimant submits that the award for general damages in this case should fall within \$180,000 and \$302,000 being the range of these two cases.
8. In relation to medical expenses learned Counsel cited Jamaican decision **Curlon Lawrence v Channus Block and Marl et al**⁵ wherein an award was made of the equivalent of \$36,153 for the cost of a prosthetic leg and the same amount is urged upon the Court as an appropriate award for the Claimant. In relation to special damages, a sum of \$1,000 per week was claimed, being the Claimant's salary of \$200 per week plus overtime of \$50 per week.

³ Belize Supreme Court No. 577 of 2001

⁴[2012] JMCA Civ 50

⁵ [2013] JMCA Civ 6

Future loss of earnings was claimed in the sum of \$144,000, comprising the sum of \$1000 as the multiplicand and 12 years of working remaining life (retirement age being 55), as the multiplier.

9. On the other hand, learned counsel for the Defendant distinguished the case of **Castanaza** on the basis that the pain and suffering endured by the Claimant therein was far greater and went on for a longer period. The Claimant therein had surgery and was hospitalized for over one month after the initial injury to his leg. Six months thereafter, as a result of his worsening condition, he was flown the United States for further treatment and amputation. In the instant case it is pointed out that the Claimant was discharged after only a few days in the hospital and was subjected to the one surgery only with no evidence of complications. Additionally, it was submitted that the Claimant in **Courts Jamaica** suffered from a multitude of injuries in addition to a loss of his leg, which additionally left lasting urological problems, sexual dysfunction and psychological effects. It was submitted that the award in **Courts Jamaica** was not suitable for comparative purposes with the instant case.
10. Instead, it was submitted, that a more suitable comparable, is the Belizean decision of **Alberto Idelfonso v Ercelia Wagner et anor**⁶ where an award of \$50,000 was made in respect of a serious leg injury with resultant disability of 20%. It was submitted that a range between the award in **Idelfonso** and that of **Castanaza** was more appropriate for an award of general damages for pain and suffering and loss of amenities. With respect to his medical expenses, it was submitted that although the need for one was evident, the Claimant had failed to adequately prove the cost of a prosthetic leg and the information he extracted from the internet was not sufficient upon which to base an award. The information in this case consisted of a webpage from an unknown source placing the cost of prostheses between US\$5,000 - \$50,000, depending on fitting, material or degree of sophistication.

⁶ Belize Supreme Court No. 131 of 2014

11. Learned counsel for the Defendant contrasted this evidence with that made available to the Court in **Lawrence v Channus Block**. That evidence consisted of a report from a medical professional based on consultation, which assessed factors such as adjustments for weight loss or gain, change of socket, variations in size of stump and gait training. Learned Counsel further pointed out that evidence was provided by the medical professionals with respect to sourcing, use and eventualities that may arise in the fitting of a prosthetic limb. She says none of that information is available in the instant case and more so it does not appear that the Claimant has managed to get any costs of what is available in Belize or in neighbouring accessible locations such as Chetumal or Merida (both in Mexico). As a result of the failure to provide sufficient evidence upon which to inform the Court's award, learned Counsel for the Defendant submits that the lowest end of the information provided by the Claimant should be awarded, ie, the sum of US\$5000 or BZ\$10,000.
12. Finally in relation to the Defendant's submission on quantum, it was urged that an award for future loss of earnings was not the appropriate award to make in this case, as despite the fact that the Claimant has lost a limb and will be affected for the rest of his life, it was not unforeseeable that the Claimant with necessary adjustments, would be able to lead a healthy and productive life. It was submitted that the Claimant's demonstrated zeal for life and strength in coping with his altered physical condition provided ample basis for this assumption. The approach urged upon the Court was therefore not to award future loss of earnings, but to make an award for handicap on the labour market, as was done in the OECS case of **Karen John v David Dibique**⁷. The approach in that case acknowledged the life altering effect of a loss of limb (an arm) but recognized that with appropriate assistance of a prosthetic limb and other resulting needs attended to, the Claimant therein ought to be able to lead a healthy and productive life.

⁷ SVGHCV 2009/0359 (decided on 20/3/14).

The award given was therefore a loss of earnings for a period of 5 years, representative of a necessary period of adjustment before it was anticipated that the Claimant would be able to resume employment having adjusted to her disability.

13. In adopting this approach in the instant case, the submission was, that a period of 5 years multiplied by his last earnings would be similarly appropriate in order to allow the Claimant time to physically adjust and to reflect the disability he would have in the labour market. This would amount to an award of 5 years (60 months) times \$800 (as the Claimant did not provide evidence of what his overtime earnings), totaling the sum of \$52,000. In the alternative, if the Court adopts the multiplier/multiplicand approach, the appropriate multiplier should be 5 years (retirement age taken as 55 years), taking into account the vicissitudes of life and based on the fact that the Claimant had a good prognosis and should be able to return to work, albeit not the same kind of work he was engaged in at the time of the accident. With this approach the award would be the same as above - \$52,000.

The Court's Consideration

Special Damages

Loss of Earnings – Pre Trial

14. With respect to loss of earnings up to the date of trial, by that time, the Claimant had already lost his job and held no employment, both occurring because of the loss of his leg. However, there is little doubt that but for the accident, the Claimant would have still have been employed in the same capacity he was prior to the accident, thus the Defendant must be liable for the earnings the Claimant has no longer been able to make⁸. The relevant question, is what is the amount that should be used to calculate the earnings lost? The claim was for \$200 per week wages plus an average of \$50 per week overtime, being a total of \$250 per week, or \$1000 per month.

⁸ Munkman on Damages for Personal Injuries and Death 11th Ed. para 10.2

Given the loss of limb, it is not found that any question of failure to mitigate arises, and indeed no such issue was raised on behalf of the Defendant.

15. The Claimant produced evidence of his earnings by means of a printout from his employer of his weekly wages from January, 2014 up to the time of the accident in August, 2014. Counsel for the Defendant submitted that his earnings should be taken as \$200 per week, as there was no evidence supporting the \$50 claimed as overtime. Based on the printout of his salary however, the Claimant earned an average of \$227 per week from January to August, 2014, that being a period of 33 weeks immediately preceding the accident. This period is found to be a clear indication of what the Claimant's wages were, including overtime and as such the sum of \$227 per week (\$908 per month) will be used to calculate his loss of earnings. In light of the fact that this print out represented amounts paid out to the Claimant, it is assumed that deductions for social security were already made from the sums presented. With respect to income tax, at a total of \$908 per month (\$10,896), the Claimant's annual income falls below the first tier of income tax deductions at \$19,000 per annum. The period for loss of earnings is from the date of accident (August 30th, 2014) to the date of trial (15th January, 2016) - approximately 16.5 months.

Medical Expenses

16. The claim for medical expenses is \$36,153 being the estimated cost of a prosthetic leg, which there is no doubt that the Claimant needs a leg and is entitled to one, having been deprived of his own by the actions of the Defendant. As counsel for the Defendant pointed out however, the cost of the prosthesis was not adequately supported by way of evidence, which makes it difficult for the Court to make an award that is properly compensatory. The failure of the Claimant to put forward such evidence however is found to be based almost entirely on a lack of finances to enable him to access the information and services that he needed. The Claimant having been put in this position of requiring a prosthetic limb by the Defendant, is unable to work and had no resources to enable him to better present his claim.

The Defendant must thus take the Claimant as he finds him. The little information that has been provided will have to be used but it is accepted that the award would have be based on the lower end of the range presented, which is BZ\$10,000. As counsel for the Defendant pointed out when contrasting the quality of the evidence provided in ***Lawrence v Channus Block***, the Court does however take into account that provision must be made for expenses associated with obtaining the prosthetic leg such as medical consultations, physiotherapy and other out of pocket expenses. The lower end of the range of BZ\$10,000 as the cost of the prosthetic is accepted, but in light of the foreseeable associated expenses, an award of \$15,000 is considered reasonable.

General Damages

Pain and suffering and loss of amenities

17. With respect to general damages, the Court agrees with counsel for the Defendant that the award in ***Castanaza*** should be categorized higher than in the instant case because of the vast difference in pain and suffering. The claimant therein underwent a painful unsuccessful operation to save his severely injured leg where he remained hospitalized for one and a half months. He thereafter suffered the painful consequences of that failed operation for six months before his injury was reviewed. As a result of that review he required further surgery which he underwent in the United States, where his leg was then amputated and he was fitted with a prosthetic leg and was left with an overall total body disability of 50%. The circumstances of this case are different in that the claimant's leg was amputated immediately upon presentation of his injuries and he was discharged from the hospital within 2 days. There was no follow up medical report which provides evidence of his healing and progress in the months following, nor was there any evidence of any complications. His prognosis was described by the orthopedic surgeon as good and whilst the Claimant describes the stump remaining after amputation as painful sometimes, he is able to manage that pain with Tylenol.

18. With respect to ***Courts Jamaica v Kenroy Biggs*** which was submitted as an appropriate upper ceiling for this award, the Court agrees with the submissions of counsel for the Defendant with respect to the non-suitability of this award as a comparable case. It is agreed, that whilst there was the similarity of a below the knee amputation, there were additional injuries far more extensive which place that case well beyond a quantification on par with the circumstances of the instant case. The preferred ceiling is the 2014 Belize decision of ***Pamela Watson, Glegg Watson & Joyce Frankson v Ricardo Palma & Belize Transit Services Ltd.***⁹. The second Claimant in this case suffered from extensive injuries, including - head trauma, lung contusions, collarbone fracture, injured shoulder, hip fracture and dislocation, fractured ribs, fractured shinbone, wrist fracture and permanent nerve damage to her leg.
19. These injuries and resulting complications arose from a road traffic accident with a resulting 70% disability of total person. The award for general damages for pain and suffering and loss of amenities in this case was \$200,000, this amount taking into consideration deductions and other adjustments relevant to Belize. Whilst the Claimant in this comparative case did not lose a limb, there was paralysis in one leg resulting in an inability to lift the leg and the total body disability arising from the multitude of severe injuries renders comparison in a category higher than the injuries and presumed resulting disability in the case at bar. This award of \$200,000 will therefore represent the ceiling for the award to be made to the Claimant.
20. At the lower end of the range for assessment, the Court considers ***Albert Idelfonso v Ercelia Wagner et anor***¹⁰, which was cited by counsel for the Defendant to be a suitable lower range comparable. The award for general damages in that case was \$50,000 where the injury was a serious injury to the leg with shortening to the leg, and a 20% residual disability to total person.

⁹ Belize Supreme Court Claim No. 74 of 2014

¹⁰ Supra

It is considered that the loss of limb in the instant case would place the award to be assessed higher than *Idelfonso's* \$50,000. For comparative purposes this Court also considers its earlier decision in *Kelvin Aguilar v David Wang*¹¹ where an award of \$82,000 was made for general damages in relation to a serious leg fracture with remaining limp and serious injury to hand with disability of 20% to the hand. Again, the loss of limb in the form of the above knee amputation in this case is regarded as warranting a higher award than *Aguilar*.

21. This view is taken because whilst it may be said, that there was no prolonged physical pain endured by the Claimant - as he lost consciousness on impact, woke up after surgery and was discharged within 2 days with no complications - the devastation of a loss of limb as opposed to a physical pain endured for a period and thereafter fading with time, was born out by the anguished words and tears of the Claimant who was barely able speak of what he woke up to find the morning after the accident. In clear distress, the Claimant wept, as he recalled that he '*woke up and didn't have no foot*'. The award to the Claimant for loss of his entire leg must be higher than *Idelfonso* and *Aguilar* as mentioned above, but will be lower than the \$200,000 awarded in *Pamela Watson et al*.
22. Aside from the pain and suffering, the further element of loss of amenities, in a case such as this, speaks for itself. The Claimant spoke of now being unable to play with his three children (the last of whom is only six years old), no longer being able to play football or to cycle or to take his dog for walks. Within the context of anyone losing a leg, these amenities are fairly expected. Having seen and heard the Claimant however, the Court's impression of him, is that of an honest and hardworking man, with a strength of character that has enabled him to accept the physical change in his circumstances. Against this measure, it is the Court's belief, that the greatest amenity lost to the Claimant, has been the loss of his ability to work and provide for his family.

¹¹ Belize Supreme Court Claim No. 550 of 2014

23. For example, the Claimant was asked in cross examination of his attempts to obtain a prosthetic leg. In answer to a question of whether he would work if he had a prosthesis, the Claimant said in annoyance – *‘Miss, I want to work, I love to work, I would work right now if I could’*. The question asked of him was factual, but such is the Claimant’s pride in working that he mistakenly took offense, thinking that his industriousness was being questioned. In the circumstances, the loss of amenities suffered by the Claimant as a result of the loss of his leg is found to be significant. Based on the discussion and categorization of the Claimant’s injury with the cases above, the sum of \$100,000 is assessed as general damages for pain and suffering and loss of amenities.

Future loss of earnings

24. Learned Counsel for the Claimant submitted a claim for future loss of earnings based on the pre-accident earnings of the Claimant and to which he applied a multiplier of 12 years, reflective of a retirement age in Belize of 55 years. No adjustments or discounts were made to this submission as are usually made to take into account the usual vicissitudes of life or the receipt of future earnings in a lump sum. Learned Counsel for the Defendant, countered with an alternative approach to calculating the future loss of the Claimant’s earnings but this alternative approach will be shortly considered. Using the usual multiplier/multiplicand method, counsel for the Defendant submitted that the Claimant’s pre accident wage of \$200 per week (overtime was submitted as unproven) should be applied against a multiplier of 5 years, discounting the remaining period of his available working life for vicissitudes of life.

The alternative approach – Handicap in the labour market.

25. The alternative argument for future pecuniary loss made on behalf of the Defendant is framed as an award recognizing the Claimant as having a ‘handicap on the labour market’. It is noted, that this award is also termed ‘disability in the labour market’.

Insofar as it is advanced as an alternative method by which to calculate the Claimant's future economic loss, the Court finds the suggested application to this case not quite on point. The Court's understanding of an award for 'disability in the labour market', is that it contemplates a situation where a claimant has recovered from an injury and returned to the same work or work at an improved rate of pay, so that there is no apparent continuing loss.¹² The nature of the injury however, may be as such, that were the claimant to lose his employment, he would be unable to obtain comparable new employment because of the effect of that injury. For example, a claimant with a particular skill that is not transferable, a claimant with an altered physical appearance, or a claimant with a disability that does not at that time, affect his current job.

26. That loss is said to be properly defined as 'loss of earning capacity', albeit recognized that all claims for future earnings are based on loss of capacity. The distinguishing factors are said to be that there is no immediate loss and future loss is uncertain.¹³ Halsbury's states it thus¹⁴ (emphasis mine):-

"Where the injured claimant has not at the date of trial sustained a loss of or reduction in his earnings, he may still claim an award of damages if his injuries make it more likely that he will lose his job and that any job he may subsequently find will be less well paid. Such an award is to compensate him for the weakening of his competitive position in the open labour market"

27. Therefore, unlike the situation where it is clear at the date of the trial, that a claimant's ability to earn has been taken away or reduced by his injury – an award for disability in the labour market is in effect quantifying an assessment of a chance - a risk - that a claimant working at the date of the trial, should he lose his job and be required to re-enter the job market, would be unable to compete for a job with fully able bodied persons, because of his remaining disability.

¹² Munkman supra @ para 10.37 et seq.

¹³ Ibid

¹⁴ Halsbury's Laws of England, 5th Ed. Vol 29 para 446

The award, is an award for the likelihood of that risk materializing and it is said, that that risk, must be 'real', or significant'. Two cases are considered the leading cases on this issue – **Moeliker v A Reyrolle & Co. Ltd**¹⁵ and **Smith v Manchester City Council**¹⁶.

The authorities and disability on the labour market.

28. In **Smith** (the award is in some texts referred to as a 'Smith v Manchester award'), the plaintiff was a part time domestic worker who sustained a disability to her elbow as a result of an injury on the job. After recovery, she returned to work, but she was only able to perform light tasks and her employers undertook to retain her for as long as they possibly could. In those circumstances it was considered that the plaintiff had no immediate risk of becoming unemployed. The Plaintiff appealed against an overall award of general damages in the sum of £2300, which comprised £300 for future financial loss. Lord Scarman first of all reproached the trial judge's categorization of the award as being a '*notional sum*' to compensate the plaintiff '*for a possible loss of earning capacity*'. Scarman LJ said that -

“there is nothing notional about the damages awarded for this item of loss; and it is quite untrue to describe the loss of earning capacity as only a 'possibility': it is in truth a fact with which this woman is going to have to live for the rest of her working life”

29. Lord Scarman then described as the usual element of future financial loss - where a victim of an accident finds that he or she can no longer earn pre-accident wages so that there is an existing reduction in earning capacity which can be calculated as an annual sum. That annual sum, is then multiplied by the number of years thought appropriately assigned as the plaintiff's remaining working life, taking usual contingencies into account. That is the figure, usually calculated by the multiplier/multiplicand method. This method, was not found applicable by Lord Scarman, because notwithstanding her injury, the plaintiff had continued at the same rate of pay with the defendant Manchester Corporation. The kind of loss usually apparent therefore, did not arise in that case.

¹⁵ [1977] 1 All ER 9

¹⁶ (1974) 118 Sol Jo 597

30. On the other hand, the kind of loss found to be presented by the plaintiff in **Smith**, was that in the event that the plaintiff lost her job and had to compete in her labour market (of domestic workers), she would be at a serious disadvantage against a fully able bodied person. It was stated that “*this represents a serious weakening of her competitive position in the one market into which she can go to obtain employment*” (emphasis mine). The competitive weakness was then expressed to be an ‘*existing*’ loss of earning capacity, as opposed to a ‘*possible*’ loss of earning capacity, as was expressed by the trial judge. The multiplier/multiplicand method was then expressed to be inappropriate to assess that element of loss and it was concluded that the court had to look at the weakened position ‘*in the round*’, take note of various contingencies and do its best to reach an assessment.
31. In the context of **Smith** therefore, the Claimant’s loss in the instant case, falls squarely within the usual element of loss of future earnings as described by Lord Scarman. Whilst it is clear that the Claimant, will be at a disadvantage in the labour market because he cannot compete with a fully abled person, the award as contemplated in **Smith**, does not arise on the circumstances of this case, as the Claimant has no obvious employment prospects at this moment. This view is buttressed by the further application of the award in **Moeliker**. Browne LJ in this case acknowledged that **Smith** lay down no new principle of law, insofar that awards for general damages have always taken into consideration a reduced capacity of a claimant for earnings, as a result of injury sustained. The classification as a separate named category under the head of general damages however was attributed to *Jefford v Gee*¹⁷.
32. Whilst affirming the correctness of the decision in **Smith**, it was cautioned that the plaintiff’s position therein should not be used as a yardstick (to determine whether other plaintiffs were better or worse off) in order to assess an award.

¹⁷ [1970] 1 All ER 12020

Further, it was clarified that Scarman LJ's words (*in Smith*) that application of the multiplier/multiplicand method of assessment was inappropriate, did not mean that it could never be used – but that it should not be used as the main method of quantification as the circumstances affecting the risk to be realized were too variable¹⁸.

33. What did not change in Brown LJ's judgment however, was the context of the award being made in circumstances where a plaintiff was in employment at the time of the trial, so that the materialization of the risk of having to suffer loss by losing their job and being thrown into the open job market with a disadvantage, was not imminent. With respect to being in employment at the time of trial, in *Karen John v Dibique*, reference was made to *Cooke v Consolidated Industries* (sic) (the case is actually **Cook v Consolidated Fisheries Ltd.**¹⁹ In this case Browne LJ stated that whereas he is initially reported to have said in his judgment in *Moeliker* that the award is given *only* where a plaintiff is in work at the time of the trial; what he really meant was that the award was '*generally*' given, where a plaintiff was in work at the time of the trial, but the award was not precluded, where a plaintiff was not so employed. This passage²⁰, was what was referred to in *Dibique* as justifying the award for handicap in the labour market. Incidentally, this passage was also referred to by Sykes J, in the first instance decision²¹ in *Courts Jamaica v Kenroy Biggs*, cited above.

34. Sykes J reasoned²² that although the Jamaica Court of Appeal had in two earlier decisions based on *Moeliker*, stated that the award (handicap in the labour market) was applicable only in cases where a plaintiff was working at the time of the trial - had the Court been seized with the **Cook** decision, they would have followed it, so there would be no bar to making the award when a claimant was

¹⁸ *Moeliker v A Reyrolle & Co Ltd* supra @ pg 16.

¹⁹ The decision is actually **Cook v Consolidated Fisheries Ltd** [1977] ICR 635

²⁰ Ibid @ pg 640 A-C

²¹ **Kenroy Biggs v Courts Jamaica**, HCV 00054/2004

²² Ibid @ paras 93 - 109

not in employment at the date of the trial. Having reasoned this way, Sykes J then went on to classify the loss of earning capacity due to injury, as the loss of an 'intangible asset' and made a lump sum award on top of his assessment of loss of future earnings, which he had calculated on the multiplier/multiplicand method. In *Dibique*, the application of the award was said to be an alternative way of calculating loss of future earnings. It was based on the assumption that the claimant would be able to return to work, albeit at a reduced capacity and wage, and the award was given to reflect the presumed period of how long it would take the claimant to adjust and return to the labour market at that reduced capacity. In terms of *Dibique*, this application is not at all what the Court has read and understood of the context of the award in *Smith v Manchester* or *Moeliker* and I therefore decline to follow this approach.

35. With respect to Sykes J at first instance in *Kenroy Biggs v Courts Jamaica*, his application of the award for handicap on the labour market resulted in an assessment of a separate lump sum in addition to his award for loss of future earnings based on the multiplier/multiplicand calculation. It is recalled that Sykes J reasoned that the loss of earning capacity was the loss of an intangible asset quite apart from any earnings lost or to be lost as a result of the reduced capacity, thus meriting its own award. Sykes J also applied *Cook v Consolidated Fisheries*, insofar as Browne LJ instructed that a claimant need not be working at the time of trial in order for the award to apply. I have read **Cook v Consolidated Fisheries Ltd.** and Browne LJ did indeed definitively state that he was correcting himself from saying that the award should *only* be made where a plaintiff was in employment at the trial and instead holding that it would *generally* be so made.
36. The facts of *Cook v Consolidated Fisheries* were that the plaintiff therein, sustained an injury to his arm whilst working at sea as a deckhand aboard an Icelandic trawler. The plaintiff was off work for 4 months but was able to return to work thereafter and made several trips back out to sea as a deckhand on board ships until the end of that year.

- After his last trip at sea for that year, the plaintiff decided to discontinue his career as a deckhand and train to become a driver of vans and lorries. At the time of his trial, he was still in the process of qualifying for his new career and as such was not working, but the evidence was that he could still have had his employment as a deck hand. The medical evidence was that whilst at age 25 (his age at the time of the accident), he'd made a good recovery and could resume his pre-accident employment, he would within the next 10-15 years suffer from arthritis as a result of the injury he sustained. The arthritis would incapacitate him in carrying out basic tasks with his hands and thus put him at a disadvantage in the labour market.
37. It was made clear by Lord Denning MR that because the plaintiff was capable of working at the time of the trial and would have had his pre-accident employment open to him had he not chosen to retrain for alternative employment, there was no award to be made for loss of future earnings. An award would however be made for the disadvantage the plaintiff would suffer on the labour market as a man with arthritis, competing against fully ably bodied men. It was in that context of the plaintiff being fully capable of working and having available employment, albeit not working, that Browne LJ made the correction to his statement that the award would only (as opposed to generally) be granted where a plaintiff was in employment at the time of the trial.
38. According to my understanding of *Smith*, *Moeliker* and *Cook*, the award of handicap in the labour market, is not applicable in the manner of its suggested application in the case at bar and as it was in *Dibique*. In this case (unlike the three above), where the Claimant has suffered a lasting disability which even if improved by a prosthetic limb, does not allow him re-entry into the job market from which he came - and there is no apparent employment to which he may readily transfer - this is an entirely appropriate case for calculation of loss of future earnings, based on application of the multiplier/multiplicand. With respect to the additional award for handicap on the labour market, in the manner made by Sykes J in *Kenroy Biggs v Courts Jamaica*, it may be the case that such an award could

have been herein considered. The application of the award in that manner however did not have the benefit of any arguments by Counsel and as such the Court cannot properly address the issue or make any consideration in that regard.

The award for future loss of earnings

39. It has already been found by the Court that the Claimant's pre accident earnings amounted to an average of \$908 per month or \$10,896 per year. The question remaining is that of the appropriate number of years to apply to this annual sum in order to determine the Claimant's future economic loss. Both counsel placed the retirement age of the Claimant at 55 years, which in answer to a question by the Court, was said to be the usual age for retirement. As far as the Court is concerned, the retirement age for public servants is 55, as provided by the Pensions Act²³ of Belize. The retirement age for persons not employed in the public service however, must be that from which a person becomes eligible for retirement benefits under the Social Security Act of Belize²⁴. This qualifying age under the Social Security Act is sixty years (60) and this is the age that the Court will use as the retirement age for a person not employed in the public service or employed by an organization with its own retirement rules.
40. With the Claimant's retirement age at 60 instead of 55, his remaining working years would be 17 and not 12 as submitted by both Counsel. This number is discounted to take account of the following factors – receipt of earnings lost as a lump sum; vicissitudes of life (what more this Claimant ought to suffer is unknown, but this is a factor that must be taken into account); the possibility of a limited return to some form of paid employment which is possible with a prosthesis. There is no comparable system in Belize of the 'Ogden Tables' as there is in the United Kingdom and it is not thought appropriate to apply those tables which are based on a projected rate of return on investment of lump sums received.

²³ Section 9, Pensions Act, Cap. 30.

²⁴ Section 11(d), Social Security Act, Cap. 44; Social Security (Benefit) Regulations, Cap. 44S, Reg. 25(1)(a).

Instead, taking the above factors into account, it is found that a multiplier of 10 years is appropriate and will be applied to the pre-accident annual income of the Claimant of \$10,896 for a total of \$100,896.

Conclusion

41. I conclude firstly by thanking learned counsel both for their very helpful and well written submissions. I particularly commend learned counsel for the defendant as she managed to professionally and effectively serve her client whilst at the same time maintaining a measure of compassion for the Claimant. The final quantification of the award in favour of the Claimant based on the reasons outlined above is as follows:-

General Damages -	
Pain and suffering and loss of amenities	\$100,000
Future loss of earnings	\$100,896
Total General Damages	\$200,896
Special Damages -	
Loss of Earnings from accident to trial	
\$908pm x 16.5 months	\$ 14,982
Medical Expenses – Prosthetic Leg	\$ 15,000
Less payment from Defendant’s insurance	\$ - 647
Total Special Damages	<u>\$ 29,335</u>
Total Damages	<u>\$230,231</u>

Final Disposition

42. Following upon the default judgment obtained by the Claimant against the Defendant on the 18th June, 2015, damages are assessed along with orders made as follows:-

- (i) General Damages are awarded to the Claimant in the sum of **\$200,896**;
- (ii) Special Damages are awarded to the Claimant in the sum of **\$29,335**;
- (iii) The Claimant is awarded prescribed costs on the total award of damages in the sum of **\$230,231**;
- (iv) The Claimant is awarded pre-judgment interest on the total award plus prescribed costs from the 12th January, 2015 at the rate of 6 per cent per annum, until the date of judgment; and
- (v) The statutory post judgment interest applies at the rate of 6% on the total sum awarded plus the amount of prescribed costs, from the date of judgment until payment.

Dated this 19th day of February, 2016.

Shona O. Griffith
Supreme Court Judge.