



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 04996

BETWEEN            OMAR WILSON                            CLAIMANT

AND                            VGC HOLDINGS LIMITED            DEFENDANT

Mr. Christopher Honeywell instructed by Christopher O. Honeywell & Co. for the Claimant.

Ms. Audré Reynolds instructed by Bailey Terrelonge Allen for the Defendant.

March 29, June 3 and 9, October 19 and November 21, 2011

**Assessment of Damages – amputation of right hand below elbow – household helper (pre-hearing and future cost) – loss of earnings – loss of future earnings – handicap on the labour market – whether mechanical or myoelectric prosthesis should be provided – applicability of multiplier/multiplicand approach to calculating various types of awards – appropriate size of different multiplicands/multipliers**

**Fraser J.**

**INTRODUCTION**

- [1] The claimant Omar Wilson was employed to the defendant company for twelve years as a machine operator. He started working for the company when he was eighteen years old. On August 13, 2010, eleven days after his thirtieth birthday, he suffered a life altering accident on the job. His right hand was severed below the elbow by a cylinder press machine from which he was trying to clear a metal fragment.
  
- [2] After the accident the claimant was taken to the Kingston Public Hospital where he remained for approximately three weeks receiving treatment.

- [3] Arising from this accident the claimant commenced action against the defendant company by Claim Form and Particulars of Claim filed on October 11, 2010. The acknowledgment of service of the claim form filed by the defendant on November 19, 2010, disclosed that service was effected on October 14, 2010.
- [4] On January 11, 2011 a Defence was filed limited to quantum. On March 2, 2011 pursuant to an application for a speedy assessment trial under rule 17.10 of the Civil Procedure Rules, the matter was set down for hearing on March 29, 2011. When the matter came on for assessment hearing on that day, based on the terms of the Defence filed, counsel for the claimant queried the effect of the Defence. For the avoidance of doubt, counsel for the defendant then indicated that liability was admitted.
- [5] The claimant sought special damages for medical expenses, loss of earnings, the cost of household help (both pre-hearing and future cost), and the cost of a prosthesis including replacements. General damages were claimed for pain and suffering, loss of future earnings and handicap on the labour market.
- [6] At the time of submissions it was indicated that the parties had agreed the special damages for medical expenses in the sum of \$57,000. This includes \$40,000 for medical reports of and consultations with Dr Warren Blake and US\$200 for the report provided by Orthotics USA. The claim for \$40,000 was supported by receipts dated 18.3.2011 and 23.3.2011 (exhibits 1a and 1b). The sum of US\$200 was supported by an invoice dated May 13, 2011 (exhibit 4b). The sum of US\$200 was converted to JA\$17,000 using an exchange rate of 85J\$ to 1US\$. General damages for pain and suffering were also agreed at \$7.5M.

## **THE CONTESTED SPECIAL DAMAGES**

### **The Prosthesis**

#### ***Myoelectric (MEP) or Mechanical (MP)?***

#### **The Evidence**

- [7] The claimant and the defendant are agreed that the claimant should be given an award to enable him to obtain a prosthesis to replace his lost hand. Counsel for the claimant submitted that a MEP should be provided while counsel for the defendant suggested that a MP was more appropriate, given our local circumstances. The court received into evidence three quotations, two from the claimant (one for a MEP and one for a MP), and the other from the defendant for a MP.

[8] In urging the court to make an award for a MEP, counsel for the claimant relied heavily on Dr Warren Blake's reports dated February 7, 21, and March 22, 2011, received as exhibits 2a, b and c respectively and on his viva voce evidence.

[9] In his **first** report Dr Blake indicated that as a result of the injury the claimant suffered a whole person impairment of 55%. In his **second** report he stated that:

1. With the disability sustained by the claimant he would be unable to engage in and pursue his usual form of employment. He would also have extreme difficulty if at all able to perform any type of manual labour.
2. The application of a prosthetic limb would improve his ability to work but would not restore this ability to normal. It would however have no impact on his percentage permanent disability.

[10] His **third** report outlined that there were two basic types of functional prostheses; body or electric powered. Body powered devices being activated by body movements that initiate movements in cables which either close or open the terminal device and electric powered devices that utilize battery power to open and close. He continued,

Some of the main disadvantages of a body powered device are the more mechanical appearance of these and the difficulty of use that they pose for some people. The battery powered devices on the other hand can be more cosmetic in appearance and tend to provide stronger grip strength. Some of the main disadvantages are the higher initial costs and the higher repair costs. The second generation electric powered devices tend to be lighter than the initial models and tend to be more reliable than the initial ones were. The improved cosmetic appearance and smoother function also makes these devices more acceptable to patients and thus more likely to be used. Both types of prosthesis also come with a variety of terminal devices, namely hooks, prehensors and hands.

[11] In his testimony in court Dr. Blake amplified his opinion by noting that the MEP mimics the function of the human hand and upper arm more closely than a MP. This he said was important given that if there is not the human look, there is a tendency for patients to neglect wearing the prosthesis despite the other advantages it brings. He also pointed out that the MEP provides greater grip strength and lifting power which was essential for someone suited to manual type labour.

[12] Dr. Blake explained that myoelectric limbs have been in existence for at least 30 years. In the early years they had problems in tropical environments caused by sweat induced corrosion of the electrodes that rest on the skin to

pick up muscular impulses. He indicated that this scenario has changed. The other problem from which myoelectric prostheses used to suffer was that the frequency of breakdown was greater than that of cable powered/mechanical prostheses. He stated that over the past 15 - 20 years there have been significant improvements in the electric power devices through the advent of computerisation and the miniaturisation of batteries, which had initially been very heavy and made electric devices heavy relative to mechanical devices. He also spoke of a general enhancement in the reliability of these devices over this 15 - 20 year period.

[13] Interestingly the other witness called/reports tendered by the claimant in support of the claim for a prosthesis, recommended that the claimant receive a mechanical one. Ms. Hope Julal, Administrative and Technical Director of Rehab Plus/Jamaica Orthotics Pedorthics & Prosthetics (JOPP) testified that her company, in business for 24 years, provides in house services to the public and private hospital system in respect of orthopaedic devices and appliances. She specialises in orthopaedic devices having been trained in that area. Her company also supplies MPs but not MEPs. Though the mechanical prostheses are manufactured overseas, JOPP does repairs and maintenance on these devices locally.

[14] Ms. Julal outlined that the claimant was seen and evaluated at her company on December 17, 2010. This evaluation was done by Gerald Anthony Boyd and recorded in his report dated May 13, 2011, received in evidence as exhibit 4c. In his report Mr. Boyd outlined his qualifications and experience as follows:

I Gerald Anthony Boyd received formal training in Orthotics and Prosthetics in the United States Military from 1977 to 1982 and have retained membership and affiliations with the certifying organizations American Board for Certification in Orthotics Prosthetics and Pedorthics(ABC) and International Board of Certification/ Accreditation for both disciplines from my initial certification to the present time. My training subsequent to the military includes Orthopedic Diseases and Appliances...under the tutelage of Orthopedic Surgeons and Specialist Surgeons in the United States of America

Over the past 10 years, I have worked with several hospitals and clinics and am presently President for Orthotics USA with responsibilities for consultations, evaluations, measurements, fabrication, fitting, adjusting as well as follow-up care and repairs for artificial limbs...at several United States hospitals and clinics.

[15] Having examined the claimant Mr. Boyd outlined the following recommended management and reasons for his recommendation:

### **Recommended Management:**

A below-elbow mechanical, cable-driven prosthesis with hand options to suit the activities Mr. Wilson stated he would like to be able to carry out. These included driving, farming and playing cricket.

### **Reason [sic] for recommendation**

This prosthesis is a durable, practical and easily maintained prosthesis which is powered by movement of the wearer. It is not impeded by wet, grimy and dusty environments. The design is simple and the learning curve for the wearer is relatively short. The initial cost as well as the maintenance cost is greatly reduced compared to electrically driven prostheses. When viewed in the Jamaican context the benefits of the MP, particularly cost and durability, outweighed those of the MEP. The MEP requires a highly specialized prosthetist trained in this device to be brought into the country several times prior to the final fitting or that the patient travel a number of times to the prosthetist, and that the device be returned to the country of origin for repairs leaving the wearer without the prosthesis for protracted periods. Additionally, the MEP is impacted by environmental conditions in particular rain or prolonged moisture. It also requires a battery system which forces the user to constantly recharge the battery, is heavier than a cable driven prosthesis and the initial cost is approximately two and a half times that of the MP, not including the fees of the prosthetist.

The MEP does not require a harness and has an operational range which is superior to that of the MP, however those advantages in my opinion, did not warrant its recommendation over the MP.

*(NB. The letters MP and MEP were substituted for mechanical prosthesis and myoelectric prosthesis and were not used by Mr Boyd)*

- [16] Based on the evaluation of Mr. Boyd, a quotation in relation to a mechanical cable driven limb, dated 12 January 2011 and signed by Ms. Julal was prepared and received in evidence as exhibit 3. This quotation for a Below-Elbow Prosthesis with Mechanical Hand covered a) pre-manufacturing, b) manufacturing, c) prosthetic accessories and d) post-manufacturing costs. The shipping and clearance costs for the finished prosthesis were also built into the quotation. The total quotation amounted to \$1,116, 950.00. To be added to this figure are the costs, also detailed in the cover letter forming part of exhibit 3, of a socket change (\$165,000.00), one year basic follow-up and adjustments (\$10,500.00) and two-year follow-up and adjustments (\$12, 500.00). The socket is the "container" that attaches the residual limb to the rest of the prosthesis. The residual limb shrinks significantly in the first few months of wearing a prosthesis, requiring a change of socket.

[17] Based on his JOPP assessment and the activities the claimant indicated he wished to engage in, the following were included in the quotation in respect of the "Wrist and Hand":

- a. A Quick Disconnect Wrist (adapter for hand quick disconnect)
- b. Hand attachments (recommended for various physical activities)
  - i. With voluntary opening
  - ii. With work hook
  - iii. 5 finger action imperial hand
  - iv. Each attachment was stated as coming, with its own cosmetic glove, specific to the attachment.

It should be noted however that in cross-examination Ms. Julal indicated that the work hook did not come with a separate cosmetic glove and therefore the inclusion of a glove in respect of the work hook was either a mistake or else it was an additional glove included, given that sometimes the gloves sustained damage and had to be replaced. She promised to check further and then advise the court. No further evidence was received from Ms. Julal, therefore the court will have to treat the additional glove as included in error to avoid the possibility of overcompensation. The quotation of \$1,116,950.00 provided above in respect of the prosthesis should therefore be reduced by \$35,000.00 and should now read \$1,081, 950.00.

[18] Ms. Julal explained in detail the process involved in the development of a prosthesis for a patient. The prostheses JOPP provides are all manufactured overseas and involve a trained prothesist travelling to Jamaica three times. JOPP coordinates the visits so that the prothesist sees a number of patients on one trip. That approach allows the prothesist's costs of travel, accommodation and professional fees to be shared.

[19] The three visits of the prothesist to Jamaica are for the following purposes:

- a. (First visit) - Assessment, casting and measurements are done which facilitate the manufacture of the trial socket.
- b. (Second visit) - The trial socket is fitted and any necessary adjustments made.
- c. (Third visit) - Fitting of the completed prosthesis including making any necessary small adjustments.

[20] The cost of six visits for physiotherapy/training sessions was included in the quotation to assist with the adjustment due to the anticipated shrinkage of the residual limb. Adjustments will either have to be made to the socket, or otherwise stump socks used to add volume to the residual limb. Ms. Julal

indicated the estimate of six visits was conservative as the longer it takes to fit a prosthesis the more likely that atrophy of the existing muscles will occur.

- [21] Though the mechanical prostheses are manufactured overseas, JOPP does repairs and maintenance on these devices locally.
- [22] A quotation on a mechanical limb produced by Aubrey Smith from United Artificial Limb, was, at the request of the defendant, received in evidence as exhibit 5a. Mr. Smith was certified as a Prothesist by the American Board for Certification in Orthotics and Prosthetics in January 2008. This provision of this quotation was to reinforce the defendant's position, supported by JOPP, that a MP was appropriate, and further to show that such a prosthesis could be obtained at a cheaper cost than that quoted by JOPP.
- [23] This quotation included costings on "*...standard and usual components used to fabricate an amputation distal to the elbow joint and proximal to the wrist joint...*" The total cost in the quotation amounts to US \$4,924.00. Using an exchange rate of 85J\$ to 1 US\$ this amounts to \$418, 540.00. The quotation concluded by noting that, "*Depending on the circumstances a prosthesis can remain functional anywhere between 1½ to 5 years.*"
- [24] In commenting on exhibit 5a, Ms. Julal noted that it was a standard quotation with only 2 hand options reflected, as opposed to the 5 or 6 which were provided in exhibit 3, the JOPP quotation. Ms. Julal also pointed out that exhibit 5a did not address the fitting stage (stage 3) and also omitted pre-manufacturing costs, some of the costs of the manufacturing phase, as well as shipping, brokerage, and customs costs. The court notes additionally that it is a generic quotation, uninformed by an assessment of the claimant for whose benefit it was generated.
- [25] In respect of the estimate of the life of such a prosthesis, Ms. Julal said a period of 1½ to 5 years would not be unreasonable in the American context and culture particularly with access to maintenance to make small adjustments that could enhance the life of the prosthesis. In the Jamaica setting however, given the nuances of our culture and geography, she thought an estimate of 2 - 3 years was a more appropriate figure.
- [26] Ms. Julal was also asked to comment on myoelectric devices. She indicated that she was familiar with them. In terms of costs she indicated she would have to give a range. This went from a low of US\$25,000.00 to a high of US\$150,000.00 depending on the number of accessories, the quality of the parts and from where they were sourced. She indicated for example that parts from China will cost less than parts from Germany. A quotation provided by Ms. Julal and received in evidence as exhibit 4a, estimated the average cost

of fabricating a myoelectric below elbow prosthesis as US\$25,000.00. This estimate was arrived at based on conversations with employees of three prosthetic companies in the United States of America. Significantly these companies declined to provide a written or detailed quote without seeing the patient. The quotation also did not include the airfare and professional fees associated with a prosthetist who specialises in myoelectric prostheses. In the quotation Ms. Julal indicated that JOPP was unable to estimate the associated costs as they do not currently engage the services of a myoelectric trained prosthetist.

- [27] In exhibit 4a Ms. Julal went on to indicate that *“it was reasonable to assume a minimum of three visits to Jamaica including the actual fitting of the prosthesis, one for assessment, measurements and castings, a second for a trial fitting and a third for any adjustments and training in the use of the prosthesis. Each visit would attract professional fees and cost for materials used.”*
- [28] The quotation further outlined that the estimated life of a MEP for an adult was four years. Maintenance and repairs were estimated to occur two to three times per year and were not offered locally. The battery has to be replaced usually once per annum. The cost of the battery was J\$25,000.00 at an exchange rate of 86J\$: 1US\$ and the charger, should it need replacement, was listed at J\$197,000 using the same exchange rate.
- [29] In her evidence Ms. Julal indicated that under normal circumstances the costs associated with the production of a myoelectric limb can be guided by the costs in relation to a mechanical limb. The cost of professional fees for the myoelectric prothesist however is very high as they are very few and there would not be the possibility of sharing the costs of the visits among several patients, as is done in the case of patients who are obtaining or have mechanical limbs. She further noted that it was very difficult to get an idea of the professional fees for myoelectric trained prosthetists as they were reluctant to quote fees without first examining the patient. She also stated that myoelectric trained prosthetists usually work with large associations and not alone.
- [30] Ms Julal testified that it was the usual case where a mechanical hand is recommended, and that the myoelectric hand is more suited for an individual such as a jeweller who has to work with fine detail. She reinforced what was contained in the contents of the Mr Boyd’s report (exhibit 4c) that the MEP would have to be returned to the United States of America for repairs if anything went wrong with it.

### **The Submissions**

- [31] In his submissions Mr. Honeywell for the claimant relied on the case of ***Aston Fitten v. Michael Black Ltd and Ken Henry*** SCCA No. 69/87 (October 29, 1990) for the proposition that it is the orthopaedic surgeon who should decide what type of prosthesis the claimant should obtain. In ***Aston Fitten*** the plaintiff lost his right arm above the elbow in a factory accident. At trial the learned trial judge made an award for the plaintiff to obtain a MP. On appeal it was contended that an award should instead have been made for a myoelectric device.
- [32] The evidence under review on appeal, disclosed that at trial testimony on this point was received from three orthopaedic surgeons, and a trained prothesist. Dr. Geddes Dundas who was the appellant's orthopaedic surgeon recommended a MEP on the basis that it was more suitable for the patient. Mr. Saunders the trained prosthetist also recommended a MEP based on the lifting capacity of the device 50 – 75 lbs and its superior "pinch force" which meant it could hold an egg or crack a walnut. The Court of Appeal however doubted whether he should have been allowed to make a recommendation, given the evidence of Dr. Dundas, apparently accepted by the Court as a correct statement of principle, that it was the surgeon's responsibility to determine the type of device to be recommended.
- [33] On the opposing side there was testimony from two other orthopaedic surgeons, Professor John Golding and Dr. Errol Bennett. Professor Golding had actually taught both Drs. Dundas and Bennett. Both Professor Golding and Dr. Bennett recommended the MP based on the delicate nature of the myoelectric device and its frequency of breakdown particularly in hot weather. In a factory environment it was noted that its use would be severely hampered due to its sensitivity to dirt, dust, heat and humidity which caused the contacts between the skin and the prosthesis to be prone to corrosion due to perspiration or other contamination. It was also pointed out that at the time of the first instance hearing in 1987, myoelectric devices were still considered experimental, they having been first certified in 1980. On the evidence presented, the Court of Appeal held the learned trial judge was entitled to make an award for a MP.
- [34] Relying on the statement of Dr. Dundas that it was the surgeon who should chose the device, seemingly adopted by the Court of Appeal, Mr. Honeywell submitted it was the opinion of Dr. Blake, the sole orthopaedic surgeon who testified in the matter that should hold sway. He maintained that the testimony of Ms. Julal and the reports of Mr. Boyd and Mr. Smith might be useful in respect of the calculation of certain costs, but it was not for them to recommend the appropriate type of prosthesis.

[35] Ms Reynolds in response on behalf of the defendant, submitted that a MP rather than a MEP should be provided. She pointed out that although Dr. Blake had recommended the MEP, Ms. Julal had testified that in practice there are very few instances in which a myoelectric device has been provided. The reasons for this she submitted are manifest and reasonable. Apart from the difference in cost there was the fact that in respect of both hands there would need to be maintenance and replacement. The maintenance for the MP would be done in Jamaica while that for the myoelectric had to be done overseas. The climatic conditions in Jamaica made it likely the MEP would need more frequent maintenance than if it was being used in America. It was estimated the MEP would require maintenance two to three times a year, during which periods the claimant would be without the use of the arm. Further Ms. Reynolds submitted the full costs of the procurement of this device were unknown and though Ms. Reynolds never used these words, in effect her submission was to the effect that the court was being asked to make an award “in the dark”.

[36] Ms Reynolds, while receiving some comfort from the fact that Mr. Boyd recommended a MP, submitted that the quotation received from Mr. Smith on behalf of the defence should be preferred to that of Mr. Boyd. The reason — Mr. Smith is a certified prothesist while Mr. Boyd is a certified orthotist. The recommendation she submitted should be made by a prothesist who was the professional who deals with the replacement of limbs and not by an orthotist who deals with devices used to support or control part of the body. On this basis she submitted the lower quotation for a mechanical limb provided by Mr. Smith should be preferred to that provided by Mr. Boyd.

### **The Resolution**

[37] The case of ***Aston Fitten*** relied on by counsel for the claimant does seem to suggest that the decision concerning which type of device is more appropriate should be made by the orthopaedic surgeon. It is noteworthy however that in ***Aston Fitten*** there was medical opinion from orthopaedic surgeons on both sides of the divide. Clearly the court had therefore to weigh the competing evidence to determine which recommendation to accept. In the instant case there is only one orthopaedic surgeon. Does that automatically mean that the recommendation made by the sole surgeon therefore necessarily has to be embraced by the court? There are other recommendations and observations provided by other professionals who work with prostheses. Is there a basis on which the court can properly consider their evidence on which device is more appropriate?

- [38] Dr. Blake's evidence is to the effect that both types of prosthesis, mechanical and myoelectric would improve the claimant's quality of life and employability but that the myoelectric device would provide the greater enhancement. His evidence indicates a MEP is a superior device to a MP in terms of cosmetic appearance, functionality and power. He acknowledged that in the early years of myoelectric devices they manifested problems. He however posited that improvements in technology over the last 15 - 20 years have in large measure addressed these problems and the devices are now lighter and more reliable.
- [39] While it may be the responsibility of the orthopaedic surgeon to suggest which type of device is more appropriate for the patient, the court can and should have regard to other evidence that touches and concerns the reliability and cost of the device recommended, in determining on all the evidence which device should be provided.
- [40] In respect of Mr. Boyd's evidence I have considered the submission of Ms. Reynolds questioning his certification as a prosthetist. According to the United Kingdom's National Health Service website located at <http://www.nhscareers.nhs.uk/details/Default.aspx?Id=286> and consulted October 17, 2011, **Orthotists** provide a range of splints, braces and special footwear to aid movement, correct deformity and relieve discomfort. **Prosthetists** on the other hand provide the best possible artificial replacement for patients who have lost or were born without a limb. It is clear therefore that the skills in relation to prosthetics are what are relevant in this case.
- [41] Mr. Boyd is currently President of Orthotics USA. His report was prepared on the letter head of that entity and he signed the report received in evidence as exhibit 4c over his name where it was also noted that he was a Board Certified Orthotist. Mr Boyd's outline of his qualifications and experience set out *in extenso* earlier in this judgment should however not be overlooked. He has received training in both orthotics and prosthetics, disciplines which are closely related and often practiced together. It is not without significance that from his outline these disciplines share the same boards for certification in America. He also indicated that he has maintained his membership and affiliations with the certifying organizations for both disciplines from his initial certification to the present time. Further over the past 10 years he has worked with several hospitals and clinics and done "*consultations, evaluations, measurements, fabrications, fitting, adjusting as well as follow-up care and repairs for artificial limbs...*" Based on the foregoing this court finds that he is eminently qualified to have conducted the evaluation of the claimant and produced the report to assist the court.

- [42] Mr. Boyd in his report conducted a comparison of the advantages and disadvantages of the MP and MEP. I will not here rehearse substantially the contents of his report which are set out in detail on this point earlier in the judgment. However in summary, given the Jamaican context, he found that the benefits of the cost and durability of the MP outweighed those of the MEP. He also suggested that the need to send the MEP overseas for repairs and its sensitivity to moist environmental conditions overrode the advantages it had over the MP which were the absence of a harness and superior operational range.
- [43] It is worthy of note that despite the evidence of Dr. Blake as to the great improvements in the weaknesses of the MEP over the last 15-20 years the challenges to the reliable operation of the MEP identified by Mr. Boyd echo those outlined in the *Aston Fitten* case decided over 20 years ago on appeal in 1990. Clearly if Mr. Boyd's evidence is to be accepted, and I see no reason why it should not, there are still some issues regarding the use of MEPs in tropical environments.
- [44] The factor which is determinative however is the question of costs. Perhaps due to the order for a speedy assessment trial or the expense involved, the claimant was not seen by a prosthetist trained in the development of a MEP. Despite the best efforts of Ms Julal the court has not been assisted by a definitive quotation as to the pre and post manufacturing costs and most importantly the professional fees associated with the provision of a MEP. While it has been indicated that a rough guide to the pre and post manufacturing costs may be gleaned from those associated with the process adopted for the MP, the professional fees associated with the provision of a MEP are wholly unknown, save and except to say they are substantial. MEP trained prosthetists it is said are few and normally are attached to large associations. Special damages have to be specific. The court has to be able to know the true costs associated with the remedy it seeks to provide. Adhering to that legal principle is the only way to ensure that justice is done between the parties. Therefore even if the court were to accept the reliability of the MEP sufficient to have considered its provision, based on the uncertainty of associated costs the court finds that a MP should be provided.
- [45] The court further finds that the quotation provided by JOPP is to be preferred and accepted over that of the one provided by Mr. Smith. JOPP had the opportunity to evaluate the claimant and tailor the device specifications to enable him to engage in his chosen activities. There are more "hand" options and a complete package detailing the costs associated with all stages from pre through to post manufacturing.

### ***The Appropriate Multiplier***

- [46] Having accepted the JOPP quotation, I also accept the estimate of the lifespan of the MP it contains and which was repeated in testimony by Ms. Julal. This estimate was that the MP will last 2 - 3 years. It would seem appropriate to use the higher number 3 as the average lifespan of the MP before it would require replacement. The court now has to adopt the best method available to determine what sum to award to the claimant to ensure that he will have an adequate number of replacements over his lifetime while guarding against overcompensation.
- [47] The case of ***Kenroy Biggs v. Courts Jamaica and Peter Thompson*** HCV00045/2004 (January 22, 2010) is instructive concerning the approach to be adopted. In ***Kenroy Biggs***, the appropriate method to compute the award for the cost of lifetime replacements of a prosthesis in respect of a claimant who had a mid left thigh amputation, had to be determined.
- [48] Sykes J. accepted the submission of counsel for the defendants, based on Scottish and English jurisprudence that the multiplicand/multiplier approach should be adopted in such circumstances and that if the cost is expected to be life long, then the multiplier should be higher than that used for loss of future earnings. As outlined at paragraph 114 of the judgment this was on the basis that, *“The bedrock premise is that loss of future earnings multipliers take account of working life, whereas cost of care multipliers are directed at lifelong costs, costs which may persist long after the person has stopped working.”*
- [49] After quoting from the judgment of the Lord President in the Scottish case of ***O'Briens Curator Bonis v. British Steel Plc*** [1991] S.C. 315, 320, Sykes J. continued at paragraph 117 of his judgment as follows:
- The principle that emerges is very clear. In the case future, the court has to look and see how the cost is likely to be endured. If that period is short then a lump sum method is more appropriate. If the period is likely to be for a very long time then the assessment uses the multiplier/multiplicand approach which has as its goal the establishment of a capital sum which ought to be invested so that it will be increased by interest but reduced by the annual expenditure required to meet the future costs. The goal is compensation and not to place the claimant in a better position than he would have been in had the injury not occurred. It is compensation, not enrichment.
- [50] The cases of ***Harris v. Harris*** [1997] C.L.Y. 1982 and ***David Pinnington v. Crossleigh Construction*** [2003] EWCA Civ. 1684 were also reviewed by

Sykes J., with it being noted that these cases also used a multiplier/multiplicand method of computation.

- [51] A very important tool utilized in the ***O'Briens Curator Bonis'*** case to determine the appropriate multiplier, was the Ogden Tables (*Actuarial tables for use in personal injury and fatal accident cases prepared by the Government Actuary's Department in the United Kingdom*). Based on the tables as they existed then, it was held that a factor of 5 should be added to the loss of earnings multiplier to arrive at the appropriate increase for the cost of care multiplier. Jamaica does not have the benefit of such tables so the court will have to determine the multiplier without such assistance.
- [52] In ***Kenroy Biggs'*** case Sykes J. added a factor of 8 to the loss of earnings multiplier he had arrived at by relying on the Jamaican case of ***Godfrey Dyer and Derrick Dyer v. Gloria Stone*** (1990) 27 JLR 268. I will adopt that approach. In ***Godfrey Dyer's*** case a multiplier of 11 was used to calculate loss of future earnings for a 35 year old. The claimant in this case being 30 it would seem, the appropriate multiplier for loss of future earnings would be 12. Adding 8 years purchase as Sykes J. did in ***Kenroy Biggs'*** case, I arrive at 20 as the appropriate multiplier in this case. With the MP needing to be replaced every 3 years this leads to 6.67 replacements. Rounding off that figure to the nearest whole number yields 7 replacements. The JOPP quotation indicated that the replacement cost of the MP would be \$1.5M. The total cost of replacements allowed would therefore be \$10.5M.
- [53] The total amount allowed for the MP (initial cost, socket replacement, one and two year follow up and replacements) is therefore \$11, 769,950.00.

#### **Household Helper (Pre – Hearing Cost)**

- [54] In the claimant's witness statement, received as his evidence in chief, he indicated that he lived on his own prior to and after the accident. His girlfriend would visit from time to time but he was responsible for his own day to day affairs. His statement further indicated that after the accident he found it hard to perform his day to day functions such as cooking, ironing and cleaning the house. This is not difficult to envisage, the claimant having lost his dominant right hand. His statement disclosed he got a lady by the name of Cocheta Edwards to help him with his day to day affairs including cooking, washing and lacing up his shoes. His evidence was that the agreement with her was that she was due \$5,000 per week. No receipts were tendered in support.
- [55] During his testimony he said that the assistance he got commenced as he came out of the hospital and continued up to the time of hearing. He was asked by his own counsel the name of the lady who provided this assistance.

He responded Ketrina Wilson. When it was subsequently pointed out to him by the court that the name given in the statement was Cochetta Edwards, he said that was a mistake as her name is Ketrina Wilson.

[56] In oral and written submissions, counsel for the claimant submitted that the nature of the injury suffered by the claimant and the fact that he lived alone made it reasonable to conclude that he would need some household help. Therefore even if the arrangement with the named person was not adequately proven, which was not conceded, the court should find that he did receive paid help and utilise the minimum wage as the basis of calculating the sum due.

[57] Counsel for the defendant resisted any award under this head submitting that the expenditure was not specifically proven and that the discrepancy in the name of the helper casted serious doubt on the claim.

[58] Notwithstanding the difference between the evidence in court and the statement concerning the name of the helper, having reviewed his statement and considered his testimony the court accepts that the claimant would have needed and that he in fact received paid household help. No documentary evidence was put forward in respect of the amount paid. In ***Shaquille Forbes (an infant who sues by his mother and next friend Kadina Lewis) v Ralston Baker, Andrew Bennett and the Attorney General of Jamaica*** 2006HCV02938 (March 10, 2011), I allowed a claim for special damages without there being documentary proof in support. In the course of reviewing relevant authorities I noted at paragraph 20 that:

Some claimants will be unable to provide documentary proof of genuine claims for special damages given the nature of informal business practices they engage in and certain types of day to day transactions they conduct. In such business practices and day to day transactions the keeping of accounts and the provision of receipts are not regular operational features.

[59] Two weeks later, Sykes J. in the case of ***Debra Sanfarraro v. Bay Roc Limited T/A Sandals Montego Bay*** 2004HCV000220 (March 24, 2011) conducted an even more extensive review of authorities which have held that it is possible for proof of special damages to be adequate in the absence of documentary proof. At paragraph 56 he stated the law as follows:

The core principle that seems to be operating in all the cases is that of reasonableness of proof having regard to all the circumstance of the case. This makes the application of the law sufficiently flexible to take account of the many factual circumstances that come before the court. In other words, there is not only one way to meet the strict proof standard in respect of special damages.

[60] Applying that core principle, in all the circumstances of this matter, including the discrepancy in the name of the helper, I find it appropriate to allow recovery based on the minimum wage rather than the sum stated in the claimant's statement. I would therefore make an award for household help received after the claimant's discharge from hospital, up to the final date of hearing evidence, June 9, 2011. The minimum wage at the time of the accident was \$4,070.00 per week. That figure increased to \$4,500.00 effective February 28, 2011. Using a start date of September 5, 2010 this amounts to approximately 25 weeks at \$4,070 and approximately 15 weeks at 4,500.00. The total sum allowed under this item of special damage is therefore \$169, 250.00.

### **Household Helper (Future Cost)**

[61] The claimant will soon have the benefit of a MP. The opinion of Dr. Blake given in his report dated February 21, 2011 was that, "*The application of a prosthetic limb would improve his ability to work but would not restore this ability to normal. It would have no impact on his percentage permanent disability.*" That opinion was given in relation to the usual employment of the claimant in manual labour. It would seem however to also be relevant to manual labour done within the house. Therefore the claimant's ability to do his household work would improve but not be restored to normal. Over time no doubt the claimant will also become more adept at using his left hand and also at manipulating the prosthesis for the maximum benefit he can receive therefrom. The fact is however, that his ability will never be restored to normal. It is therefore appropriate for the claimant to be awarded a sum to enable the employ of future household help.

[62] For the reasons given when making the award for the cost of household help pre-hearing, the court is of the view the sum to be awarded should be based on the current minimum wage. In determining what multiplier to utilise the reasoning adopted in determining the multiplier to be used for the calculation of replacements for the MP is relevant. By parity of reasoning, the household help multiplier has to be higher than the loss of future earnings multiplier as the period during which household help will be required is likely to exceed the period of working life. It may be recalled the multiplier arrived at for the replacement of the prosthesis was 20. This multiplier should however be discounted to take account of the fact that with the prosthesis, some improvement in the claimant's ability to do manual work will be achieved; he will also over time become more adept in the use of his left hand; and he is receiving a lump sum which he is expected to invest so that he can meet the recurrent cost of household help over his lifetime.

[63] The court finds in the circumstances that a 50% reduction in the multiplier should be applied; the multiplier should therefore be 10. The sum awarded under this item will therefore be  $4,500 \times 52 \times 10 = \$2,340,000.00$ .

### **Loss of Earnings**

[64] The claimant sought the recovery of his lost income since the accident. He testified at the hearing on March 29, 2011 that his income per fortnight was in the range of \$12,000.00 to \$15,000.00. In cross-examination counsel for the defendant countered that assertion, suggesting to the claimant that he would usually earn about \$4000.00 per week although sometimes the figure would be as much as \$10,000.00. The claimant denied those suggestions. Counsel for the defendant did not produce any documentation or evidence to support her suggestion. The claimant was recalled on June 9, 2011 at which time he produced his pay sheet for the week ending 11/12/2009 (exhibit 6a) in the amount of 15,475.00 and his pay slip for the period ending 04/12/2009 (exhibit 6b) also in the amount of 15,475.00. Despite the difference in date, the claimant indicated that the sum indicated on both documents was in respect of one and the same two week period. These documents were in support of his earlier testimony that he earned in the region of \$12,000.00 to \$15,000.00 per fortnight.

[65] On the basis of his testimony and the production of exhibits 6a and 6b the court accepts the evidence of the claimant concerning his fortnightly earnings. The court finds no basis to support the suggestion made by counsel for the defendant that the earnings of the claimant were usually \$4000.00 per week and occasionally up to \$10,000.00. Given the fact that the claimant indicated that he sometimes earned as low as \$6,000.00 per week, the court finds it appropriate to use that sum in calculating the lost earnings rather than that of \$7,500.00 urged by the counsel for the claimant, or the sum of \$4,000.00 urged by counsel for the defendant. The period for which the claimant should recover is from August 16, 2010 to June 9, 2011 which amounts to 43 weeks. The sum for pre-hearing loss of earnings will therefore be  $\$6,000 \times 43 = \$258,000.00$ .

## **THE CONTESTED GENERAL DAMAGES**

### **Loss of Future Earnings**

[66] The claimant also sought an award for loss of future earnings. In the opinion of Dr. Blake the accident left the claimant with a 55% whole person disability. It will be recalled that the import of the second report of Dr Blake (exhibit 2b) is that without a prosthesis the claimant would be unable to do manual labour. The report went on to indicate that the claimant's prospects of employment

would be enhanced if he got a prosthesis. Then he would be able to perform manual tasks, not to the total extent he could before his accident, but his ability would be significantly improved over that of his post accident, pre-prosthesis ability. One of the reasons Dr. Blake had recommended the MEP was that it provided greater grip strength than the MP. The greater the grip strength the better for someone doing manual labour. For reasons outlined during the discussion of the choice between the MEP and the MP the court has chosen the MP as the appropriate device to be provided for the claimant. The fact that the mechanical device has a lesser grip strength than the myoelectric is a factor to be taken into account in the determination of the claim for loss of future earnings.

[67] The evidence of the claimant is that up to the time of the hearing he was unemployed. He had been offered re-employment at the defendant company but declined, due to the psychological torment he suffered whenever he saw the offending machine that has deprived him of his hand. The reasonable forecast is therefore that the claimant will suffer a loss of future earnings for which he should be compensated. The sum of \$6000.00 which the court used as the weekly figure to calculate the claimant pre-hearing loss of earnings may appropriately be used as the multiplicand. The question is what should be the multiplier?

[68] In the case of **Godfrey Dyer** a multiplier of 11 was used to calculate loss of future earnings for a 35 year old. In **Kenroy Biggs** the multiplier used for a 26 year old was 14. The claimant being 30 in the instant case the appropriate multiplier as indicated earlier in this judgment would seem to be 12. That would be the case all things being equal. All things are however not equal. The claimant in this case unlike the claimants in the cases of **Godfrey Dyer** and **Kenroy Biggs** has his prospects of employment being improved, perhaps significantly improved by his obtaining a prosthesis, albeit not the ideal one from the standpoint of Dr Blake. The multiplier therefore needs to be further discounted. I think the appropriate discount should be by a third ( $1/3^{\text{rd}}$ ) leaving a multiplier of 8. The award for loss of future earnings will therefore be  $6000 \times 52 \times 8 = \$2,496,000.00$ .

### **Handicap on the Labour Market**

[69] Counsel for the claimant maintains that the injury sustained by the claimant has severely affected the claimant's employability. The defendant had offered to continue the employment of the claimant but as indicated a few paragraphs previously, due to psychological trauma caused by viewing the offending machine, he declined the offer. In his witness statement received as his evidence in chief he stated that, *"I am unable to work on any of the machines that I have worked on my entire working life. The type of work which I know*

*how to do I can't do now because I have only one hand. It is hard for me to get certain types of work because I am barely literate."*

[70] The claimant is therefore only suited for manual labour. This accident has deprived him of his dominant right hand. Even with the MP he will have to be competing in the job market with able bodied persons who have two hands. As was noted in **Aston Fitten's** case, at page 4, "...a person with prosthesis was not expected to be a frequent heavy lifter". Based on the foregoing it is obvious that he suffers a handicap on the labour market. Counsel for the claimant submits that the sum of \$400,000.00 is reasonable given that the sum awarded under this head is usually modest compensation.

[71] Counsel for the defendant opposed the claim under this head submitting that the claimant had not led adequate evidence to support his impaired employability and further relied on the case of **Victor Campbell v. Samuel Johnson and The Attorney General of Jamaica** (1991) 28 J.L.R. 109, for the proposition that for a claim of handicap on the labour market to succeed, the claimant must have been in employment at the date of the trial.

[72] I have already noted that the evidence adequately demonstrates the fact of an existing handicap on the labour market. Therefore the only issue that remains to be addressed is whether the claimant can recover, he not having been in employment at the time of the trial.

[73] In **Victor Campbell's** case the plaintiff suffered a right arm amputation below the shoulder as a result of a motor vehicle accident. He was not working at the time of the trial. In respect of his claim for handicap on the labour market the headnote reads, "*for a claim in general damages of handicap on the labour market to succeed the plaintiff must have been in employment at the date of the trial and there was a strong likelihood of him being dismissed; and as this was not the case there can be no award for handicap on the labour market.*"

[74] The answer to the submission of counsel for the defendant is found in the case of **Attorney General of Jamaica v. Ann Davis** SCCA 114/2004 (November 9, 2007) at paragraph 12 where K. Harrison J.A. stated as follows:

I now turn to examine the principles in relation to an award for loss of earning capacity or handicap on the labour market. They have been enunciated in the English case of **Moeliker v A. Reyrolle Co. Ltd** [1977] 1 All E.R. 9. Browne L.J., who delivered the main judgment in the Court of Appeal, Civil Division said:

In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity

if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materializes, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise.

No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate.

In ***Cook v Consolidated Fisheries Ltd.*** [1977] I.C.R. 635 at 640, Browne LJ., corrected himself by stating that an award of damages for loss of earning capacity did not arise only when the injured person was employed at the date of trial. He said at page 640:

In my view, it does not make a difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial. ...In *Moeliker's* case at page 261 of the report in [1976] I.C.R., I said, 'This head of damage only arises where a plaintiff is at the time of the trial in employment.' On second thoughts, I realize that is wrong...and when I came to correct the proof in the report, in the All England Reports, I altered the word 'only' to 'generally' and that appears at [1977] 1 All E.R. 9, 15. (Emphasis added)

[75] As neither ***Moeliker's*** case nor ***Cook's*** case was considered in the ***Victor Campbell*** case, that explains the conclusion there arrived at. The reality is however, for some time now it has been settled law that a claimant does not have to be in employment at the time of trial to be entitled to an award for handicap on the labour market. That position accords with good sense. In some circumstances, where as in this case there have been unsuccessful efforts to obtain employment, the fact of unemployment may in itself speak eloquently of the existing handicap. This issue was also addressed by Sykes J. in the cases of ***Icilda Osbourne v. George Barned, Metropolitan Management Transport Holdings Limited and Owen Clarke*** 2005HCV294 (February 17, 2006) and ***Kenroy Biggs***, in which a number of other Jamaican, English and Australian cases that have upheld the principle that the claimant does not need to be in employment at the time of the trial to receive an award under this head were reviewed.

[76] In ***Icilda Osbourne's*** case a 60 year old practical nurse who had suffered whiplash neck and back injuries which affected her ability to compete on the job market with able bodied persons was awarded \$500,000.00 for loss of earning capacity (handicap on the labour market). In ***Kenroy Biggs'*** case where the 26 year old claimant suffered amputation, had severe urological problems and back pains, he was also awarded \$500,000.00 under this head. It should be noted however that the total award in ***Kenroy Biggs'*** case was in excess of \$45M which might have influenced downwards the size of the award under this head. In all the circumstances, I find that the claim for \$400,000.00 under this head in the instant case is reasonable and should be allowed.

[77] For the foregoing reasons, on October 19, 2011, the court made the Order outlined below, *(now adjusted by the reduction of \$35,000.00 in respect of the sum allowed for the prosthesis, given the removal of the cost of the extra cosmetic glove included in error in the quotation for the prosthesis (exhibit 3))*:

1. Judgment for the claimant as follows:

**General Damages**

- a. ***Pain and Suffering*** – \$7,500,000.00 with interest at 3% from October 14, 2010 to October 19, 2011;
- b. ***Loss of Future Earnings*** – \$2,496,000.00 (no interest);
- c. ***Handicap on the Labour Market*** – \$400,000.00 (no interest).

**Special Damages**

- d. ***Medical Expenses*** – \$57,000.00 with interest at 3% from August 13, 2010 to October 19, 2011;
- e. ***Loss of Earnings*** – \$258,000.00 with interest at 3% from August 13, 2010 to October 19, 2011;
- f. ***Household Helper (Pre-hearing cost)*** – \$169,250.00 with interest at 3% from August 13, 2010 to October 19, 2011;
- g. ***Household Helper (Future cost)*** – \$2,340,000.00 (no interest)
- h. ***Cost of Prosthesis (including initial cost, socket change, one and two year follow-up and replacements)*** – \$11,769,950.00.

2. Costs to the claimant to be taxed or agreed.

3. Stay of execution granted for three (3) weeks from October 19, 2011.

[78] On the 11<sup>th</sup> day of November 2011 by e-mail a further stay was granted until the delivery of these reasons now provided.

[79] That stay is now extended for ten days from today, the 21<sup>st</sup> day of November 2011.