

**BACK TO BASICS:
RE-EVALUATING THE ASSESSMENT
OF DAMAGES IN PERSONAL
INJURY CASES**

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Introduction

1. Personal Injury litigation is an area in which many attorneys in Jamaica practice. In fact quite a large percentage of the cases currently before the Supreme Court are negligence cases involving a claim for personal injury. The area is seen as pretty straightforward however, over the last few years there have been new elements of the practice which give cause for concern. Some of these include the strong reliance on the assessment of permanent partial disability as an indicator for the level of award without more, the discrepancies in assessments of claimants by medical practitioners, the proof or lack thereof for awards for handicap on the labour market. The aim of this paper is to
 - a. revisit the principles upon which personal injuries are assessed and compensated;
 - b. consider the role of the medical experts and the use of American Medical Guidelines on Impairment
 - c. Revisit the guiding principles and evidential framework for the assessment of an award for handicap on the labour market award;
 - d. Identifying solutions to some of the problems in this field of practice.

Basic Principles in Assessing Damages for Personal Injury

2. Damages is the principal remedy provided by the law to an individual who has suffered loss including personal injury. The guiding principle is one of compensation. Money can never make good permanent physical or mental disabilities and as a consequence compensation for the non-pecuniary loss (general damages) can never be arithmetically perfect¹. An award "should as

¹ Rowley v London and North Western Ry. Co. L.Rep. 8 Ex. 221

nearly as possible get at the sum of money which will put the party who was injured, or who has suffered, in the same position as he would have been if he had not suffered the wrong for which he is now getting compensation"².

3. In assessing damages for personal injuries, a trial judge is expected to apply the standards of fairness and reasonableness³. There must be a balance of what is fair for the Claimant to receive for what has happened to him through the negligence of the Defendant and what is fair for the Defendant to pay for such acts of negligence.
4. Damages are assessed "once and for all" and must be adequate and commensurable with the injuries and their resultant consequence for the Claimant and not influenced by the depth of the Defendant's pocket or the extent of his coverage under a policy of insurance.
5. In assessing general damages the court ought not to concern itself with the use which would thereafter be made of the money awarded. It is therefore immaterial that the Claimant is wealthy and not in need of the funds or the converse, that the Claimant is a pauper. Lord Devlin in **West v Shephard**⁴ expressed the principle in the following way:

*"What is meant by compensation that is fair and yet not full?
I think that it means this. What would a fair-minded man,
not a millionaire, but one with a sufficiency of means to
discharge all his moral obligations, feel called upon to do for
a Plaintiff whom by his careless act he has reduced to so
pitiable a condition".*

² Lord Blackburn in **Livingstone v Rawyards Coal Company** (1880) 5 App. Cas. 25 at p. 39

³ **Phillips v The London and South Western Railway Company** (1879) L.R. 5 C.P.D

⁴ [1964] A.C. 326

6. In assessing damages for personal injury the court considers all the relevant changes in a Claimant's circumstances which are as a direct consequence of the Defendant's negligence. In looking at the various heads of damages the court endeavors to give effect to the overriding objective to deal with cases justly by, in so far as possible, maintaining a uniformed approach to the assessment of damages by being guided by the awards for comparable injuries.
7. The court should however be mindful that no two Claimants are exactly alike and as such each case must be decided on its own peculiar set of circumstances by taking into account both the subject and objective elements.
8. In analyzing a claim for general damages under the orthodox headings of pain and suffering and loss of amenities and loss of future earnings or earning capacity, recourse may be had to the useful guidelines of Wooding CJ in **Cornilliac v St. Louis**⁵ namely
 - a. The nature and extent of the injuries sustained,
 - b. The nature and gravity of the resulting physical disability,
 - c. The pain and suffering endured,
 - d. The loss of amenities suffered and,
 - e. The extent to which, consequently, the claimant's pecuniary prospects have been materially affected.
9. It is to be noted that these guidelines are well accepted in our local jurisprudence as they have been oft repeated by our judges in numerous cases .

⁵ [1964], 7 W.I.R. 491

The nature and extent of the injuries sustained

10. This is merely a recital of the injuries as disclosed in the medical reports and is often referred to as the **objective element** that guides the trial judge in making his assessment.

The gravity and extent of physical disability

11. This contains both the objective and subjective elements as it is based both on the findings presented in the medical report and the oral evidence of the Claimant.

The pain and suffering endured

12. The components of this head of damage are predominantly subjective and based largely on the evidence of the Claimant. In the absence of any objective test of the degree and intensity of pain the danger is that the court can fall into error when assessing damages under this head when dealing with a malingering Claimant. Where the Claimant does not experience pain as a result of being in a coma no award is made under this head.

The loss of amenities suffered

13. The House of Lords decision in **West v Shephard** is the leading authority on this. Here the court considered whether damages should be awarded under this head where the Claimant is either comatose or had only limited consciousness of the injury and the resulting impairment and disability.
14. Both Lord Reid and Lord Devlin examined both the objective and subjective realities of a man who had suffered the amputation of his leg. Where the man's life was not shortened by the injury he may instead be forced to endure a life of frustration and handicap. His compensation would include not only the loss of the leg itself (which is the objective component) but its attendant mental strain and anxiety (subjective component). This is not to

say that a different Claimant suffering the same injury but who instead has a more positive outlook should be awarded any less compensation.

15. Lord Reid noted⁶ that :

"There are two views about the true basis for this kind of compensation. One is that the man is simply being compensated for the loss of the leg or the impairment of his digestion. The other is that the real loss is not so much his physical injury as the loss of the opportunities to lead a full and normal life which are now denied to him by his physical condition- for the multitude of deprivations and even petty annoyances which he must tolerate...

...So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life."

The effect on the claimant's pecuniary prospects

16. The Claimant's working life at the time of the accident is the starting point for an examination under this head. Compensation is based on the loss, if any, for the period from the date of the accident to the date of trial (pre-trial loss) and any loss that the Claimant may endure in the future (post-trial loss).

17. In arriving at an award for general damages the court looks at the evidence as a whole based on the guidance offered under each head of damage in conjunction with awards made in comparable cases. Notwithstanding that the assessment is conducted by examination of each head of damage only one award is made.

⁶ At page

MEDICAL EVIDENCE

18. Medical doctors play an integral role in the litigation of personal injury claims from an evidential perspective. Their role is to examine the injured party and thereafter provide independent assistance to the court by way of an objective unbiased opinion in relation to matters within their expertise. This opinion is usually in the form of a medical report.
19. Medical practitioners who are suitably qualified and experienced are usually appointed expert witnesses by the court and their medical reports tendered into evidence without the need to call the doctors to give evidence or be cross examined.
20. Rule 32 of the CPR requires that all experts be so certified prior to his evidence being tendered into evidence. Failure to obtain this certification will result in the doctor not being treated as an expert witness and his evidence will be treated as any other hearsay evidence, if he is not called to be cross examined. It is essential that this rule is complied with as opinion evidence can only be given by an expert witness.
21. The expert witness's duty is to the court. This duty overrides any obligations the expert may have to the party that pays him. His evidence must therefore be seen as the independent product of his opinion uninfluenced as to form or content by the demands of litigation.

Expert witness's overriding duty to court

22. Rule 32.3 of the CPR provides

"It is the duty of an expert witness to help the court impartially on

- i. *the matters relevant to his or her expertise. This duty overrides any obligations to the person by whom he or she is instructed or paid.*
- ii. *Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert witness uninfluenced as to form or content by the demands of the litigation. An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within the expert witness's expertise.*
- iii. *An expert witness must state the facts or assumptions upon which his or her opinion is based. The expert witness must not omit to consider material facts which could detract from his or her concluded view.*
- iv. *An expert witness must state if a particular matter or issue falls outside his or her expertise.*
- v. *Where the opinion of an expert witness is not properly researched, then this must be stated with an indication that the opinion is no more than a provisional one.*
- vi. *Where the expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report. "*
- vii. *Where after service of reports an expert witness changes his or her opinion on a material matter, such change of view must be communicated to all parties."*

23. The recent decision of **Cherry Dixon Hall v. Jamaica Grande Limited**⁷ dealt with the use of expert medical evidence and the requirements of the C.P.R. in respect of such evidence.
24. In that case the Claimant, a 58 year old American tourist fell in her room at the Defendant's hotel. After the fall she complained of pain in her left elbow and wrist. She also complained of severe pain in her ribs. She was seen by Dr. Wright who diagnosed her with a fractured rib and soft tissue injury to the elbow. Prior to the fall the Claimant was diagnosed with Lupus. The Claimant alleged that she began to experience Lupus Flares shortly after the accident and sought to claim damages for the exacerbation of her Lupus along with her other injuries. In support of this claim she sought to rely on the medical reports of Dr. Eric Williams from the North Central Bronx Hospital.
25. Justice M. McDonald-Bishop (Ag) outlined the role of expert witnesses and the scope of their reports. She also made very useful remarks regarding the content of an expert report along with its admissibility. In rejecting the evidence of Dr. Williams the Learned judge said at paragraph 51 of her written decision:-

"There is no distinction between what he was told by the claimant or seen from other sources and what is in his personal knowledge. He spoke to no clinical examinations or tests personally conducted by him on the claimant on which his independent findings could be based. Neither has he referred to any other examinations, conducted by any other medical

⁷ Claim No HCV 2588/2005 (on appeal)

personnel on which he had relied to properly base his conclusions

He indicated no diagnostic test done or ordered by him to analyse the claimant's condition particularly as it relates to sciatica, sprain to the wrist and the muscular back pains...

The question that arises is: on what clinical basis has he concluded that the claimant had the injuries he spoke about? Is it just based on what the claimant told him or is it based on his own personal examinations and findings as a "doctor? These are critical questions that remain unanswered on the terms of Dr. Williams' report. The court cannot speculate. These questions do arise because at no place in his reports, for instance, does he say the claimant made complaint to him of pain in the areas noted or that she complained of injuries allegedly sustained in a fall. He wrote as if he found pain but he has not indicated any examinations done by him to arrive at such conclusion. He spoke definitively of injuries she sustained in 'the fall' as if it is within his personal knowledge that there was a fall and not what was told to him by the claimant

There is no indication that he has independently diagnosed the claimant with lupus and had himself treated her for the flares. He has not indicated for how long he has had the claimant as a patient and

have been treating her preexisting condition, if at all... He spoke about her not having any flares before the fall all mirroring what the claimant herself has said. From which source has he derived such information? This is not stated... One cannot tell from Dr. Williams' reports whether he had in fact confirmed by his own diagnosis that the claimant has lupus. He has stated several conclusions without showing the court how he arrives at them. The claimant stated that she has been hospitalized twice for lupus. There is no proper medical report confirming this as to dates of admission, complaint, treatment administered, by whom and so forth.

One of the troubling things about Dr. Williams' reports is that that he has presented hearsay as facts in his report and so I am not able to distinguish what are, indeed, facts within his own knowledge and what constitute hearsay. It is accepted as a matter of law that an expert need not have personal knowledge of every relevant matter within his field of expertise and may base his testimony on the research and findings of others to arrive at his conclusion but these must be indicated in his report and the basis on which he grounds his conclusions must be stated. R.32.13 (1) has confirmed this principle. There is nothing put before me to ground the reputability of Dr. Williams' conclusions.

Above all else, the court is left asking: what is the competence and qualification of Dr. Williams to proffer an opinion as to the causal nexus between the fall and the lupus condition that is now being blamed for the resultant disability of the claimant? Dr. Williams has disclosed no qualification and specialized training in the treatment of lupus that would qualify him to speak on the cause and effect relationship between a fall and lupus."

26. It must be noted that for personal injury cases the court requires the report of a medical doctor outlining the injuries sustained by the Claimant along with the treatment received and prognosis for recovery. Chiropractors, Physiotherapists, and Neuropaths provide information regarding the Claimant's treatment and cannot speak to his diagnosis and his medical condition. Sole reliance on the reports of these professionals will leave the court without any medical evidence on which to make an award of damages for personal injury; as in the absence of a report from a medical doctor little or no weight may be attached to these other reports.

IMPAIRMENT VS DISABILITY

27. In our jurisdiction medical doctors usually comment on the patient/client's whole person disability or impairment placing great reliance on the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA guides). This begs the question of whether the AMA guides are being used appropriately in the context of personal injury litigation in Jamaica.
28. Impairment is defined by the AMA Guides (5th edition) as "a loss of use, or derangement of any body part organ system or organ function." Impairment

is considered permanent when the patient has reached maximum medical improvement.

*"Impairment percentages or ratings developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living **excluding work**. Impairment ratings were designed to reflect functional limitations **and not disability**."⁸*

29. A disability may be described as a physical or mental incapacity, either congenital or resulting from an injury or illness or a condition that curtails a person's ability to carry on his normal pursuits. A disability may be partial or total, temporary or permanent. Historically the word disability has been used to refer to a broad category of individuals with diverse limitations in the ability to meet social or occupational demands. The AMA Guides however define disability as an:-

"alteration of an individual's capacity to meet personal, social or occupational demands or statutory or regulatory requirements because of an impairment."⁹

30. The AMA Guides go on to say that:-

"The impairment evaluation, however, is only one aspect of disability determination. A disability determination

⁸ Guides to the Evaluation of Permanent Impairment – Fifth Edition page 2 paragraph 1.2a

⁹ Supra page 8

also includes information about the individual's skills, education, job history, adaptability age and environment requirements and modifications. Assessing these factors can provide a more realistic picture of the effects of the impairment on the ability to perform complex work and social activities¹⁰.

31. The Guides as its name suggests is a guide to the assessment of ***impairment*** and not ***disability***. Unlike impairment which measures the quantitative loss or incapacity of a body part, disability is really the ability or inability to perform and is qualitative in nature. Reliance solely on an impairment rating as outlined in the guides would not accurately reflect the impact of a particular injury a client, as that impairment rating would not have considered the impact of the injury on the person's ability to work or relate to his environment.
32. It is interesting to note that in the United States where the AMA Guides originate, disability ratings are predominantly used in the context of worker's compensation systems¹¹. Awards and entitlement under that system may be determined independent of the Court as rules and schedules of compensation

¹⁰ Supra page 8

¹¹ The Montana Code for example defines permanent partial disability as "a condition, after a worker has reached maximum medical healing, in which a worker: (a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and (b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work." 39-71-703 of the Code outlines the rules regarding compensation for permanent partial disability: "(1) If an injured worker suffers a permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the worker is entitled to a permanent partial disability award if that worker:

(a) has an actual wage loss as a result of the injury; and

(b) has a permanent impairment rating that:

(i) is not based exclusively on complaints of pain;

(ii) is established by objective medical findings; and

(iii) is more than zero as determined by the latest (emphasis mine) edition of the American medical association Guides to the Evaluation of

Permanent Impairment.

(2) When a worker receives an impairment rating as the result of a compensable injury and has no actual wage loss as a result of the injury, the worker is eligible for an impairment award only."

are structured to determine awards. Regrettably in our context it has become commonplace for the words disability and impairment to be used interchangeably in medical reports and in the courts.

Concerns Re Use Of the AMA Guides

32. The Fourth Edition of the AMA guides was the subject of much criticism and controversy. The criticisms focused on two areas: internal deficiencies, including the lack of a comprehensive, valid, reliable, unbiased, and evidence-based system for rating impairments. ...;¹².
33. It was recommended that the *Guides* remain a tool for evaluation of permanent impairment, not disability and that its authors needed to "improve the validity, internal consistency, and comprehensiveness of the ratings; document reliability and reproducibility of the results; and make the *Guides* easily comprehensible and accessible to physicians"
34. Though the guides to permanent impairment have been constantly improved with a view to increase its reliability, it is our view that not all local doctors are keeping abreast of developments. The most recent edition of the guides is the 6th edition, yet impairment ratings are being assessed based on the fourth and fifth editions to provide guidance to the court in assessing permanent impairment and in many instances erroneously, permanent partial impairment.
35. In view of the object of an award of damages over reliance on the impairment rating would not accurately compensate a seriously injured

¹² **Recommendations to Guide Revision of the *Guides to the Evaluation of Permanent Impairment***, Emily A. Spieler, JD; Peter S. Barth, PhD; John F. Burton, Jr, PhD, LLB; Jay Himmelstein, MD; Linda Rudolph, MD, MPH <http://jama.ama-assn.org/cgi/content/abstract/283/4/519> -Vol. 283 No. 4, January 26, 2000

person who suffered a serious disability due to the impairment of a body part. For example a writer and an athlete sustained a displaced tibial fracture which resulted in 8% whole person impairment. However, the disability rating of each of these individuals would be dramatically different as the resultant impairment would affect each person's ability to work and earn a living very differently.

36. The attached case studies demonstrate that there is a lack of uniformity in approach and determination of impairment ratings; they are based on actual medical reports that have been relied on in support of claims made in the Supreme Court to recover damages for personal injuries. The case studies show that:
- a. The terms impairment and disability are erroneously used interchangeably;
 - b. Different editions of the AMA Guides are used within the same period, resulting in different ratings; and
 - c. The assessment of the impairment differs from doctor to doctor;
37. Quite apart from these case studies, in our experience dealing with personal injury claims it is exceptional and rare when a patient is examined by different medical doctors and their impairment ratings are identical, even with similar findings; this points to the lack of reliability of the impairment rating.
38. Using Case Study (iv), one can imagine the disparity in award that the same individual would receive if only the medical report assessing his disability at 11% was obtained as opposed to the award he would be likely to receive if only the medical report assessing a 29% impairment was obtained, perhaps millions apart, yet we are dealing with the same person, the same injury.

39. We take a big gamble when we peg an award to impairment rating and when we focus on impairment rating as one of the paramount considerations in arriving at an award. Similar awards ought not to be granted carte blanche because two individuals have similar impairment ratings. Detailed evidence must be lead as to how the particular injury affects an individual's life and livelihood and an award which compensates the entire loss must be made after careful examination of the evidence on a case by case basis. Focusing on impairment rating instead of the nature of the injuries and loss of amenities is a numbers game where awards are based on the 'luck of the draw' and results in inappropriate compensatory awards and should be discouraged.

HANDICAP ON THE LABOUR MARKET

40. A claimant whose injury results in a permanent impairment or disability may suffer a disadvantage on the labour market. If this occurs he is entitled to compensation.
41. Simply put an award for handicap on the labour market is made to compensate the claimant for the weakening of his competitive position on the labour market as a result of his injury.
42. The often quoted definition of this head of damage is that of one used by Browne L.J. in Moeliker v. Reyrolle¹³:

"This head of damage generally arises where a claimant is, at the time of the trial, in employment, but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a

¹³ [1977] 1 WLR 132 C.A

different head of damages from an actual loss of future earnings which can readily be proved at the time of trial"

43. Handicap on the labour market is a different head of damage from future loss of earnings. An award for loss of future earnings seeks to compensate an injured Claimant for an anticipated diminution in his future earnings as a consequence of his injuries. An award for handicap on the labour market seeks to compensate the Claimant for the risk that his competitive position on the labour market will be diminished.
44. Questions have arisen as to whether a claimant who is not working at the time of trial can recover an award for Handicap on the Labour Market. Sykes J in ***Icilda Osburne v. George Barned & Ors.***¹⁴ addressed this issue and found in the affirmative. The confusion arose out of the Moeliker decision where the original report of the quotation at paragraph 43 above read "this head of damage **only** arises where a claimant is, at the time of the trial, in employment". However Lord Browne-Wilkinson in ***Cook v. Consolidated Fisheries***¹⁵ indicated that this was an error in the printing of the Moeliker judgment and when he corrected the proof in the report he changed the word 'only' to '**generally**' as there was no intention to limit the award to only persons who were in employment at the time to trial.
45. On the issue of whether both handicap on the labour market and loss of future earnings are recoverable by a claimant the authorities show that there is no principle of law that precludes this¹⁶.
46. Generally speaking it is not easy to prove a claim for handicap on the labour market. However in recent times it has been our experience for Claimants to

¹⁴ (***Claim No. 2005 HCV 294***), heard (2nd and 17th February, 2006).

¹⁵ The Times January 17, 1977

¹⁶ See ***Zeilinski v. West*** [1977] C.L.Y. 798

throw up a claim for an award for without sufficient proof. Based on the authorities, in assessing an award for handicap on the labour market the following 4 factors are relevant

- (a) Net annual income -this is the starting point as it should form the basis for any award. Of course if the claimant is not in work at the time of trial then his annual income will be his residual earning capacity and will need to be estimated.
- (b) The length of the remainder of working life- one would expect that the longer the remaining working period, the higher the award and the shorter the period, the lower the award.
- (c) The level of the risk that the Claimant will be on the labour market and the number of times- each time in the future the Claimant is searching for work he will be exposed to further loss as a result of his restriction on the labour market caused by his injuries. Regard must be had for example to the industry in which the Claimant is working as where there are frequent job changes, the risk of being thrown on the labour market is higher and the award is likely to be higher than for a claimant with a similar injury in an industry where a job for life is the norm. The risk of being thrown on the labour market must be real or no award should be made. In the case of **Dawnette Walker v. Hensley Pink**¹⁷ Harrison P. (Ag) in refusing an award for handicap on the labour market said "There is no evidence of a chance of a risk of the loss of her job arising in the case of the appellant."¹⁸
- (d) The effect of the claimant's disability/handicap on his work capacity- this injury will speak for itself and but the particular aspect which is relevant to an award for handicap on the labour market is

¹⁷ Civil Appeal No. 158/01

¹⁸ Supra at page 13

whether the effect the symptoms have on the Claimant's capacity to work and to gain work . In this regard Browne LJ in **Moeliker** said

"the next stage is to consider how far he would be handicapped by his disability if he was thrown onto the labour market that is what would his chances of getting a job and an equally well paid job. Again all sort of variable factors will or may be relevant in particular cases for example a claimant's age, his skills , the nature of his disability ; whether he is only capable of one type of work or whether he is or could be capable of others, whether his is tied to working in one particular area; the general situation in his trade or his area or both."

47. From the above it is clear that there may be severe and permanent injuries that may produce no award for handicap on the labour market. A banker, for example, may lose three fingers but get no award for handicap on the labour market but a construction worker with no education qualifications loses three fingers and he is likely to get an award.

Evidence to support an award

48. A claimant hoping to secure an award for handicap on the labour market needs to ensure that there is sufficient information before the court to ground the award. Such evidence is likely to come from different sources including
- a) Medical evidence – the letter of instruction to the doctor should alert him to the possibility of an award for handicap and seek his comments on whether the injury is likely to affect the claimant in his work.

b) The Claimant himself in his witness statement needs to give evidence for example as to the security of his present job and employers, security in the industry in general e.g. whether there are frequent redundancies, the availability of jobs in that area and field, how the injury affects his work at present, whether his present employers are understanding and sympathetic to his injury.

c) An employment consultant/ human resource consultant may be called to give support to the claimant's evidence as for example as to the availability of jobs in the field in which the Claimant works.

49. A defendant contesting a handicap on the labour market award may wish to consider the following evidence.

a. The defendant's medical expert should be asked to consider the claimant's earning capacity and to set out the types of work the claimant is still capable of fulfilling.

b. An employment consultant- to prove that the claimant's earning capacity has not been reduced at all by showing other fields of work in which the claimant could earn as much, if not more than in his pre-accident field.

c. The claimant's employer, if possible, to get evidence of high regard in which the claimant is held and the job security to ensure that the award is kept to a reasonable level.

How is handicap on the labour market calculated?

50. The calculation of awards for handicap on the labour market has always posed a great difficulty for both attorneys and the courts. In the **Forey v.**

London Buses¹⁹ □ Taylor "finding the appropriate figure ... must necessarily be imprecise ... It must involve weighing up all the circumstances as best one can and taking a stab ... One cannot say that it is precisely right because no figure can be arithmetically calculated in a case of this kind"

51. These awards are by their nature speculative. Over the years two distinct methods of calculation have been used.
- a. The multiplier/multiplicand approach
 - b. The lump sum approach
52. This method of calculation has been sanctioned by the Jamaican Court of Appeal in the decisions of **Carlton Campbell and Others v. Natalie Whylie**²⁰ and the **Kiskimo Limited v. Salmon**²¹
53. In the recent Supreme Court decision of **Marcella Clarke v. Claude Dawkins and Leslie Palmer**²² Sykes J. (Ag) relied on the abovementioned authorities and made an award for handicap on the labour market using the multiplier multiplicand approach. In delivering his decision he said
- "In making this award I will use the multiplier/multiplicand approach. The Court of Appeal in Jamaica has decisively settled the issue of whether the multiplier/multiplicand approach can be used to calculate the damages under this head. Forte J.A. (as he was at the time) in **Campbell and Others v Whylie (1999) 59 WIR 326** approved this method of calculation (see page 341, 342). His Lordship stated that the circumstances of **Campbell's** case (supra) was one in which the multiplier/multiplicand method was appropriate. The question is what are the circumstances that make this method*

¹⁹ [1992] PIQR 48

²⁰ 59 WIR 326

²¹ (1991) Civil Appeal 61 of 1989

²² SUIT NO. C.L. 2002/C – 047

appropriate? ***In Campbell's*** case (*supra*) there was evidence of:

- a. loss of earning capacity;
- b. the plaintiff's age and likely length of working life;
- c. the plaintiff's monthly earnings;

All this meant that the court in ***Campbell's*** case was placed in a position to calculate the multiplicand. I am also in the same position... In the instant case an appropriate multiplier is 14. I chose this figure having regard to (i) her age (20); (ii) the expected length of working life (at least another forty five years); (iii) the injuries have already begun to affect her ability to stand or walk; (iv) she is earning and will continue to earn for some time and (v) there is an 8% whole person disability."

- 54. In circumstances where there is clear evidence of the Claimant is likely to suffer a diminution in his ability to earn; his wage at the time of trial and the length of his working the multiplier multiplicand approach should be used.
- 55. Where it is not possible to calculate the risk mathematically and/or the court, in its discretion, does not believe that the case is one in which the multiplier multiplicand approach is appropriate then the lump sum approach will be used.

The Way Forward

- 56. Those who practice personal injury litigation will no doubt agree that there is room for improvement in the practical especially as it relates to earlier resolution of disputes, restoring trust between defendants and claimants, the presentation of claims and defences which in the end will bring more certainty to the level awards so it is not left up to the luck of the draw. The following are some suggestions for a way forward.

Adoption of Pre-action protocols.

57. Pre-action protocols were introduced in the UK as a part of the 1999 overhaul of the civil justice system. There are protocols for different areas of law as for example personal injury claims, construction and engineering disputes, judicial review, professional negligence claims and defamation.
58. Pre-action protocols outline the steps parties should take to seek information from and to provide information to each other about a prospective legal claim. The objectives of pre-action protocols are to
- (a) to encourage the exchange of early and full information about the prospective legal claim;
 - (b) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings;
 - (c) to support the efficient management of proceedings where litigation cannot be avoided.
59. The pre-action protocol for personal injury claims for example sets out a timetable for claimants and defendants to respond to each other, guidelines as to the instruction of experts for defendants and claimants to agree on experts before instruction. The latter for example, is most useful as not only will it reduce the number of reports coming forward and the possible discrepancies in the diagnoses but it will also reduce costs.

Expert Reports

60. Clearly defining the terms of reference to medical experts. Experts must not only be instructed in accordance with the CPR but their terms of reference should be clearly defined. For example the letter of instruction could ask specifically for the comments on impairment and disability separately. If there

is insistence on using the AMA guides then in instructing the expert, it may be useful to ask for an assessment in based on the latest 6th edition.

Judicial Guidelines

61. In the UK the Judicial Studies Board periodically publishes guidelines for awards in personal injury cases. These are guidelines only but are useful as they classify injuries in like categories and a range of awards recommended depending on whether the injury is minor, moderate or severe. A similar guideline would be useful in Jamaica as it would bring some certainty to the range of awards for general damages and no doubt reduce the number of cases that will have to be judicially determined.

Presentation of evidence

62. As practitioners we need to take a second look at how we present our present our cases and ensure that all the pertinent information is set out in witness statements. Furthermore we need to be willing to think outside of the box and consider what else can I do for my client, should I be instructing a Human Resource Consultant to assist in the prosecution/ defence of a claim for handicap on the labour market? However, whatever the decision, we must always be mindful of costs and proportionality.

This paper is the effort of the Insurance Litigation team at Nunes Scholefield Deleon & Co., comprising of Symone Mayhew, Camille Wignall, Kerry Ann Rowe, Tashia McDonald and Julie-Ann Ellis.

Annex 1

i) Case Study 1

Claimant sustained Injuries to the neck and back.

Dr. A – Examines Claimant in November of 2007 assesses Permanent disability - “Estimated disability is based on the AMA Guide to evaluation of Permanent Impairment, fourth edition. total disability = 19% whole person impairment

Dr. B - Approximately four (4) months later (March 2007) seen by another orthopaedic specialist who diagnoses whiplash injury and mechanical lower back pains and says a “total permanent partial percentage disability is ten percent (10%) of the whole person.” In accordance with the AMA Guides to evaluation of permanent impairment, 5th edition

ii) Case Study 2

Claimant sustained injuries to neck and back in January of 2004

Dr. A-

Examination February 2007, total disability assessed as 10% whole person impairment using AMA Guides to Permanent Impairment, Fourth edition

Dr. B -

Examination July 2007, had benefit of Dr. A's report. Disability rating – Permanent partial percentage disability assessed at 5% whole person, no edition indicated.

iii) Case Study 3

Claimant sustained injury to her foot and presents with similar complaints to all the Doctors seen.

Dr. A-

Examined in July 2006, the disability rating is expressed as:
Permanent partial disability (15% to total body)

Dr. B-

Examines the Claimant during the period August to September 2006. Final Assessment :There is no disability for this injury.

Dr. C-

Examined Claimant in March of 2007 as concluded his report as follows: At this time I have estimated her disability at 15%

Dr. D-

Examines Claimant on three occasions between September 2007 to January 2008, assesses an impairment rating of 1% of the whole person based on the AMA Guides, 5th edition

iv) Case Study 4

Claimant sustained left sciatic nerve paresis, an injury to the sciatic nerve resulting in drop foot syndrome.

Dr A -

In September of 2005 after assessing the patient as having reached a plateau in his recovery with not much further recovery expected assessed a permanent impairment due to loss amounting to **11%** of the whole man based on the AMA Guides to permanent impairment, fourth edition.

Dr. B-

examined the patient in June of 2006 and assessed his permanent impairment rating as **29%** of the whole person based on the AMA Guide for the Evaluation of Permanent Impairment (fifth edition)