JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 83/96

COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	**MONEX LIMITED**	**1ST DEFENDANT/APPELLANT**
AND	**DERRICK MITCHELL**	**2ND DEFENDANT/APPELLANT**
AND	**CAMILLE GRIMES**	**PLAINTIFF/RESPONDENT**

Donald Scharschmidt, Q.C. & Daniella Gentles instructed by
Livingston, Alexander & Levy for appellants

Carol Davis for respondent

27th, 28th, 29th April, 1st May
18th June, & 15th December 1998

RATTRAY, P.

On the 31st of May, 1996 Edwards J., awarded judgment in favour of the plaintiff Camille Grimes in an action brought by her in negligence against the defendant arising out of a motor vehicle accident in which the plaintiff was hit down by a motor car on the roadway in the vicinity of the Hope Experimental School on University Road in the parish of Saint Andrew.

The trial judge awarded the following damages:

> "1. Special Damages in the sum of $35,000.00 with interest at 3% per annum from 10th December, 1982.
>
> 2. General Damages in the sum of $1,150,000.00 as follows:
>
> Pain and Suffering and loss of amenities $1,100,000.00

Handicap on the Labour Market $50,000.00.

3. Interest on the said sum of $1,150,000.00 at 3% per annum from the 14th day of November, 1986; and

4. Costs to the Plaintiff to be agreed or taxed."

It is this judgment which has come before us on appeal by the defendants, the owner and driver of the motor car which was involved in the accident.

The plaintiff/respondent was at the time of the accident a schoolgirl of 10 years of age. The evidence supporting her claim was that on the 10th December, 1982 she travelled on the No. 10 J.O.S. bus in her Brownie uniform to attend a Brownie bonfire at her school. She alighted from the bus at a bus stop across the road from the school and close to a pedestrian crossing. Whilst she was in the pedestrian crossing and making her way to the other side of the road on which the school is situated, a motor car travelling in the opposite direction came around a corner and hit her down.

The plaintiff did not give any account of the accident as she retained no memory of it. However, eyewitness evidence was given on her behalf by the bus driver and a school friend Josephine White aged 8 years at the time of the accident and who was in the school yard at that time and witnessed what had happened.

The defence relied on the evidence of the driver of the motor car which was to the effect that the little girl ran from behind the bus into the path of the car and that the accident could not be avoided. At the place where the accident occurred on the driver's evidence no pedestrian crossing existed. A passenger in the car who gave evidence could not recall seeing a pedestrian crossing at the place where the plaintiff had been hit down. The Court made two visits to the locus during the hearing of the action.

The trial judge on the basis of the evidence given before him and his visits to the locus accepted the account of the plaintiff/respondent witnesses on the facts and found the defendant/appellant liable.

There was much evidence on which the trial judge could have come to a conclusion of negligence on the part of the driver of the motor car. The area is a school area and was known to the driver of the car as such. The Brownies were having a bonfire there on that evening and the driver was aware of this. The driver of the car did not sound his horn. He saw the bus stationary at the bus stop near to the school. There was evidence of a pedestrian crossing there to be seen on the visits to the locus but even assuming that the pedestrian crossing was not there at the time of the accident, the car driver seeing a stationary bus at the bus stop in a school area at the time when there was activity at the school should have anticipated someone coming off the bus, and also should be aware of children in the area. The trial judge accepted, as he was entitled to do, the evidence of the plaintiff's witness as against that of the defendant's witnesses in relation to how the accident occurred.

The challenge therefore by Mr. Scharschmidth, Q.C., to the Judge's assessment of the facts and his conclusion in respect to the negligence of the appellant cannot be sustained.

If I have not fully ventilated the questions of law raised and commented on the burden of proof and the duty of care, it is because the law in these matters is so very well-established and known that it does not require repetition. On any proper assessment of the facts as found and a proper application of the relevant law the result establishes negligence on the part of the appellant. Furthermore, I accept Miss Davis' submission on behalf of the respondent in this regard. Consequently, I agree with the Judge's finding on liability.

I have read in draft the judgment of Harrison, J.A. on damages and agree therewith, and with the order proposed.

HARRISON, J.A.

The respondent suffered injuries in a motor vehicle accident on the 10th day of December, 1982, along the main road at August Town, St. Andrew, when she was struck by a motor car owned by the first appellant and driven by the second appellant.

Having read the judgment of the Honourable President, I agree with his reasoning that the said injuries were caused by the negligent driving of the second appellant and consequently the learned trial judge correctly found both appellants liable to the respondent. In the circumstances, it is unnecessary for me to reiterate the issue of liability.

The damages awarded were as follows:

Special Damages -	$35,000.00 plus interest at 3% from 10th December, 1982 to 31st May, 1996.
General Damages-	
(a) Pain and suffering and loss of amenities	$1,100,000.00
(b) Handicap on the labour market	$ 50,000.00, plus interest @ 3% on $1,150,000 from 14th November, 1986 to 31st May, 1996 . Costs to be agreed or taxed.

On the issue of damages, counsel for the appellants argued that the award of $1,100,000.00 for pain and suffering and loss of amenities was excessive on an examination of the awards in comparable cases and ought to be reduced, and that the award of $50,000.00 for handicap on the labour market should not have been made in view of the lack of evidence even though it is speculative, or alternatively, if the court finds that there was evidence then only a moderate sum should be awarded.

Counsel for the respondent, by notice filed, argued that examining the awards in previous cases both sums were too low and should be increased, that the respondent suffered severe brain damage and resulting neurological defects resulting in a deterioration of her mental faculties and capacity to learn and to be employable and the finding that she was ... "in good health..." and that her injuries had "... not affected her...," was not consistent with the medical reports; that in considering the award of handicap on the labour market in respect of a child, a different approach should be taken than in relation to an adult, in that a child so injured, loses the potential and expectation to earn and that there was sufficient evidence to make both awards though speculative, in moderate and not nominal sums.

The principle governing the award of damages for injuries in tort is to compensate the victim in order to restore her, as far as money can, to the position in which she would have been, if the tort had not been committed (**Admirality Commissioners vs S.S. Valeria** [1922] A.C. 242).

Tersely described as restitutio in integrum, this principle although aiming at full and adequate compensation must not be excessive. In order to maintain this balance, a judge is required to so advise a jury, or himself, if sitting alone, in assessing such damages.

This was ably described, by Sellers, L.J. in **Warren vs King** [1963] 3 All E.R. 521, when he said:

> "...It has ...been the invariable rule that judges have warned juries to keep to a standard of moderation and fairness in the interest of both parties... there are generally a number of ingredients... in an award of damages, and, if every ingredient is extravagantly or too meanly assessed, the whole may become immoderate and unreasonable, either too much or too little, and a caution to a jury...

> tends to ensure a reasonable and not excessive or inadequate award." (p. 526)

A judge sitting alone should equally advise himself in the above terms, in arriving at a final assessment of damages. There must be evidence on which a judge bases his award, and difficulty of assessment should not preclude him from doing so.

The material facts, including the medical evidence summarised hereunder are: On the 10th day of December, 1982, the respondent then 10 years old, while crossing the August Town main road, was hit down within the pedestrian crossing by a motor car owned by the first appellant. She became unconscious and was admitted to the University Hospital, bleeding from an 8 cm. laceration to the left side of her head, lacerations to her body and a left periorbital contusion. She was diagnosed as having suffered "a diffuse brain injury, a scalp laceration and post-traumatic epilepsy." She was treated and remained unconscious for about two weeks, but not able to talk until after five weeks, although "speech was slow and dyarthric," as described by Dr. Ivor Crandon, a consultant neurosurgeon. She suffered six weeks of post traumatic amnesia and a psychological assessment by one Sister Johanna Mary showed her performance as "borderline... with deficit in information processing, categorization, and conceptual skills." She was discharged on 29th January, 1983 only then just able to walk without support, and able to feed and change herself.

Dr. Crandon examined the respondent on 3rd April, 1990, 7th May, 1990 and 17th May, 1990. On the latter date she was found to be "alert and orientated in time, place and person," had an impaired short term memory, fair verbal recall, but very good visual recall. Her ability to do simple calculations was impaired and substandard and her multiplication was slow. Her speech was slow and sometimes halting; she had

difficulty in pronouncing some words, had at times a blank stare, a "left facial weakness and right frontalis muscle palsy" giving her face a "slightly unusual appearance."

An examination was conducted of the respondent's educational performance. A pre-accident report, for 1981/82, recorded an overall B+/A - average grade. The post-accident report available for comparison was of July, 1983 "which showed a considerable decline in performance with an average C-grade." Assessment done in May 1986 by the Jamaica Association for Children with Learning Disabilities, and in 1988 by Mico College revealed deficits in her information processing and reasoning, a below average educational performance in various categories of conceptualizing/reasoning ability, and acquired knowledge.

Dr. Crandon's opinion was:

> "She has suffered a severe head injury. There is evidence of generalized brain damage of a moderate degree. There is residual deficit of mental function including language and information processing, also of speech, coordination, balance motor and autonomic function. Using the Glasgow Outcome Scale for grading disability after head injury, this young lady would be considered moderately disabled. This scale grades disability after injury into four classes. These are:
> Vegetative, Severe Disability, Moderate Disability and Good Recovery in ascending order of function.
>
> Her disability results in mental and physical deficits and also carries social implications within her peer group and the wider society.
>
> There is mild disfigurement. This is the result of the scars and mild impairment of facial expression consequent upon the right frontalis palsy and the left facial weakness.
>
> There is no deformity which is referable to her head injury.

PROGNOSIS

> She is permanently at increased risk for epilepsy compared to the rest of the population. This risk is of the order of 17 percent and is the result of the injury, the long period of post-traumatic amnesia and the occurrence of early epilepsy.
>
> Further improvement in her neurological capabilities is unlikely at this stage. That is not to say that she will not benefit from further education. However, because of her neurological deficit, her ability to benefit from this is permanently impaired. There are therefore obvious implications for her eventual educational accomplishments and career opportunities."

This opinion given by Dr. Crandon on 20th June, 1990, revealed a lower level of progress than projected earlier by him. His report dated 30th August, 1984, to the Principal, Excelsior High School, which the respondent was due to attend, optimistically read:

> "Camille Grimes was admitted to this hospital on 10th December 1982, after suffering a severe head injury. She has made a good recovery. Her speech is slightly halting but almost normal. There is no weakness but she stumbles occasionally when she walks. Continued recovery may occur. There is no reason why she cannot attend a High School and participate fully in all activities including physical education, to the best of her ability. She will be easily able to accomplish frequent inter-classroom movements.
>
> We look forward to hearing good reports about her progress."

The respondent's father Hubert Grimes gave evidence of her difficulties after she left the hospital: that she could not speak properly, nor walk properly "for about one and a half year ...", she needed assistance; that she could not bathe herself, nor grip knives or forks, nor pens, nor pencils- she did physiotheraphy therefor at the Mona

Rehabilitation Centre. That she sat the common entrance examinations in January 1983, unsuccessfully; that her grades in school fell and she no longer participated in Brownie activities, school choir or other activities, which she had done before.

The respondent herself testified to her physical difficulties after the accident, her inability to participate in school activities including sports, until she was at Excelsior and confirmed that she developed epilepsy as a result of which she had seizures for which medication was prescribed. At the time of trial in 1996, she still had such epileptic seizures although at less frequent intervals, her hand writing had improved, so also had her walking, although somewhat unsteady. Her speech has a slur and she can now run as exercise.

An award for pain and suffering and loss of amenities is given in an attempt to compensate the victim, in money's worth, for the pain and mental suffering and the deprivation of the enjoyable things of life that she has undergone because of the action of the wrongdoer. It may fall short of achieving that objective, because courts may differ in their approach in doing the best they can. However, an appellate court will look at the global figure, and will not disturb the award unless it is out of harmony with comparable cases as being inordinately too high or too low.

The proper approach was described by Birkett, LJ in **Rushton v. National Coal Board**[1953] 1 All ER 314. He said at page 317:

> "I still think ... that it is a most useful thing to look at comparable cases to see what other minds have done, and so to gather the general consensus of opinion as to the amount which a man in a certain state of society ought to be awarded."

This approach was approved in later cases, notably in **West and Son Ltd vs Shephard** [1963] 2 All ER 626 and **Wright v British Railways Board** [1983] 2 All ER 698.

In **Damages for Personal Injuries and Death, 8th edition**, the author John Munkman cautioned, at page 21:

> "... comparable cases are a guide and a tool, not the essence of the award; they are always open to review by the court."

In challenging the award of $1,100,000 for pain and suffering and loss of amenities, both counsel for the appellants and the respondent in advancing their opposing views, referred us to several cases:

(1) In **Smith vs Smith et al**- C.L. 1985 S 393 (Harrison's Assessment of Damages - Personal Injuries page 38)

Date of Award: 26th July 1990 (infant - 5 years old date of accident.)

Injuries: Brain damage causing excess fluid in brain and blood clotting, fracture of right femur.

Disabilities: Shortening right limb, inability to walk, moved on knees, grandmal-epilepsy, incontinence severe intellectual loss and emotional disturbances, functions at level of 18 month old; requires institutional care.

Pain and suffering and loss of amenities: $200,000 (Value May 1996: $1,337,279.70)

(2) **Hamilton vs Walford** - C.L. 1989 H3 (Harrison's Assessment of Damages - Personal Injuries, page 54)

Date of award: 31st. January, 1991.

Injuries: Brain damage from head injury, lacera-

tions and abrasions

Disabilities: Right hemiparesis and right facial palsy, speech defect, weakness in right upper and lower limbs, 15% defection in recent memory, wasting of muscle of right limb and lower extremity, walked with limp right side permanent injury to left hemisphere of brain, 50% impairment of whole person and resumption of physical work unlikely

Pain and suffering and loss of amenities: $150,000 (Value - May 1996 $847,142.85)

(3) **Burrell et al vs United Protection Ltd. et al** - C.L. 1992 B72 **Khan's, Personal Injuries**, page 182)

Date of Award: 23rd October, 1996 - (infant 8 years accident 16th August, 1990)

Injuries: Fracture of base of skull with moderately severe cerebral contusion, brain injury, swelling and hemorrhage of the right eye, abrasions and lacerations, unconscious two(2) days.

Disabilities: Unable to walk for two (2) weeks, intellectual functions impaired, smiling laughing and giggling inappropriately on visits to doctor and complained of headaches and pain in right eye; reduced learning ability in class at school, learning capacity diminished, concentration impaired, memory function diminished 25% because of injury to brain; 80% risk of developing epilepsy, ability to earn impaired. Plaintiff functioning below age level, unable to pass exams; remedial therapy recommended.

Pain and suffering and loss of amenities: $1,372,000.00

Loss of earning capacity: $312,280.00

In the instant case the respondent suffered " a severe head injury..." with "...generalized brain damage of a moderate degree..." with consequential "... residual deficit of mental function including language and information processing, also of speech, coordination, balance motor and automatic function." Dr. Crandon's assessment in 1990 was that she would be considered "moderately disabled." In addition in my view, the 5 c.m. scar to her forehead would add no charm to her features. She has suffered and will continue to suffer mental and physical disabilities.

It is undoubted that the injuries in the first two of the abovementioned cases are somewhat more serious than the instant case. However the award of $1,100,000 for pain and suffering and loss of amenities cannot be regarded as so out of line with comparable awards to warrant its disturbance. This award should stand.

In respect of the award for handicap on the labour market, counsel for the appellant argued that there was no evidence in the case on which to base such an award, and if there was, the amount awarded should be moderate. Counsel for the respondent countered that there was evidence to permit such an award and agreed that such an award should be moderate not nominal and in the instant case it was too low.

Loss of future earnings to a victim as a consequence of disability suffered due to the action of a wrongdoer, may arise in various ways, and attract a varied categorisation.

Loss on the labour market, handicap on the labour market, loss of earning capacity, in my view, may be regarded as synonymous terms. They represent a specific categorisation. This head of damages arises where the said victim:

(a) resumes his employment without any loss of earnings; or

(b) resumes his employment, at a higher rate of earnings,

but because of the injury he received, he suffered such a disability that there exists the risk that in the event that his present employment ceases and he has to seek alternative employment on the open labour market, he would be less able to vie because of his disability, with an average worker not so affected: (See **Moeliker vs A. Reyvolle & Co. Ltd**[1977] 1 All ER 9).

Loss of future earnings represents a distinctly different circumstance where the victim who, earning a settled wage, has suffered a diminution in his earnings on resuming his employment or assuming new employment, due to his disability. The net annual monetary loss in terms of the reduction in earnings is easily recognizable and quantifiable, in such circumstances.

A further situation may arise, not falling exactly within any of the above categories. For example, in a case where an infant victim, not yet employed, is injured and suffers a disability and the risk exists that subsequently he will be unable to work or will obtain employment at a level below that which he would have, with normal development, but for his incapacity. This deficit in earnings represents a handicap on the labour market. It attracts an award and is quantifiable, whether by way of a global sum or by the use of the multiplicand and multiplier principle. This is so despite the fact that there is not yet any actual earnings attributable to the said infant.

Lord Denning explained the distinction between awards for "loss of future earnings" and "loss of earning capacity" in **Fairley vs John Thompson (Design and Contracting) Ltd** [1973] 2 W.L.R. 40. He said at page 42:

> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is

> awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as a part of general damages."

The author in **Damages for Personal Injuries** John Munkman, supra, although recognizing the above categories, placed a broader definition on "loss of earning capacity." With reference to the case where the victim has suffered no reduction in wages or is in receipt of increased earnings he said, at page 75:

> "These cases are sometimes described as 'loss of earning capacity', but this is inaccurate as all claims for future earnings are based on loss of capacity.... What distinguishes these from other cases is that there is no immediate loss and future loss is uncertain. This does not prevent an award of damages. The court has to assess and value the chance that there will be actual loss sooner or later."

The award of damages for loss of earning capacity in respect of an infant victim not yet earning a wage and disabled by the act of the defendant, although speculative, represents to the said victim a real loss which a court has a duty to examine and quantify, if material is provided by evidence.

In **James vs Lawrence** [1969] 3 All ER 267, the plaintiff, 7 years old, was hit down by the defendant's motor cycle and sustained lacerations, fractures of the skull resulting in permanent brain damage causing impairment in his ability to concentrate. His school work was adversely affected for approximately three years, he failed his examination to go to a grammar school and went to a comprehensive school instead. In making an award for "loss of future money earning capacity" as a part of general damages, Cumming-Bruce, J. said, of the plaintiff, then 12 years old:

> "In my view the loss of opportunity of grammar school education and the permanent impairment of powers of concentration are significant in relation to the infant plaintiff's future opportunity of obtaining

> the kind of job that would otherwise have been open to him...
>
> ...That loss of opportunity together with permanent impairment of power of concentration implies some loss of future money earning capacity and, perhaps more important, a restriction on the openings available to a bright young man who has been to a grammar school."(At p 271)

The earning power of the victim's parents or the national average wage may have to be resorted to in the determination of the potential earning of an infant in the assessment of loss of earning capacity.

In **Taylor vs Bristol Omnibus Co. Ltd.** [1975] 1 WLR 1055, the plaintiff, 3 years old, sustained severe head injuries in a motor vehicle accident, crippling him for life. He did not walk nor feed himself, nor control his arms or speech, had major epileptic attacks and required constant supervision and nursing. The Court of Appeal confirmed an award for "loss of future earnings" for the said plaintiff, then 10 years old, using as the basis, the earnings of his father, and applying to the multiplicand so found, a multiplier of 16. The court stated its approach in such cases at page 1059:

> "In children's cases hitherto, the courts have made an estimate of loss of future earnings"

The method by which such estimate is arrived at, whether by the use of the multiplicand/multiplier means or the global sum, depends on the circumstances of each case. Where the imponderables are numerous and the projections have not reasonably crystalized, the multiplicand/multiplier method is rarely used, but this is not an invariable practice.

In **Joyce v Yeomans** [1981] 1 W. L. R. 549, the plaintiff, nine years old at the time of the accident, sustained head injury, rupture of the spleen, fracture of the clavicle and began to suffer "epileptic seizures which continued when he went to

grammar school, to the detriment of his performance there and future employment prospects." On the plaintiff's appeal, against damages, the Court of Appeal allowed the appeal on the basis that the award of £7,500 was too low for loss of earning capacity.

The use of the multiplier/multiplicand method was not preferred in that case. Waller, L.J. while agreeing on the figure, said quite unreservedly at page 555:

> "... I agree... that the multiplier/multiplicand basis is inappropriate in a case of this sort..."

However, Brandon, L.J..... embraced the more flexible view, with which we agree, he said at page 557:

> "I feel it right to express my view that, while a court is not bound to arrive at a multiplier and multiplicand in a case of this kind in order to assess the damages, it would be erring in law if it attempted to do so. The basis for finding a multiplicand is slender but judges are often faced with having to make findings of fact on evidence which is slender and much less convincing than would be desirable. Therefore it seems to me to be open to the court to approach the problem by putting a figure upon the loss of earning capacity on a weekly or annual basis and applying a multiplier to that figure. I do however think that if that method is adopted, then the court should take a very careful look at the ultimate result in the round in order to see whether it seems a sensible figure in general terms or not."

Carey, J.A. in **Kiskimo Ltd. vs Deborah Salmon** (unreported) SCCA No. 61/89 delivered 4th February, 1991, commented approvingly of the ratio of the Court of Appeal in **Joyce vs Yeomans** (supra). He said at page 10:

> "The reason given for treating the arithmetic approach as being inappropriate was that having regard to the nature of the disablement in that case, the imponderables were too many. But the court was careful to say that even if that method had been used it would not have entitled the court to say that the judge had erred."

Gordon, J.A. said at page 27:

> "The plaintiff had never been employed and there was no evidence adduced to grant an award for 'real assessable loss'. The evidence led was in support of a claim for compensation for diminution in earning capacity and the trial judge assessed damages under this head as a part of general damages. I find no fault with this approach."...,

and at page 28:

> "Critical factors in the approach to assessing loss of earning capacity are the imponderables and the degree of speculation involved. Where these are great, to arrive at a figure that is fair compensation to the plaintiff but is also fair to the defendant, the court should assess a figure without making the assumption that the child would ultimately fulfill his/her life's ambition as to the choice of a career."

Gordon, J.A. went on to apply the multiplicand/multiplier method in calculating the award for the loss of earning capacity.

In the instant case the respondent suffered a severe head injury causing moderate brain damage. Her recovery has been good but her resulting disability was classified as moderate. She suffers from a speech defect of halting and slurring; her concentration has been impaired and her co-ordination and balance affected - stumbling occasionally when walking. The prognosis of 17% risk for epilepsy remains, but she has in fact experienced only involuntary body tremors. She took anti-epileptic medication. Her ability to benefit from further education is permanently impaired because of her neurological defects caused by the injury. Whereas she was graded as a "B+/A" student and placed in the "A" class at school prior to the accident, after the accident and the resulting disability she declined to a "slow learner," "low average," "C-" classification. Consequently, she failed to pass the common entrance examination in 1984, and CXC subjects at Excelsior in 1989.. Dr. Crandon's medical report of the

20th June, 1990 recognising no medical history of illness or injury prior to the accident in relation to the respondent, diagnosed that her educational accomplishments and career opportunities would be affected by her post-accident disabilities. The respondent is mildly disfigured with a scar to her face, walks with a limp and has an impairment of her facial expression because of a "right frontal palsy and the left facial weakness"; these are features highly prejudicial to a female seeking employment involving service in public. However other areas of employment exist.

The respondent having failed the test to qualify for enrollment in a course in front office management operated by Human Employment and Resource Training joined its School Leavers Programme and was assigned a job as teacher's aide at a basic school in 1991. She was so employed for six (6) months; she left voluntarily because she felt "betrayed," having confided information to her teacher trainer who communicated it to the staff. In 1994 the respondent gained employment as a cashier at a supermarket for two (2) months; this she also left because the correction of her frequent mistakes at the cash register called "voiding" caused by the lack of co-ordination in her fingers, earned her a nickname. From May 1995 she was employed as a salesperson for two (2) months, but left because the earnings were "very small. After (the payment of) bus fare and lunch, there was nothing left."

The respondent was clearly adversely affected, mentally and physically by the injuries received. Her academic development was so arrested that she was unable to acquire and retain knowledge sufficient to succeed in exams or to obtain and remain in employment. She suffered a reduced eligibility for employment (See **Gravesandy vs Moore** (unreported) SCCA 44/85 delivered 14th February, 1986.)

The speculation involved in the assessment of loss of earning capacity or handicap on the labour market in respect of an infant plaintiff is due to the degree of imponderables involved. In the instant case matters that were earlier regarded as uncertain, for example, the degree of impairment of her mental and physical condition and the likelihood of epilepsy and her ability to gain employment were reasonably more predictable and settled at the date of trial. It seems to us, that, the imponderables having been somewhat reduced, the multiplicand/multiplier principle is appropriate.

Creditably, the respondent has been diligent in seeking employment. She has not sought to capitalize on her disability and thereby to neglect to seek employment to gain a benefit. Her best efforts both to attempt examinations and training have not been entirely successful. However, she hardly has a choice to decide that teaching, at whatever level:

> "... is not something I would want to to do for a lifetime..."

The instant case does not follow the usual pattern, because at the date of trial and assessment of damages for the handicap on the labour market, it was not a situation that the victim was a infant with a disability and who had not yet begun an employment nor a person who had been injured and resumed employment with no loss of or with increased earnings. The respondent received her injury and disablement while she was an infant not yet employed and has since gained employment, albeit irregularly and handicapped by her disability.

There is no evidence of a regular wage earned by the respondent on which the trial court could have relied; Edwards, J. was entitled to rely on other evidence in the case. A witness, Hubert Sherrard, a statistician employed to the Statistical Institute of Jamaica gave evidence of the national average income in Jamaica. Quoting from the

said Institute's latest report, in the compilation of which he was involved, he said that the national average income for September 1994 was $2,563.50.

It is incorrect to seek to update this amount by using the consumer price index, because no allowance can be made for increase in the sum for earnings due to inflation; only real increases are considered. **(Young vs Percival** [1974] 3 All ER 677). There is no evidence of any actual increase in earnings between September 1994 and the date of trial in 1996. Even if there was, it is notorious that increases were at a minimum and along with the unemployment and lay-offs, such increases, if any, would have been negligible.

In the circumstances, the national average income of $2,536.50 per week is an appropriate starting point in respect of the respondent's earnings. In order to find the appropriate multiplicand, to achieve a fair balance to both the appellant and the respondent, this gross figure taxed down by 25% would yield a net earning of $1,902.38 per week (vide **British Transport Commission vs Gourley** [1957] 3 All ER 796.)

The respondent is not totally incapacitated and is therefore capable of being employed and was employed. Account therefore has to be taken of the extent of her employability. The evidence is that she was employed as a cashier and also in a "holiday job" at a wage in each case of "$350 - $400 per week." Deducting the sum of $400 her net loss of earning per week is $1,502.38, which, if it is multiplied by 52 shows an annual net loss of $78,145.60, the multiplicand.

At the date of trial in 1996, the respondent was 24 years old. Assuming her retirement age is 60 years of age, she would have a working life remaining of 36 years. In arriving at an appropriate multiplier, the court has to take into consideration the

uncertainties of life, the chances of intervening illness and the fact that a lump sum payment is being awarded at once for losses that would normally accrue in the future. Taking these contingencies into account an appropriate multiplier would normally be 14.

The respondent at age 24, is unemployed, but despite her permanent disability Dr. Crandon said, in 1990, "That is not to say that she will not benefit from further education."

The respondent's general neurological condition has improved, and one cannot necessarily state that the lack of employment is not in part due to the high level of unemployment, and her own unfortunate choice not to remain in some jobs. These factors demand that a lower multiplier be applied, the chances and risks having been influenced by her own actions. Probably, her wages as a sales person would have improved with time, but for her own premature act of termination. An appropriate multiplier, in the circumstances would be 9, taking the above factors into account.

The amount assessed for handicap on the labour market is therefore $78,145.60 multiplied by 9, namely, $703,310.40.

It is worthy of note that from the date in 1991 when the respondent commenced her working life until the date of trial, real quantifiable losses were sustained, which could have been claimed as loss of earnings, an item of special damages.

The Respondent's Notice treated as a cross-appeal is allowed in respect of the head of damages, handicap on the labour market. The award of $50,000.00 is set aside and substituted is the sum of $703,310.40. No interest is payable on this sum, being future earnings. **(Jefford v Gee** [1970] 1 All ER 1202).

The overall award should read:

Special damages - $35,000 plus interest at 3%

from 10th December, 1982
to 31st May, 1996.

General damages - $1,803,310.40 being,

Pain and suffering - $1,100,000,00

Handicap on the labour market - $703,310.40, plus interest at 3% on $1,100,000.00 from 14th November, 1986 to 31st May, 1996

and costs to be agreed or taxed.

RATTRAY, P

Appeal dismissed The cross-appeal of the plaintiff/respondent on the Respondent's Notice is allowed. Order of the court below varied. The award to read:

Special damages - $35,000 plus interest at 3% from 10th December, 1982 to 31st May,1996.

General damages - $1,803,310.40 being,

Pain and suffering - $1,100,000.00

Handicap on the labour market - $703,310.40 plus, interest at 3% on $1,100,000.00 from 14th November 1986, to 31st May, 1996.

Costs to be agreed or taxed.

Costs of the appeal and the cross appeal to the plaintiff/respondent to be agreed or taxed.

It should be noted for the record, that Gordon, J.A. (deceased) approved in draft the foregoing judgment before his passing.