JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 61/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	KISKIMO LIMITED	DEFENDANT/APPELLANT
AND	DEBORAH SALMON	PLAINTIFF/RESPONDENT

Dennis Morrison & David Batts for Appellant

Ainsworth Campbell for Respondent

November 6, 7, 1990 & February 4, 1991

CAREY, J.A.

On 21st April, 1982, the plaintiff a normal, healthy 13 year old school girl attending the Queens High School in St. Andrew was very seriously injured in a motor vehicle accident involving the defendant's motor car. For five weeks thereafter she was unconscious and then she remained partially unconscious until July 1982. She suffered brain damage which has resulted in epileptic seizures and intellectual impairment. She has been placed in the category of severely disabled brain damaged patient. There is also orthopaedic disability. She told the judge that she is unable to walk, use her hands and do things for herself. She has to be bathed. She has learnt to use her left hand but there is no movement in her right hand which she cannot now use.

Fortunately, she has loving parents and was able to return to school. But not to her former school; she attended Wolmers Girls' School instead because there she had no staircase to negotiate. Her schoolmates helped her by pushing her wheelchair to class-rooms and to the bathroom. She found it difficult to take notes. For examination, a typist was employed. She sat six subjects in the C.X.C. examination

and was successful in five. She was unable to read General Maths because she needed both hands to manipulate geometry instruments. Her ambition was to become an attorney-at-law, but she no longer believes that is attainable. Dr. John Hall a neurologist confirmed that there was absolutely no likelihood of her becoming a lawyer. He does not visualize her doing any meaningful work nor being capable of any intellectual activity. There was no likelihood either of her condition improving to the extent that she could produce in economic terms. A clinical psychologist said that she was 75% disabled as a total person. Her intellectual defect was rated in the 30% area.

From a note of his findings which formed part of the record, the judge appears not to have been persuaded that her condition was as hopeless as the medical expert's opinion suggested. He held that her ambition to be a lawyer was entirely realisable but stated her handicaps in the employment market are real and she must be fully compensated for them in the area of loss of earning capacity.

He awarded her damages as itemised below:

General Damages -

(1)	Pain & Suffering	$500,000.00
(2)	Loss of earning capacity	450,000.00
(3)	Future Nursing care Future Transport Future medical care Future medication Future therapy	366,900.00
		$1,316,900.00

The appeal relates to the quantum awarded for two heads of damages viz., $130,000.00 for future nursing care and the award of $450,000.00 for loss of earning capacity. By a

cross-appeal, the respondent also challenges the quantum in respect of those heads and in addition questions the quantum of the award for pain and suffering. I propose to deal with these matters under their respective heads.

FUTURE NURSING CARE

Under this head, the judge awarded the sum of $130,000. He used a multiplier of 25 years and a multiplicand of $100.00 per week which gave him the figure awarded. Mr. Morrison challenged that multiplier on the ground that the judge had not taken into account the factors of a present lump sum awarded for expenses to be incurred in the future. He pointed to the fact that in compensating the parents for their time and care in respect of the plaintiff, he had discounted the multiplier by 25% and in respect of earning capacity, he had used a 50% discount. With respect to the sub-head, he had not discounted the multiplier by any manner of means. Counsel suggested that since the award would cover a longer period into the future than either parental care or earning capacity, he should have used the same figure of 50% rather than the 25% formula mentioned above.

It is necessary at this stage to point out that this Court's function on an appeal against the quantum of an award of damages, is to determine whether the global figure or the figure arrived at, in the round by the trial court, is outrageously high. Orr L.J., in **Taylor v. Bristol Omnibus Co. Ltd.** [1975] 1 W.L.R. 1054 at p. 1063 expressed this view thus -

> "whether standing back from the details of the case and looking at the totality of the award, it can be said that it is too high."

In determining this question however, it is inevitable that the components of this figure in the round, must be scrutinized.

Where judges give a reasoned judgment or set out the basis of the award arithmetically, this court's task is greatly lessened. The learned judge in this matter has provided us with the notes of his mathematical calculations, and we are obliged to him.

The evidence as to the plaintiff's life expectancy came from Dr. John Hall. His opinion was that her life's expectancy was less than the average for women, which was 73-75 years. At the time of the trial of this action, when she was aged 20 years, her residual life expectancy probably could be reckoned at about 71 years. It is to be borne in mind that the court in assessing compensation for the expense of nursing and attendance is not calculating ahead what that expense will be. It is only giving compensation for the fact that in the future, extra expense will be incurred. See the observations of Lord Denning M.R. in **Taylor v. Bristol Omnibus Co. Ltd.** (supra) at p. 1057. The probable life expectancy of 50 must be reduced to have regard to the fact that a lump sum payment is being made immediately and there are a number of imponderables to be considered. The plaintiff's present condition, both physical and mental might conduce to her being involved in some accident resulting in earlier death. Note must be taken of the fact that she is subject to epileptic fits and the neurological damage has resulted in paralysis in her lower limbs. She cannot respond to danger as quickly as normal.

In **Povey v. Governors of Rydal School** [1970]1 All E.R. 841 the plaintiff aged 16½ years suffered grave injuries as the result of a fall in the school gymnasium. He would never be able to stand or walk. There was a complete loss of sensation from the collar bone to and including the soles of

his feet. He was severely incapacitated in that he was doubly incontinent, both as to bladder and bowel action. Prior to the accident, he had obtained nine G.C.E. O'Level subjects and planned to take the G.C.E. A' Level in science subjects. His ambition was to become a doctor. However, he was able after the accident to read English and History and as a result of his passes at A' Level was accepted at Manchester University to study psychology. His aim was to become a child psychologist. His expectation of life was agreed at 25 years. The judge therefore used a multiplier of 25. Although there was an appeal and cross appeal as to quantum, in the event they were not pursued as there was a settlement which did involve some variation in the judgment.

We were provided with another judgment viz., **Taylor v. Glass** heard 23rd May, 1979 at Middlesborough before Smith J. This judgment has not apparently been reported in any Law Reports but appears in Kemp & Kemp Vol. II 1986 Edition section C paragraph 1-715. There too the learned judge used a multiplier of 25. The basis for the choice of that multiplier was threefold viz:

(i) his finding as to the plaintiff's life expectancy as against his present age of 9 years. He found that there would be some reduction in the plaintiff's life expectancy of 10-15 years;

(ii) the high incidence of taxation upon the sum. The judge made an increased adjustment to take care of inflation;

(iii) evidence that the plaintiff would probably outlive his parents whose life expectancy was in the order of 25 to 30 years.

These reasons can, I think, be applied to the present case and tell in favour of a high rather than a low multiplier. The question of inflation is of great importance because it

is well known that the Jamaican dollar continues to deteriorate at an alarming rate the incidence of 33 1/3% income tax rate is also a relevant conversation. Against these factors, must be balanced the high interest rates paid on time deposit on funds invested by banks or other finance houses.

In the cases I have cited, no percentage discount was employed by any of the judges and the reason is not far to seek. It is the multiplier which is to be adjusted to take account of factors of immediate lump sum payment and other contingences. I will return to this aspect of the matter when I come to deal with the head of "earning capacity" later in this judgment.

The multiplier in both these cases were applied to persons aged 16½ and 9 years respectively but in the instant case, our concern is, with a person aged 20 years. That leads me to believe that a multiplier of 25 would be too high and a lower multiplier would be appropriate. That appropriate multiplier, I would fix at 18 years purchase.

NURSING CARE BY PARENTS

There was included under the head of special damages a claim for "special help at home up to 15th March, 1985 because of plaintiff's condition and continuing at $60 per week - $6,660." The judge did make an award under this head and no complaint has been made in that regard. As is plain on the evidence, this unfortunate young woman will be dependent on others for her physical well-being for the rest of her life. In other words, she will require nursing care both day and night for the rest of her life. When general damages fell to be considered, I would have thought the cost for that care would have been subsumed under one head

"nursing care." But that was not the position. For reasons which remain altogether unclear to me, the dichotomy of one head "nursing care" and another "nursing care by parents" was persisted in. The judge heard arguments in this regard and made an award of general damages under the latter head as well, which he set out in the following form -

> "Compensation to parents for time and care 72 x 2 x 5 multiplier less 25% because of lump sum award 9,500.00 off of 38,000.00 $28,500.00

We heard no arguments from the appellant who would be called upon to foot the bill, on the footing that there was any overlapping of awards. In resisting the arguments of Mr. Ainsworth Campbell who sought to have this award of the judge increased, Mr. Morrison was content to say that there was no finding by the judge for continuous night care.

The evidence was so clear in showing that Miss Salmon would require attention both night and day, that both counsel put arguments on this basis, each contending for a different mathematical computation. Mr. Morrison submitted that a multiplier of 5 years was appropriate and for the multiplicand, $75 per week and that the figure arrived at, should be discounted by 25%. Mr. Campbell's approach was to suggest a multiplier of 10 years with a multiplicand of $320 per week. Seeing then that the judge did make an award, that argument regarding the absence of a finding must fail.

I can only assume that on the basis of the presentation of the case by the parties, no overlapping could therefore take place and that it was perfectly correct for the judge to have made a provision for "nursing care at night," not "nursing care by parents." As I understood the evidence of the plaintiff's father, he used to employ a nurse's aide but

found it expensive to do so. Her mother and himself saw to her needs at night, obviously for the same reason.

Logically therefore, on whatever basis the nursing care provision was calculated, the same must apply to the head of night care. This computation of the judge on the basis of a multiplier referable to the life expectancy of the parents is plainly unsustainable. Naturally, the need for such care will endure for the life of the injured plaintiff. The multiplier can only be the same as that allowed for nursing care. With respect to the multiplicand, no evidence was really adduced as to the rate chargeable for such duties. The plaintiff's father said in evidence that he sought compensation at a rate of $150 per week. In the absence of such other evidence, I would, with regret, be compelled to allow that figure as the appropriate multiplicand. I do not think the figure of $150 per week would represent a rate in keeping with present costs for such care but also I do not think it should be reduced by half as representing charges of one parent only. The multiplicand can only be referable to charges by a nurse's aide employed at night. The ultimate figure arrived at, will be higher than that used for nursing care because night charges, as is well known, are generally higher than that for day charges.

I return therefore to my earlier observation that "nursing care" must be regarded as a single head and ought not to be divided up into heads of "nursing care" and "nursing care by parents." That being so, I think we should endeavour to make one award based on a multiplier of 18. I have already remarked on the dearth of evidence of rates paid for nursing care whether by day or night which can only result in grave injustice to an injured party being denied a realistic

award. Doing the best I can, however, with such evidence as was provided, viz, by using the sum of the day rate $100 per week and night rate $150 per week which gives us a figure of $250 per week as the multiplicand, I arrive at the figure of $234,000. Even on the basis of unrealistic figures for nursing care, that amount which is not inconsiderable when put out at current interest rates, should provide a reasonable sum to care for this unfortunate young lady for the rest of her natural life.

LOSS OF EARNING CAPACITY

The figure awarded under this head by Theobalds J, was $450,000.00. He used as a multiplicand $60,000.00 per year and a multiplier of 15 and then halved the figure arrived at.

The attack against the sum awarded was made on the ground that the judge erred by resorting to a multiplier/multiplicand formula and then discounting the figure arrived at. This computation, it was said, was not appropriate to the situation where the sum being assessed is intended to represent reduced eligibility for employment. Mr. Morrison was prepared to concede that different approaches to the assessment of this head of damage were perfectly feasible and that there was really no inflexible approach. He said however, that where a multiplier/multiplicand formula was invoked, the courts tended to be conservative with respect to the figure. He submitted further that in the instant case, assuming that the arithmetic approach was supportable, then the multiplicand taken by the judge was too high.

It is clear from **Joyce v. Yeomans** [1981] 2 All E.R. 21 that there is no inflexible method of calculating loss of earning capacity. Brandon L.J. at p. 27 put the matter in

this way -

> "I feel it right to express my view that, while a court is not bound to arrive at a multiplier and a multiplicand in a case of this kind in order to assess the damages, it would not 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 on the loss of earning capacity on a weekly or annual basis and applying a multiplier to that figure."

Sir David Cairns said at p. 28 -

> "I do not find it useful in this case to make any attempt to work out a multiplier and a multiplicand, I regard it as essentially a case in which the best approach is that of going straight to estimating in the round what the figure should be.....".

Waller L.J. tersely said at p. 25 -

> "I agree with counsel of this sort."

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. Seeing therefore that we cannot say that the learned judge had erred in methodology, I would look at the figures he has used as multiplier and multiplicand. Mr. Morrison as I understand his alternative arguments did not complain of the multiplier but he challenged the multiplicand. The learned judge, as counsel correctly pointed out, assumed that the plaintiff would have qualified as a lawyer and could obtain employment in the Government Legal Service and achieve perhaps the position in the scale of a Resident Magistrate.

I do not think that is the correct approach.

It is not inevitable that every person who is appointed in the Government Legal Service will become a Resident Magistrate which is a senior post in the Civil service. It might have been more reasonable to take a more median salary seeing that it takes some years to attain that position. But having said that, the fact cannot be ignored that the learned judge halved the resulting computation in order to arrive at $450,000.00. It is that figure on which attention must therefore be focussed and I am quite unable to say that figure is outrageously high. Using a lower multiplicand and not discounting the sum arrived at by half would almost certainly result in the same or even a higher sum than that assessed by the judge. I must say I have the greatest doubt whether the method of discounting used by the learned judge in this case should be encouraged. It has nothing to recommend it and indeed I think it to be wrong. The usual, and indeed the recognized method of allowing for contingencies and the fact of immediate lump sum payment is by adjusting the multiplier. Where however, a judge merely makes an overall estimate of what should be the loss of earning capacity, as is permissible, then I think, he would be perfectly entitled to discount that total. The method adopted by a judge will depend more often than not, on the adequacy of the evidence before him and in some instances on the nature of the injuries which might well create many imponderables as to the plaintiff's future. But I think, if we are to ensure some uniformity in awards under this head, the arithmetic approach should be preferred as it allows this court to maintain some equilibrium in the figure taken as the multiplier by trial judges. We should, so far as is possible, require and encourage attorneys desiring to secure

awards under this head to take pains in presenting satisfactory evidence. As Carberry J.A. said in **United Dairy Farmers Ltd. & Anor. v. Goulbourne** (unreported) S.C.C.A. 65/81 dated 27th January, 1984 -

> "The problem of presenting evidence under this head is not insoluble and those who appear for plaintiffs must attempt it if they hope to secure damages under this head."

The award under the head of earning capacity was challenged in the cross-appeal in this way -

> "(c) That the Learned Trial Judge erred in describing the award for $450,000.00 as Loss of Earning Capacity rather than Loss of Future Earnings."

I do not think anything really turns on the nomenclature ascribed to the item. It is inconceivable that counsel who filed the writ, and statement of claim which included the following averment -

> "The Plaintiff who had very promising future has been reduced to a mere shadow of what she was and would have become were it not for the injuries."

adduced evidence in support and also addressed the court, did not deal with the measure of damages. I am entirely unaware how any error in the manner complained of, could possibly result in a reduction in damages which might otherwise have been ordered. The judge was dealing with a case where the plaintiff had never been employed. He was necessarily constrained to concentrate in this case on earning capacity and regard it as a capital asset destroyed by the accident. This view has the support of Windeyer J. in **Tenbner v. Humble** [1963] 108 C.L.R. 491 -

> " I think that the damage arises really from the destruction of a faculty or skill and that this is the best way in which to consider its assessment."

There really is nothing in this point.

PAIN AND SUFFERING

Mr. Campbell also complained that the award for pain and suffering was too low but it is enough to say that the case cited from Mrs. Khan's valuable compilation of Personal Injury Awards did not assist him in showing that the award in this case erred on the side of being too low. See **Goodin v. Webley** Vol. 1 at p. 166. In that case the plaintiff was a 27 year old registered medical practitioner of 3 years standing who was severely injured in a motor vehicle accident. Neurologically he had severe organic brain damage. He was described as surgalistic lethargic, and suffered a diminution in his concentration span. He was unable to read for more than 10-15 minutes. There was the risk of traumatic epilepsy. He no longer had any marriage prospects, was unable to continue his post graduate studies or to practice his profession. The award in that case was $90,000 and was made on 3rd July, 1980.

One half million dollars, with all respect to Mr. Campbell, cannot be described as outrageously low in the context of this case. I would not disturb it. I think the award is justified and should stand.

Finally, it was conceded that by an omission, the amount of $12,700 in respect of a medical bill under special damages was omitted from the judgment as recorded. The final judgment must also be increased by that amount.

For these reasons, I would dismiss the appeal with costs and allow the cross appeal to the extent indicated. The respondent would be entitled to her costs of the cross-appeal.

WRIGHT, J.A.:

I have read the judgment in draft of Carey, J.A. and agree that the appeal be dismissed. Since he has detailed the evidence I am relieved of the necessity to do likewise. I will, therefore, content myself with a few comments on both the appeal and the cross-appeal. My main concern relates to the award of $130,000 for future nursing care and the award of $28,500 provided for care by the parents.

The award of $130,000 has been challenged on the appeal on the ground that it should have been discounted by one-half. The observations made of the plaintiff/respondent, as recorded in the notes of the Judge's judgment which disinclined him to accept in toto the assessment of Drs. John Hall and Ruth Doorbar could only relate to the state of her mental ability. There was no basis on which he could discredit the evidence of her physical condition which is one of total dependence by day and night on someone else for help. Accordingly, although no basis was disclosed for choosing $100 per week as the rate at which future nursing care should be provided for, the trial judge awarded that figure, being the amount stated in the Statement of Claim and which rather resembles the weekly minimum wage for house-hold helpers. And although authority is against the making of such awards on the basis of calculating ahead what the expense will be (See **Taylor v. Bristol Omnibus Co. Ltd.** (1975) 1 W.L.R. 1054) commonsense ordains that if the compensation is not such as will enable the injured person to be able to afford such care rendered necessary by the trauma already suffered then further trauma is predicated as the award will be derisory and will only have the victim further embarrassed. Although the full claim of $130,000 was awarded to cover such care for a period of twenty-five years it must be borne in mind that the full

interest from investment will not go to meet this claim because one-third will be taken out for tax. Added to this is the factor of inflation which shows no tendency to abate.

Let me say a few words as well about the award of $450,000 for loss of earning capacity. It has been challenged on the appeal as being excessive but on the cross-appeal it is criticized as being too low and ought to be increased. At the centre of the contention is the method by which that sum was arrived at. The trial judge adopted, as a starting figure, a salary of $60,000 based on his acceptance of the plaintiff/respondent's claim that, but for the injuries sustained, she would have realised her ambition of becoming a lawyer and thus capable of earning that salary in the Government Service. But that figure represents earnings as a Resident Magistrate, a senior post in the Government Service. His method was to apply a multiplier of fifteen years, yielding a total of $900,000 which he then halved. So, in actual fact, what she was awarded was a salary of $30,000 per annum for fifteen years producing $450,000. The tortuous method does not commend itself to me but when the award is seen for what it really is, the challenge that it is excessive quickly dissipates. That represents earnings in a Clerical Grade rather than as an Attorney-at-law.

On the cross-appeal, I am deeply concerned with the complaint in Ground b, which is the only ground with any merit. It reads:

> "That the learned Trial Judge erred in that he failed to make an award for Nursing Care particularly during the night and incorrectly restricted the award in relation to the Parents' age rather than the plaintiff/respondent's age."

I find myself sympathetic to this complaint. The award for future nursing care has been made on the basis that she will always be in need of such care. The award made in respect of

the care rendered by the parents, which has not been objected to as superfluous, tacitly admits the need for such care by day and night; for it could not be and was not contended that she will not have such a need. What was submitted before us by Mr. Morrison is that the judge did not make such a finding. But on the evidence of her physical condition what other finding could he make?

Deborah Salmon:

> "Neither hand 100% perfect. My left hand has spasms and right hand damaged. Can use left better; trembles and no control over it. No movement in right hand. Can't do anything with right hand. Right leg has no feeling. Trembles and shorter than left. No strength. Left has strength but is a bit weak. Right leg was broken in accident.
> .....
> .....
> Daddy takes me to godmother's by car about two chains away. ....
> Before that helper looked after me. Five days a week to god-mother's, not Saturdays. .....
> .....
> Mum bathe and dress and cook for me. Daddy puts me in bath and takes me out."

Linton Salmon:

> "Extra and enormous work on me at home. Bathe, feed, clothes, meals, transport and special attention and care through the day and night - bed pan, change bedding continually. .....
> .....
> I don't see any end in sight - up till now. I have no choice. I intend to continue to assist plaintiff for as long as I can."

The plaintiff/respondent's father, aged 50 at time of trial, has a job at which he works during the day. His wife, 51, also works but unfortunately she is afflicted with diabetes and high blood pressure. Inasmuch, therefore, as the plaintiff/respondent is cared for by her god-mother for five days per week it must be that the care by the parents is

outside those hours when she would be at her god-mother. According to Mr. Salmon, she had previously been cared for at home by nurse's aides but that proved too expensive hence resort to the god-mother. I think the case for night nursing is unanswerable and, indeed, no attempt was made to meet that claim. Indeed, the question may be asked, "If the trial judge did not make such a finding, why then the award of $28,500?".

It follows, therefore, that an award for this specie of nursing care reckoned with reference to the age of the parents is wrong. It is coterminous with nursing care during the day which is calculated with reference to the plaintiff/respondent's probable life expectancy reckoned to be somewhat less than the normal 73-75 years. Accordingly, an award for night nursing ought to have been made on this basis and not on the basis of the parents' age. What is clear is that whether her parents are alive or dead she will be in need of this nursing care for which provision ought to be made. Having said this, however, I am not at all happy with the manner in which the case has been presented and greatly sympathise with the trial judge, having regard to the paucity of evidence on which he was required to act. Future nursing care, to my mind, should be seen as one head of damage and evidence adduced of the actual cost of such services at the time of trial so that the trial judge would have a basis for making the award.

So far as past services are concerned, both parents rendered assistance and a claim by both cannot be regarded as unreasonable. But it must be borne in mind that the plaintiff/respondent is no longer a child and as such is obliged to depend on her parents' care. At trial she was aged twenty years and still entertained hopes of finding some fulfilment in life. She should be enabled to salvage

what she can of herself. If she wishes to meet the challenge to life away from her parents - a feeling that does come to some young people - she should not feel that, because of lack of adequate provision for her care, she must unwillingly remain hostage, as it were, under her parents' roof. The dichotomy in the award for future nursing care, to my mind, seems artificial and unsupportable.

But before treating this head of damage as I think it ought to be treated, I must call attention to the fact that, under Special Damages, the award for special help by the parents relieves the appellants of three years liability and this results from the pleading as it stood at the time of judgment. This is how the trial judge records the award:

> "6. Special help given by parents - Rule that each parent is entitled - minimum $75 per week. Particulars only state $150 per week for 208 weeks - $31,200."

This is, indeed, a remarkable and costly oversight since, instead of the claim being for seven years up to the time of trial, it was made for only four years and not updated. The amount thrown away is, therefore, ($150 x 52 x 3) **$23,400.**

Let me now return to the question of future nursing care. As I have said before, the evidence indicates that such care will be required for the rest of her life since she has already reached maximum physical recovery and yet she remains severely handicapped. There is the caveat, however, that while the provision for future nursing care must be made as adequate as the evidence allows it must at the same time be fair to the tortfeasor.

Since, in our jurisdiction, we are without the actuarial expertise available elsewhere, I would encourage adherence to the multiplier/multiplicand system choosing a multiplier which reflects a discounting to take into account

the imponderables. What must be borne in mind is that the lump sum now being paid will yield interest which, although diminished by one-third for tax purposes, will assist in meeting the necessary charges with the effect of lengthening the life of the award. In the circumstances, a multiplier of twenty-five, which has been used not only for loss of future earnings but for other heads of damage as well, though not challenged on appeal, would be inappropriate. And yet, having regard to her life expectancy, I think it should be for a longer period than the fifteen years employed with respect to loss of earning capacity. I would say about eighteen years purchase would do justice under this head.

In arriving at a multiplicand, the only figures available on the evidence, even if unrealistic, are $100 and $150. So the total future nursing care would be provided at the rate of $250 per week. This will yield ($250 x 52 x 3) $234,000.

It was agreed that the judgment had omitted one medical bill in the amount of $12,700. This amount should be added to that head of Special Damages.

I would, therefore, dismiss the appeal and allow the cross-appeal by substituting the sum of $234,000 for future nursing care. The respondent will have her costs of both the appeal and the cross-appeal.

GORDON, J.A. (AG.)

The plaintiff sustained injuries when on 21st April, 1982 while walking along Elizabeth Avenue to attend school at Queens High School in St. Andrew she was struck by a motor vehicle owned by the defendant and driven by Clarence Wright. The injuries were severe and resulted in her being unconscious for some 5 weeks and sustaining fractures to her right limbs and brain damage giving rise to epileptic seizures. The defence conceded that the injuries were severe and that they occasioned substantial damages. Damages were assessed by Theobalds J., and on 23rd June 1989 he awarded general damages amounting to $1,403,872.00 and special damages $89,279.00 with costs to be agreed or taxed.

The defendant appealed praying that "That part of the said Judgment whereby the plaintiff was awarded $130,000.00 for future nursing care (ground 1) and (ground 2) $450,000.00 for loss of earning capacity be set aside and such lesser sums substituted therefor as this honourable court may deem just."

The respondent in a cross appeal sought an order varying the judgment:

> "(1) By increasing from $500,000.00 for pain and suffering and loss of amenities for so much as this Honourable Court thinks fit;
>
> (2) that the award for Nursing Care by the Parents be increased from a period of five (5) years to a period and at a weekly rate as this Honourable Court sees fit;
>
> (3) that the Damages awarded for Loss of Earning Capacity be awarded under the head of Loss of Future Earnings;
>
> (4) that the award for Future Loss of Earnings be increased to such sum as this Honourable Court sees fit."

The appellant contended that the awards under the heads challenged were too high and that no account was taken of contingencies and of the fact that lump sums were being received. On the other hand the respondent contended that the awards were too low.

General damages awarded were as follows:

Future Nursing Care for 25 years at $100.00 per week	$130,000.00
Compensation to parents for time and care for 5 years	28,500.00
Future Medical care	15,000.00
Future Medication	30,000.00
Future therapy	13,000.00
Transportation	150,000.00
Loss of earning capacity not loss of earnings	450,000.00
Pain & Suffering, loss of amenities	500,000.00

Mr. Morrison submitted that in making the award of $130,000.00 for future nursing care the learned trial judge failed to take into account as he did in relation to other aspects of the award that the plaintiff would be receiving a lump sum relating to expenses in the future. He contended that the multiplier of 25 years was very high and did not itself provide any discount for contingencies. He pointed out that the judge had discounted by 25% the figure awarded to the parents reducing it from $38,000.00 to $28,500.00 and had discounted the loss of earning capacity by 50% reducing it from $900,000.00 to $450,000.00. The principle of discount, he said, should be applied across the board and the award for future nursing care reduced by 50%.

In his submissions on ground 2 of this appeal Mr. Morrison referred to S.C.C.A. 44/85 **Noel Gravesandy v. Neville Moore** (unreported) delivered on 14th February, 1986

and submitted that in **Gravesandy's case** the court placed a value on the risk of the plaintiff losing his job and being unable to secure comparable employment and awarded a sum for loss of earning capacity. Loss of earning capacity herein connotes handicap on the labour market. He further submitted that in this case a totally different kind of problem arises as it involves an infant who has not yet embarked on a career and has been so badly injured that she will never be employed or can only be employed in a restricted field. In such cases, he submitted, the court is not assessing loss of future earnings: it is assessing the plaintiff's loss of earning capacity not in the sense as used in **Gravesandy's case**.

Mr. Campbell submitted that the global award for future nursing care was correct although the weekly sum of $100.00 awarded was low. The multiplier he said should stand. The award for loss of earning capacity should be increased to $600,000.00 and that of $500,000.00 for pain and suffering and loss of amenities should be increased to $900,000.00.

Damages are awarded as compensation for actual or reasonable prospective loss, and are primarily intended to place the plaintiff as much as possible in the position she would have been in, had she not sustained the injury. They are not intended to punish the defendant for the tortfeasors wrongdoing. See **Browning vs. The War Office** (1963) 1 Q.B. 750. The evidence adduced in support of claims for damages should be as precise as possible so as to assist the court in arriving at an award that is fair to plaintiff and defendant. Here the plaintiff gave an assessment of the cost of nursing care. The plaintiff's father, Lynton Salmon, said in evidence that he employed a nurse's aide at $60.00, later $80.00 per week. He went on "I find it quite expensive to keep nurse's aide so I got plaintiff's godmother as a substitute. To take plaintiff to her

godmother cost $40.00 per day" (viz $200.00 per week) he said. This far exceeds the $80.00 he found expensive for the nurse's aide.

It is admitted that someone has to be in attendance on the plaintiff so an award for nursing care is appropraite. In making the award the court must take into account contingencies. The fact that a lump sum is awarded must also be considered. A sum of $130,000.00 invested at current bank **savings interest rates** would, after the deduction of taxes, yield an annual income of approximately thrice the multiplicand assessed for future nursing care.

The nursing care required by the plaintiff is to have someone to assist her when necessary i.e. to dress and to go to the toilet. On her evidence she can walk with a tripod and can use her left hand to use toilet tissue. She attended school after trauma and completed subjects at C.X.C. The evidence is that students assisted her to the lavatory. There is no indication that she needs a qualified nurse or a trained nurse's aide or practical nurse. The father said he had employed a nurse's aide to assist the plaintiff at home. In the absence of evidence as to actual cost the trial judge did the best he could in the circumstances and assessed the weekly cost of this assistance at an amount above the then prevailing minimum wage of $84.00 per week for a domestic helper.

In **Mallett v. McMonagle** (1969) 2 All E.R. 178 a judge (in Northern Ireland) awarded a widow £21,500.00 damages under the Fatal Accidents Acts. At page 178G -

> " ..... The amount of the award if reasonably invested in long-term securities would, without resort to capital, have produced an income exceeding double the rate of the dependency at the time of the deceased's death. The Northern Ireland Court of Appeal set aside the award, and ordered

> "a new trial limited to the issue of damages under the Fatal Accidents Acts, on the ground that the award was excessive and an amount that no reasonable jury could properly award."

The House of Lords dismissed the appeal. In his judgment Lord Diplock held at page 189F and at page 190I -

> "My Lords, the purpose of an award of damages under the Fatal Accidents Acts is to provide the widow and other dependants of the deceased with a capital sum which with prudent management will be sufficient to supply them with material benefits of the same standard and duration as would have been provided for them out of the earnings of the deceased had he not been killed by the torticus act of the respondents, credit being given for the value of any material benefits which will accrue to them (otherwise than as the fruits of insurance) as a result of his death.
> .....
> ..... In estimating the amount of the annual dependency in the future, had the deceased not been killed, money should be treated as retaining its value at the date of the judgment, and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to times of stable currency such as 4 per cent to 5 per cent should be adopted."

Malletts case is one of an award of damages under the Fatal Accidents Act, but I accept this statement as accurately reflecting the principles of general application to awards for general damages. I extract from this the principle that courts in assessing damages should award a sum which when invested will produce an income sufficient to cover the expenses and/or needs (the multiplicand) estimated. Any award which would yield an income grossly in excess of the needs is excessive.

I consider the award in the instant case excessive and taking into account contingencies and the fact that a lump sum will be paid I would award a multiplier of 15 years at the multiplicand assessed of $100.00 per week, that is, $78,000.00.

I now turn to consider ground 2 of this appeal. The authorities indicate that assessment of loss of earning capacity can be approached thus:

1. By treating the loss as one of the elements that go to make up the global figure for pain and suffering and loss of amenities, see **Jones vs. Lawrence** (1969) 3 All E.R. 267; C.A. 65/81 **Goulbourne vs. United Dairy Farmers Ltd and Lucille McCallum** dated 27th January, 1984; C.L. 1984 H 129 **Tanisha Henderson (b.n.f. Elease Trench) v. Gerald Ludford** Vol. 2 Khan's Report p. 223;

2. By using the multiplier/multiplicand formula as used in this case; see **Taylor vs. Bristol Omnibus Co Ltd** (1975) 1 W.L.R. 1054; C.L. D 105/1984 **Douglas v. K.S.A.C. et al Vol** 1 Khan's Report p. 177; C.L.R. 137/78 **Elaine Russell vs. Bancroft Bromfield** Vol 2 Khan's Report p. 206; **Croke (a minor) & Another vs. Wiseman & Others** (1981) 3 All E.R. 852;

3. By assessing a sum (figure) which in the court's view represents adequate compensation for the loss: **Joyce vs. Yeomans** (1981) 2 All E.R. 21; C.L. 1978 F 018 **Foster vs. Smith et al** Vol 1 Khan's Report p. 172 and C.A. 13/81 C.L. 1979 A 137 **Archie vs. International Rentals & Leroy Kennedy** vol. 2 Khan's Report p. 202.

I agree with Mr. Morrison's submissions that the authorities support the following propositions:

(a) In cases of young children damages for loss of earning capacity are recoverable and there is no basis for limiting such damages to a conventional or nominal award.

(b) There is no fixed approach to the computation of such damages. In some cases multiplier/multiplicand have been held appropriate in others a fixed and relatively moderate sum has been awarded while in yet other cases loss of earning capacity has been subsumed in the general damages awarded.

(c) Even in the multiplier/multiplicand cases it is clear that judges have been conservative in their application of the multiplier and multiplicand.

I quote with approval the observations of Brandon L.J. in **Joyce v. Yeomans** (supra) at page 27 c - e:

> "The second matter of general interest is whether and to what extent in a case of this kind the loss of future earning capacity should be calculated on some kind of mathematical basis, that is to say by taking a multiplier and multiplicand. **Waller L.J.** has expressed the view that, on the facts of this particular case, any attempt to arrive at a figure for damages on a basis of a multiplier and a multiplicand would be inappropriate because of the very great number of imponderables which exist.
> I feel it right to express my view that, while a court is not bound to arrive at a multiplier and a multiplicand in a case of this kind in order to assess the damages, it would not 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 on 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." (emphasis supplied)

Before proceeding further I consider it appropriate to distinguish loss of earning capacity from future loss of earnings. I deem it desirable because in the respondent's appeal Mr. Campbell sought to have "the damages awarded for loss of earning capacity awarded under the head of loss of future earnings." I can do no better than to advert to the judgment

of **Lord Denning** in **Fairly vs. John Thompson (Design and Contracting Division) Ltd** (1973) 2 W.L.R. 40 at page 42 where he said:

> "It is important to realise 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 part of general damages." (emphasis supplied)

Expanding on this theme **Carey, J.A.** in **Gravesandy's** case (supra) said:

> "In the case of loss of future earnings, the Court is therefore concerned with quantifying an item of special damage, which provided the evidence is adduced, is comparatively easy to assess. Loss of earning capacity is an item of general damages coterminous with pain and suffering. What the Court is being asked to assess is the plaintiff's reduced eligibility for employment or his risk of future financial loss."

The plaintiff had never been employed and there was no evidence adduced to ground 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.

In **Croke (a minor) and Another vs. Wiseman and Others** (supra) damages were awarded to an infant, aged 21 months at the time of injury, who suffered irreparable brain damage resulting in total incapacity for loss of future earnings and the term loss of future earnings, in that case is out of line with the definition of **Lord Denning** in **Fairly vs. Thompson** (supra). In this case the damages awarded are "compensation

for diminution in earning capacity" and I see no reason to interfere with the judge's categorization.

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 fulfil his/her life's ambition as to the choice of a career. In **Croke vs. Wiseman** the Court of Appeal considered the factors which determine an award and held:

> "(1) (**Lord Denning MR**) dissenting) a gravely injured child who would live for many years into adult life was entitled to a sum for his loss of future earnings during the period of his likely survival, and (per Shaw L J) compensation for that loss was not to be treated as being so speculative that it could not be assessed and nor was it a relevant consideration that a plaintiff might not be able personally to benefit from the damages awarded for such loss. Accordingly, although the infant had been awarded a sum for the cost of his future professional and parental nursing care, he was also entitled to an award for loss of future earnings during the period of his likely survival. It could not be assumed that his parents would remain able throughout his life to house, feed and care for him and the award for loss of future earnings was required to provide a home for him in the future and for his care and such extra comforts as he could appreciate. If, however, the award for future nursing care had included the full cost of residential care, the award for loss of future earnings would have had to be small to avoid awarding the infant his future living expenses twice over. The infant was not, however, entitled to any additional sum for loss of earnings in the lost years, namely the years beyond the period of his likely survival. In assessing the sum to be awarded for loss of future earnings the judge's figure of

> "£5,000 per annum was in all the circumstances the correct multiplicand, but his multiplier of 9 years would be reduced to 5 years to take account of the accelerated payment of a capital sum for loss of future earnings and the fact that the infant might never have become an earner."

In the instant case the plaintiff was 20 years at the time of trial. She had, despite the severe injuries she sustained, injuries which on the medical evidence affected her memory and powers of concentration, passed five subjects at C.X.C. examination. This is an achievement that many high school students in full physical and mental health fail to achieve. Her life expectancy was less than the average for women because of the trauma she suffered. She was described by Doctors Hall and Cross in their report as an "Obese adolescent." Obesity is a factor that conduces to a determination of life expectancy but there is no indication on the evidence that this factor was considered in the assessment.

The learned trial judge did not agree with the gloomy picture painted by the doctors in the case. He found that the plaintiff might well achieve her life's ambition and become a lawyer but that her handicaps on the employment market are real and she should be fully compensated. The multiplicand of $60,000.00 he used was at the upper level of attainment for lawyers in the government service as indicated in the evidence of Dennis Townsend.

The learned trial judge assumed the plaintiff will achieve her life's ambition and the probabilities are that she might not achieve this ambition or even become an earner. I consider it undesirable to assume such a high level of achievement. The plaintiff had completed subjects at C.X.C. which in ordinary circumstances would ensure employment in the clerical field of the Civil Service. Handicapped though she

be, one cannot ignore the fact that today the field for the employment of the handicapped is wide and the probabilities are that she could find employment within her capabilities. On Mr. Townsend's evidence one with her qualifications could aspire, in the Government Service, to the administrative stream at a salary of $30,000.00 per year.

Taking into account the imponderables as adumbrated above, contingencies and that a lump sum will be paid I would make an award at a lower level of attainment, I assess a multiplicand of $30,000.00 with a multiplier of 10 years which yields an award of $300,000.00. The multiplicand of $30,000.00 is that finally awarded by the learned trial judge when he taxed down the award of $60,000.00 by 50%. The multiplier of 15 years he awarded I have reduced to 10 years.

The award for nursing care invariably has a multiplier awarded that is greater than that applied to future earnings based on the fact that nursing care continues beyond normal working life. Looking at the award for loss of earning capacity I consider the award of $450,000.00 excessive and the multiplier of 15 years too high. The multiplier of 10 years at $30,000.00 makes a lump sum payment of $300,000.00. This when invested at minimum bank savings rate of 10% yields, after tax, the sum of $30,000.00 per annum, sufficient to provide the needs.

I consider the award of $500,000.00 for pain and suffering and loss of amenities adequate. I would therefore dismiss the respondent's appeal on this ground. I have already dealt with the defendant's appeal against the award for loss of earning capacity. Consideration must now be given to the respondent's appeal seeking an increase in the award for parental nursing care.

Mr. Salmon was 50 years old Mrs. Salmon 51. The learned trial judge awarded the parents compensation for their care of plaintiff for 5 years at $150.00 per week. This sum was reduced by 25% because of the lump sum payment making the award $28,500.00. In support of his claim for compensation Mr. Salmon testified "extra enormous work on me at home. Bathe feed .... special attention and care through day and night - bed pan, change bedding continually. I seek compensation at rate of $150.00 per week." Reference to the changing of bedding continually may lead to the inference that coupled with her injuries the plaintiff is incontinent. No where in the plaintiff's evidence, in Mrs. Salmon's evidence, in the evidence of Doctors Hall, Dundas and Doorbar or in the medical reports admitted in evidence is there any mention of incontinence of the plaintiff. The plaintiff said she had to be assisted to the toilet. This bit of evidence therefore by Mr. Salmon must be regarded as gross exaggeration. The parents are, however, entitled to be awarded damages for future parental nursing care.

The award of 5 years purchase is in my view inadequate and I would increase this to 15 years at a multiplicand of $150.00 per week i.e $117,000.00.

Nursing care is one classification whether it be called "general" or "parental" and when the global award for nursing care is addressed the total award under the separate heads namely $78,000.00 + $117,000.00 = $195,000.00 is fair compensation to meet the requirements of this case. The needs of the plaintiff are provided for and the award is fair to the defendant.

In contemplating the multiplier I considered the cases of **Povey vs. Governors of Rydal School** (1970) 1 All E.R. 841

and **Taylor v. Glass** heard 23rd May, 1979, **Kemp v. Kemp** Vol II 1986 Edition section C paragraph 1-715. In each case a multiplier of 25 years was used in assessing the award for future nursing care and in **Povey's case** was the agreed **datum** figure for damages including loss of earnings. In **Taylor's case** the multiplier for parental nursing care was 13 years and for loss of earnings 10 years.

The plaintiffs in these cases suffered severe injuries with residual incapacitation. Each suffered from double incontinence but **Povey** required manual evacuation. **Povey** had tetraplegia causing a complete loss of sensation from the collarbone to the soles of his feet: complete paralysis in that area making him prone to develop sores in the absence of devoted care. He required constant attention and had to rely on others for his physical needs. Once he has been placed in his wheelchair he could propel himself. **Taylor** suffered severe Brain damage and in addition to double incontinence was grossly mentally handicapped. He was totally deaf, he walked with a limp, he could not talk or communicate with anyone, his right arm was useless and he was epileptic. The injuries sustained by the plaintiff in this case are not as severe as those suffered by either **Povey** or **Taylor**.

In **Lim Poh Choo vs. Camden & Islington Area Health Authority** (1979) 2 All E.R. 910 the House of Lords held:

> "Cost of future care: Damages for cost of future care were to be awarded on the basis that capital as well as income was to be used to meet the cost, and therefore any award was to be calculated on an annuity basis. ....."

Lim Poh Choo's case is a leading case on the assessment of damages in personal injuries cases.

This case indicates that in awarding damages under this head the court must contemplate that capital and income will be used to meet the needs until the capital is exhausted. The global award of $195,000.00 invested at current savings interest rates after deduction of income tax will yield $23,400.00 annually. This amount will meet the need assessed at $13,000.00 with a built in factor to take care of future increases.

I therefore considered a multiplier of 15 years for parental nursing care and 10 years for loss of earning capacity appropriate.

I would therefore allow the appeal and (i) set aside the award of $130,000.00 for future nursing care and substitute therefor the sum of $78,000.00. (ii) Set aside the award for $450,000.00 for loss of earning capacity and substitute the sum of $300,000.00.

I would allow the respondent's appeal re the award for parental nursing care. I would set aside the amount of $28,500.00 and substitute the sum of $117,000.00. By consent the award of special damages is increased by $12,700.00 an amount agreed but inadvertently omitted from the judgment below. In other respects the respondent's appeal is dismissed. The appellant should have his costs to be taxed if not agreed.