HAMIANI v. GIBRALTAR SHIPREPAIR LIMITED

SUPREME COURT (Schofield, C.J.): October 28th, 1998

Tort—personal injuries—damages—multiple injuries—crushing injuries to lower leg and hand causing severe deformity, chronic infection and progressive deterioration—quantum

The plaintiff brought an action for damages for personal injury.

The plaintiff, now aged 51 and a father of eight, was employed by the defendant as a skilled engine-fitter in the dockyard. Whilst he was repairing a heavy piston the lifting mechanism holding the piston failed and it fell, crushing his right leg and left hand against the cylinder. He sustained severely comminuted fractures of the right knee and tibia, and of the metacarpal of his left thumb. He received emergency surgery during which skin and soft tissues were removed from his lower leg and part of his thumb amputated. A further 16 operations

were needed to deal with the fractures in his leg and stabilize his injuries generally.

The plaintiff was left permanently disabled. His right knee, lower leg and foot were severely deformed and painfully scarred. He walked with a limp and had to wear an orthopaedic shoe, since his right leg was 3.5 cm. shorter than his left. He also suffered from necrosis of the interior of the leg bone and chronic post-traumatic bone infection, causing constant weeping from a wound in his lower leg. This infection could intensify at any time, requiring surgical intervention and antibiotics. His knee and ankle joints showed severe arthritis and degeneration of the cartilage. The prognosis was that unless the infection was successfully treated and a knee replacement operation performed, the knee joint would fuse and an amputation might have to be resorted to.

The plaintiff had only the stump of his left thumb, and atrophy of the muscles in the base of the hand had occurred. The mobility of his thumb was restricted by damage to the tendons so that he was unable to grip, and arthritis had begun in the remaining joints, for which there was no cure.

As a result of his injuries, the plaintiff could not work and returned to his native Morocco to live with his wife and family. He was unable to walk any significant distance or perform day-to-day tasks such as dressing himself. His wife was required to be on hand at all times to assist him. On the recommendation of his doctors, he was shortly to move into a bungalow built by his brother, which was to be adapted to his special needs.

Less than a year after his accident, the defendant closed its operation at the dockyard, and the plaintiff would have been made redundant. Another company took over the shipyard for five years. The yard was then closed for six months before again re-opening under new management.

Held, awarding damages on the following bases:

(1) The court would award £75,000 plus interest by way of general damages for pain, suffering and loss of amenity, in recognition of the severity of the plaintiff's injuries and the extent to which they had curtailed his ability to maintain employment and enjoy life. The accident had transformed him from an active, hard-working man to a sedentary one reliant upon assistance for many everyday functions (page 396, lines 1–8).

(2) Special damages would be awarded for lost earnings until the defendant ceased its operations at the shipyard, including a sum based on the plaintiff's average overtime earnings. In the absence of supporting evidence, no deduction would be made for the scaling down of work. Nor would any deduction be made for the fact that, having returned to Morocco following hospital treatment, the plaintiff no longer had to maintain accommodation in Gibraltar or incur expenditure to keep in contact with his family, since the expenses of living in Morocco were not comparable with those of living here. Since it was likely that the plaintiff

would subsequently have been employed as a fitter by the defendant's two successor firms at the shipyard, damages would be awarded on the basis of the evidence available on wages, basic hours and overtime from those employers (page 396, line 11 – page 397, line 17; page 397, lines 31–41).

(3) The plaintiff would be awarded the cost of the palliative care provided by his wife since the accident and in future, based on the cost of employing a home help without medical qualifications whose duties included cleaning, and with a 25% deduction because the care was provided by a family member. The plaintiff's needs could not be met by awarding the cost of a cleaner to perform household duties for his wife, since although her attendance of the plaintiff totalled only a few hours per day in aggregate, she was required to be on hand at all times (page 398, lines 13–30; page 402, lines 8–14).

(4) Under s.15(1) of the Contract and Tort Ordinance, the court was obliged to deduct from damages awarded for lost earnings half the value of the plaintiff's right to benefits under the Social Security (Employment Injuries Insurance) Ordinance for the five years since his accident. However, since the plaintiff had begun claiming those benefits only a year and a half after his accident, when he discovered that he was entitled to them, only those benefits actually received in the subsequent $3\frac{1}{2}$ years would be taken into account. Although the plaintiff had had a duty to mitigate his loss throughout the five-year period, he had not acted unreasonably in the circumstances. Since the provisions of s.29(2) of the Social Security (Employment Injuries Insurance) Ordinance were additional and not alternative to those of s.15, a further deduction would be made for benefits recovered and recoverable by the Director of Labour and Social Security from the defendant under s.29(1) of the Ordinance (namely, half that payable to the plaintiff) up to the date of trial (and not beyond) (page 398, line 38 – page 400, line 16).

(5) Since mortality rates and life expectancy were similar in Gibraltar to those in England and since the plaintiff had spent most of his working life in Gibraltar, his future loss of earnings would be calculated by reference to the latest available figures published in English actuarial tables. Assuming that, having eight children to support, he would have worked until the age of 65, the working-life multiplier of 11 for a 51-year-old man would be used as a starting point. No allowance would be made for Gibraltar's higher rate of taxation in the discount interest rate of 3% adopted in reaching this figure, but a generous 12% deduction would be made to the multiplier for life's contingencies. In respect of lost pension rights, the plaintiff would receive the difference between the estimated sum which would have been payable on retirement and that which would now be paid, due to the plaintiff's ceasing contributions. A multiplier of 7.64, taken from the actuarial tables, would be applied (page 400, lines 28–33; page 401, line 4 – page 402, line 5).

(6) The plaintiff was entitled to receive £23,724.90 for the cost of a knee-replacement operation and post-operative care to be performed in Morocco, since there was no evidence that the operation would be carried out free of charge under s.30 of the Social Security (Employment Injuries Insurance) Ordinance in Gibraltar and the plaintiff had already experienced difficulty obtaining a visa to remain in Gibraltar for the present hearing. The further cost of continuing medical and physio-therapy treatment would be awarded at £67,306.40, based on a whole-life multiplier of 17.63 calculated from actuarial tables (page 402, line 32 – page 403, line 9).

(7) The usual award in respect of special accommodation necessitated by a plaintiff's injuries was the additional annual cost of providing that accommodation over the plaintiff's lifetime. However, since no reliable figures were available to show the cost of building the plaintiff's new home, and since, from the evidence, the improvements might not be entirely justified by the plaintiff's circumstances, the better approach would be to award a figure (£2,000) for the cost of adapting the new house to the plaintiff's needs. The plaintiff was also entitled to £2,096.77 as the cost of specially adapting his existing car for his needs, multiplied by 3.24 to allow for replacement vehicles. No award would be made for the capital value of a new car or the cost of running it (page 404, line 25 – page 405, line 30).

Cases cited:

(1) *Eli* v. *Bedford*, [1972] Q.B. 155, followed.
(2) *Moriarty* v. *McCarthy*, [1978] 1 W.L.R. 155; [1978] 2 All E.R. 213, applied.
(3) *Roberts* v. *Johnstone*, [1989] Q.B. 878; (1988), 132 Sol Jo. 1672, not followed.
(4) *Shearman* v. *Folland*, [1950] 2 K.B. 43; [1950] 1 All E.R. 976, followed.
(5) *Wells* v. *Wells*, [1999] A.C. 345; [1998] 3 All E.R. 481, followed.

Legislation construed:

Contract and Tort Ordinance (1984 Edition), s.15(1): The relevant terms of this section are set out at page 398, line 44 – page 399, line 11.

Social Security (Employment Injuries Insurance) Ordinance (1984 Edition), s.29: The relevant terms of this section are set out at page 399, lines 14–22.

s.30: "An insured person who suffers personal injury by accident arising out of and in the course of his employment, being insurable employment…shall be entitled to receive free of charge such medical, surgical and pharmaceutical aid at a hospital in Gibraltar, as is considered by a prescribed medical officer or practitioner to be necessary in consequence of the relevant injury…."

H. McGregor, Q.C. and *D. Whitmore* for the plaintiff;
L.W.G.J. Culatto for the defendant.

SCHOFIELD, C.J.: Mohamed Hamiani, the plaintiff, is a Moroccan national who, on May 21st, 1991, was employed in the dockyard in Gibraltar by Gibraltar Shiprepair Ltd. ("GSL") as a skilled engine-fitter. He had been so employed for seven years and had reached the highest grade of mechanical fitter employed by GSL. Prior to his employment with GSL he had been employed by Appledore when that company ran the dockyard, and prior to that had been at sea as an engineer's mate for three years, and had 11 years' experience as a motor mechanic in Gibraltar.

On May 21st, 1991 the plaintiff was repairing and placing into position a heavy piston when the lifting gear failed and the piston dropped, crushing his right knee, lower right leg and left hand between the piston and a cylinder. I shall detail the injuries later. It seems that he was left in that position for 25 minutes before the piston was lifted from him. The plaintiff is permanently incapacitated and is unable to work. GSL has accepted liability to him and the issue in this trial is the amount of damages to which the plaintiff is entitled.

The plaintiff is approximately 51 years of age and is married with eight children. Two of these children were conceived after the accident. He had lived in Gibraltar, apart from his period at sea, for upwards of 20 years, maintaining his family in Morocco, as is the way with many of the members of the Moroccan labour force in Gibraltar. The accident has completely changed his life and he is now unable to walk much further than 100 yards without feeling intense pain. Indeed, he is in pain for much of the time. Because of the damage to his hand he has difficulty dressing and he cannot perform ordinary tasks like changing a light bulb.

When taken to hospital the plaintiff was in hypovolumic shock and he had lost a considerable amount of blood. The right knee and lower limb had a ragged laceration and severely comminuted fracture of the tibia, including the knee-joint. There was a circumferential laceration round the left thumb with loss of skin and a severely comminuted fracture of the metacarpal of the thumb.

The plaintiff was immediately treated with antibiotics and analgesics to relieve pain. Intravenous fluids were rushed in to maintain his blood pressure and pulse and blood was given to resuscitate him. As soon as his haemodynamic status improved he was rushed to the operating theatre for necessary emergency surgical intervention to his compound fractures. The skin and soft tissues of the lower limb which were of doubtful viability were thoroughly excised. All foreign bodies and grit were washed out. The wounds were packed with antiseptic solution and skeletal traction to the calcaneum was established to maintain the length of the bone. The limb was immobilized in a back-slab. The laceration

over the joint of the left thumb was debrided and sutured. The fracture of the terminal phalanx of the left thumb was stabilized by a Kirschner's wire, transfixing it to the proximal phalanx.

The base of the thumb was damaged. Most of the first metacarpal had been lost at the accident. Splinters of the first metacarpal were removed and the remnant of terminal ends were discarded. The skin and soft tissues were thoroughly debrided to get rid of the dead tissue. Tendons were repaired. The proximal phalanx of the thumb was now implanted at the site from where the metacarpal bone had been lost in order to preserve the stump of the thumb. The exposed tissues were covered by a flap of skin. A small area of the ventral aspect of the thumb was exposed because there was not adequate skin locally available to achieve primary cover.

Two days later the plaintiff was back in the operating theatre. Tissues of the right leg which had declared themselves dead were excised. The skin was brought together with tension sutures. The unstable tibial fracture and knee-joint were stabilized by using an external fixator from the femur to the lower tibia. The skeletal traction through the calcaneum was discontinued. The left thumb wounds and stitches were examined and further areas of destabilized tissue were excised.

From the date of the injury to December 20th, 1991 the plaintiff had a total of 15 operations at St. Bernard's Hospital. There are various medical reports in evidence but I think I need only refer to the latest of these presented to court by Dr. Abdelmoumen Zian, an orthopaedic surgeon practising in Tangiers, Morocco. Dr. Zian testified that—

> "the plaintiff is in good general health apart from the consequences of his injuries. He is affected by the extent of the injuries and by the socio-economic and family life consequences of his infirmities and the uncertainty of this litigation. He is in a constant state of anxiety.
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> The right lower leg is severely deformed and scarred and is painful to the touch. It is 3.5 cm. shorter than the left leg, which causes the plaintiff to walk with a limp and requires him to wear an orthopaedic shoe. There are visible signs of spinal scoliosis, which is a consequence of the reduced length of the leg. This will continue to evolve. The plaintiff exhibits a *varus* deformity of the right knee which makes him bow-legged. Actual and passive movement of the right knee is limited to 40° flexion and -5° extension. There is a cavity in the bone of the lower leg which is a consequence of chronic post-traumatic bone infection. It seems there is weeping from this wound which requires daily treatment.
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> The plaintiff exhibits an *equino varus* deformity of the right foot with the hallus flexus, which is a consequence of post-traumatic paralysis of the external popliteal sciatic nerve. The X-ray examinations show malunion of the tibia, non-union of the fibula, and a *genus varum* deformity of the right knee. There is marked and serious arthrosis of the intra-articular structures and signs of

necrosis of the interior of the leg bone. There is Sudeck's atrophy of the right ankle and foot. Comparison with earlier X-rays shows significant degeneration in the plaintiff's condition. The degeneration of the intra-articular cartilages has passed to the most severe grade."

Dr. Zian's opinion on the prognosis for the right leg is that—

"unless treated the degenerative changes to the knee will continue and the rate of degeneration will accelerate. Without treatment there will be total fusion of the knee within 3–5 years. There is a danger that the present chronic infective osteomyelitis may flare up at any time as a result of opportunistic infection. This has happened in the past and can happen at any time, requiring immediate and serious surgical intervention. This needs to be treated urgently and will require antibiotic medication for between six and nine months and daily domiciliary nursing care. Next there will have to be a slowing down of the rate of degeneration of the knee and once the chronic osteomyelitis has been treated there will preferably be a total knee-joint replacement. An alternative would be an arthrodesis [that is, a fusing of the knee-joint]. As a last resort, an amputation would have to be performed."

Dr. Zian opines that leaving matters as they are is not an option. Whichever of the above options is chosen, Dr. Zian testified that the plaintiff will require physiotherapy and medication for the rest of his life:

"There is scarring to and deformity of the left hand. There is complete atrophy of the muscles in the hand at the base of the thumb. There is impairment of the flexor and extensor tendons of the thumb which results in an impairment of mobility of the thumb in the order of 25–30%. The thumb is reduced in length and the plaintiff is unable to oppose his thumb to his fingers which has resulted in a reduction of the precision-grip and power-grip functions of the hand which is now in the order of 90%. The X-ray examinations show arthrosis of the first carpo-metacarpal joint and the metacarpal phalangeal joints. Degeneration has already taken place and there will be progressive and irreversible degeneration for which there are only palliative treatments available. There is diffuse osteoporosis of post-traumatic origin."

General damages

There was an attempt by GSL, at least initially, to suggest that the plaintiff has been exaggerating the effects of his injuries and indeed GSL called a private investigator, Henry Bautista, to produce a video recording of the plaintiff walking, rather briskly, in Casemates Square. However a careful review of the video recording by Mr. McGregor on behalf of the plaintiff demonstrated that the plaintiff had not been walking quite so

briskly as Mr. Bautista would have had the court believe. The evidence, particularly the medical evidence, shows that these injuries were of an extremely serious nature and have changed the whole course of the plaintiff's life. An active man, and a hard worker, he is now unable to pursue any kind of employment or enjoy many of the ordinary amenities of life. Quite rightly, GSL accepted the figure of £75,000 as general damages with interest at the rate of 2% from the date of service of the writ, making a total of £81,400.

Special damages

Loss of earnings: The plaintiff had been working for GSL for some years and would have continued working with it but for the accident. However GSL closed its operations on June 21st, 1992 when the plaintiff would have been made redundant. The plaintiff continued to receive his basic weekly wage of £153 for 39 weeks after the accident. From the figures produced of his net earnings for the year 1990–91, the plaintiff earned £88.17 in overtime, less tax of £31.65 per week. He therefore claims that amount for the 39 weeks after the accident, which comes to a total of £2,204.28. From February 20th, 1992 until GSL closed its operations on June 21st, 1992, the plaintiff received no salary from GSL and claims his full net salary based on the 1990–91 earnings, *i.e.* 18 weeks at £175.41 which totals £3,157.38.

GSL suggests I should reduce these figures because a natural consequence of the shipyard closing down would be a reduction of the work leading up to its closure and thus a reduction of the overtime earned by the plaintiff. There is no evidence to support GSL's position on this and I cannot accept the argument.

GSL also argues that because the plaintiff moved back to Morocco as a result of the accident his expenses were reduced by at least £30 per week as a result of not having to maintain accommodation in Gibraltar, and not having the cost of telephone calls to his wife in Morocco and monthly visits to his family. Mr. McGregor has shown, on the authority of *Shearman* v. *Folland* (4), that this is an inappropriate deduction. I would allow the £2,204.28 and £3,157.38 claimed under this head.

Kvaerner Gibraltar Ltd. took over the shipyard from GSL and it is the plaintiff's claim that he would have been taken on by Kvaerner until it closed its operations on April 7th, 1997. A letter is exhibited from the personnel department of Kvaerner Gibraltar Ltd. to the effect that as at March 30th, 1995 a mechanical fitter was earning a weekly wage of £207.10. There is no evidence of the weekly wage of a mechanical fitter in 1992 or in 1997, when Kvaerner closed. Nor is there an indication whether such an employee would earn overtime. The plaintiff has used the figure of £207.10 for the whole of the period from June 22nd, 1992 to April 7th, 1997, added 50% to reflect overtime which would have been earned, and deducted tax at Code 20 of £74.39 and Social Insurance of

£12.00. The total claimed is £225.16 per week for 198 weeks, which amounts to £44,383.68. GSL asks me to adopt a year-by-year approach and to assess the plaintiff's earnings from 1992 to 1995 at a figure close to his earnings with GSL, increasing the figure in accordance with Kvaerner's letter of 1995 and even further in 1996, with a reduction as we reach the time for Kvaerner's closure. I am also asked to deduct a further figure for contingencies.

It is impossible to be precise in this computation. The plaintiff earned good overtime with GSL and one can conclude that he would have earned overtime with Kvaerner, but there are no figures to go on. In the tax year 1990–1991 the plaintiff earned £175.41 per week net. He asks me to find that his average weekly wage for the year 1992 to 1997 would be £224.16. I think that is slightly on the high side. Balancing one thing with another and doing the best I can, erring slightly on the low side to take account of contingencies, I assess his average net earnings for the period June 22nd, 1992 to April 7th, 1997 to be £210 per week. For 198 weeks the total figure is £41,580.

From April 7th, 1997 the shipyard was closed for 47 weeks, until March 1st, 1998. The plaintiff claims that he would have been able to secure employment as a garage mechanic, given his employment background in that occupation, and has produced a net weekly figure of £167.18 for employment as such. I accept that figure and would not make deductions as a result of his subsequent move to Morocco and consequent reduction in expenses. It is not disputed by GSL that this hard-working man would have secured employment but to my mind it would be over-optimistic of the plaintiff to expect to fall immediately from employment in the shipyard to employment in a garage. It would take him some time to find a job. I do not, therefore, give him the figure he seeks for the whole 47 week period and award him £167.18 per week for 41 weeks, which comes to a total of £6,854.38.

Cammell Laird re-opened the shipyard on March 1st, 1998. We heard the evidence of Spencer Atkinson, the production manager of Cammell Laird. From his evidence there is no doubt in my mind that had the plaintiff been in the job market, he would have been employed by Cammell Laird. The evidence is that he would be earning £6.75 per hour for a 39-hour week and that overtime is at a premium. The plaintiff's claim for 20 hours or so a week overtime is a conservative claim, according to Mr. Atkinson, and I accept, therefore, his figure of £394.87 gross, which amounts to £316.52 net after deductions for tax and Social Insurance. This would be from March 1st, 1998 to the hearing on August 11th, 1998, the total being £7,279.96.

I should add here that when dealing with the plaintiff's earnings, past and future, we have his evidence that he would earn some money on the side by repairing motor vehicles. I have not taken this into account directly but bear it in mind as representing a further factor in favour of

GSL when considering contingencies. In total, therefore, the amount I award for loss of earnings is £61,076.

Domiciliary care provided by wife: The plaintiff was discharged from St. Bernard's Hospital on January 2nd, 1992 and returned to Morocco. Since then his wife has provided care and assistance to him over and above that provided by a spouse. The plaintiff requires assistance with such simple matters as dressing and bathing and despite the efforts of GSL to demonstrate that the plaintiff is exaggerating his condition, I am satisfied that his wife does provide care and assistance which amounts to basic nursing care. I believe the plaintiff when he says such simple tasks as buttoning his shirt and putting on his trousers are difficult for him. According to Dr. Zian, a home help in Morocco, someone who is more than a cleaner but who is not a nurse, will earn 50 Dirhams per hour. The plaintiff's evidence is that his wife renders him the kind of assistance referred to here for three or four hours a day. Basing his claim on the lower period of three hours a day and deducting 25% because the care is provided by a family member, the plaintiff claims (and on this I am assuming his computation of exchange rates *etc.* is correct) £2,649.19 per annum, or a total of £17,484.65, for domiciliary care from January 2nd, 1992 to date.

I do not think GSL disputes that the plaintiff requires three hours' care per day. However, it is suggested that the hourly rate claimed should be the reduced rate for a cleaner on the basis that if the plaintiff's wife loses three hours each day from her household duties she should employ someone to undertake those duties. That argument does not take account of the realities of the situation. The plaintiff's wife does not spend a three-hour stretch each day looking after her husband's special needs. She is called on as and when the husband needs assistance, and the aggregate period is assessed at three hours each day. In my judgment, the plaintiff is entitled to the sum he claims and I award £17,484.65 under this head of damages.

Miscellaneous loss: The plaintiff has made a claim for miscellaneous special damages of £2,038 to cover return ferry trips from Tangier to Gibraltar, taxi fares to and from the ferry, the clothing ruined in the accident and for medical reports. This figure is agreed and is awarded.

Deductions made from special damages: From November 16th, 1993 the plaintiff has been receiving a disablement pension of £77.40 per week from the Department of Labour and Social Security. This benefit brings into effect the provisions of s.15 of the Contract and Tort Ordinance and s.29 of the Social Security (Employment Injuries Insurance) Ordinance. Section 15(1) of the Contract and Tort Ordinance reads:

> "In an action for damages for personal injuries (including any such action arising out of a contract), there shall in assessing those

damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of any benefits under the Social Security (Employment Injuries Insurance) Ordinance during the five years beginning with the time when the cause of action accrued.

This subsection shall not be taken as requiring both the gross amount of the damages before taking into account the said rights and the net amount after taking them into account to be found separately."

Section 29(1) and (2) of the Social Security (Employment Injuries Insurance) Ordinance reads:

"(1) Where benefit has been made or is payable in circumstances creating a legal liability in some person (other than the insured person) to pay damages, then such person shall be liable to pay one half of the amount of such benefit to the Director.

(2) Nothing in this section shall affect prejudicially any right to recover damages which the insured person or those claiming on his behalf may have, but in assessing the amount of such damages the court shall take into account the amount of any benefit recovered or recoverable by the Director under the provisions of subsection (1)."

The plaintiff did not claim benefit from the date when the cause of action accrued because, we are told, he did not know that he was entitled to such benefit. He claimed benefit from November 16th, 1993 when he learned of his entitlement. He has therefore calculated the deduction pursuant to s.15 of the Contract and Tort Ordinance for $3\frac{1}{2}$ years or so up to the fifth anniversary of the accident. To do so, argues GSL, is wrong, for the plaintiff was entitled to benefit for the whole of the five-year period from the date of the accident and he had a duty to mitigate his loss. GSL would have me deduct half of the benefit paid for the whole of the five-year period following the accident, even though the plaintiff received benefit for just $3\frac{1}{2}$ years.

In *Eli* v. *Bedford* (1) it was held that although a plaintiff must always do what is reasonable to mitigate his loss, a plaintiff who does not know that he has a right to benefit is not acting unreasonably in failing to claim that right. In the circumstances, therefore, I make a deduction as calculated by the plaintiff of £5,069.70.

What deduction, if any, do I make pursuant to s.29 of the Social Security (Employment Injuries Insurance) Ordinance? I cannot accept the plaintiff's first argument that this section is an alternative to s.15 of the Contract and Tort Ordinance and that if deductions are made under one provision they should not be made under the other. I cannot deduce that such was the intention of the legislature from the wording of the two statutory provisions.

GSL would have me say that since the disablement benefit is payable for life and s.29 states that the amount of benefit to be taken into account is the amount recovered and recoverable by the Director, I should make a deduction from the whole of the damages awarded, including those awarded for future loss.

I must say I do not find this an easy point to determine but I prefer the argument of Mr. McGregor for the plaintiff that only those amounts recovered or recoverable up to the date of trial should be taken into account. If the legislature intended the deductions to be in respect of future and potential amounts payable to the Director, the section would have been more clearly worded. When s.29(2) refers to amounts "recoverable by the Director" it means those amounts recoverable up to the date of trial but not actually paid over. I shall therefore deduct from the special damages a further sum of half of £77.40 per week from the date of the accident to the date of trial, which is a total of 375 weeks. The deduction is therefore £14,512.50.

Interest calculations on special damages: Interest is payable on judgments entered in Gibraltar at the rate of 15% per annum. The plaintiff's argument that interest on special damages should be half that amount was abandoned because it is clear that 15% bears no relation to commercial rates of interest. The plaintiff accepts GSL's suggested rate of 4% per annum, being approximately half of the commercial rate. My calculation, using the plaintiff's helpful method of computation, is that interest at 4% raises the special damages by £12,285.66.

Future loss

Loss of earnings: I am persuaded that the plaintiff would have remained in the work force until a normal retirement age of 65 years. We are dealing here with a hard-working individual who has fulfilled his family responsibilities faithfully and who has young children. I do not consider he would have abandoned his obligations and removed himself from work sooner than he had to.

I am satisfied that but for his accident the plaintiff would now be working for Cammell Laird in the Gibraltar shipyard. His basic weekly wage, according to Mr. Atkinson, would be £263.25. His earning potential on overtime would be high. The plaintiff asks me to fix his overtime earnings for these purposes at 50% of his basic working week and I am satisfied that this is a reasonable and proper, indeed conservative, figure. Mr. Atkinson's evidence is to the effect that fitters are working at present much more than 50% of their normal working week as overtime. The plaintiff worked more than 50% of his normal working week as overtime in his last year with GSL. In my judgment, therefore, the plaintiff's assessment of £400.72 per week, less tax and Social Insurance, raising a net figure of £281.98 is reasonable. For reasons

already given, I do not accept that this amount should be reduced by £30 per week because the plaintiff's expenses on his forced return to Morocco have been reduced.

What multiplier should I use and what discount on that multiplier to allow for contingencies? Mr. McGregor has referred me to the recent decision of the House of Lords in *Wells* v. *Wells* (5) where it was held by Lord Lloyd of Berwick ([1998] 3 All E.R. at 498) that the actuarial tables "should now be regarded as the starting point, rather than a check" and that "a judge should be slow to depart from the relevant actuarial multiplier…." Furthermore, a discount rate of 3% was adopted by their Lordships. There is an argument for adopting a higher discount rate of, say, 3.5% because of the higher rates of taxation in Gibraltar, but I am persuaded by Mr. McGregor's argument that to do so complicates the situation and it is better to reduce the multiplier in some instances and to build in discounts such as not providing for the plaintiff's earnings from motor car repairs and by being generous with deductions for contingencies.

The Working Party producing the actuarial tables published by Her Majesty's Stationery Office in May of this year recommends that tables 11–20 be used. There are two sets of tables produced by the Working Party. The first set is based on mortality rates experienced in England and Wales over a three-year period from 1990–1992. The second set, in tables 11–20, is adjusted to take account of projected improvements in mortality rates based on improvements in longevity which have occurred in recent years. It is this latter set of tables which the Working Party commends to the courts. I see no reason for departing from the recommendation in the case of this plaintiff. There is nothing to suggest that the life-expectancy of the plaintiff would be less than that enjoyed in England. Inhabitants of Gibraltar and England seem to enjoy similar life-expectancy and the plaintiff has spent most of his working life in Gibraltar. Counsel for GSL has argued that I should adopt previous actuarial tables but has given me no cogent reason why I should not take account of the most up-to-date figures. Earlier tables may favour his client but I am bound, I consider, to take the latest figures. Table 13 of the tables produced shows the multipliers for loss of earnings to a pensionable age of 65 for males. For a man of 51 years, on a rate of 3%, it gives a multiplier of 11. I see no reason to depart from that figure.

The plaintiff suggests discounting that multiplier by 12% to allow for contingencies. From the cases cited to me, I regard that discount as generous and I adopt it. For future loss of earnings, therefore, I accept the plaintiff's claim of £141,937.45.

Loss of pension: As a result of the accident the plaintiff has ceased to make contributions to the Gibraltar Social Security Fund. The difference between the amount which would have been payable on retirement and the

amount actually payable is £120.50 per month or £1,446 per annum. This is agreed between the parties but GSL disputes the multiplier which the plaintiff would have me adopt. For the reasons given above, I adopt the May 1998 actuarial tables, table 17, which provides a multiplier of 7.64. I therefore accept the plaintiff's claim of £11,047.44 under this head. The plaintiff has abandoned a claim for future loss of widow's pension.

Future domiciliary care provided by wife: The plaintiff receives care and assistance provided by his wife, and it is clear that he will continue to receive such care and assistance as he currently receives. It is reasonable to assess this care at three hours a day, and I have accepted the figure given by Dr. Zian of 50 Dirhams per hour. There will be a deduction of 25% because the care is given by a member of the plaintiff's family. The figure raised by this is £2,649.19 per annum.

Using table 11 of the actuarial tables presented to me and applying the same principles as explained above, the whole-life multiplier is 18.63. This raises a total figure of £49,354.41 under this head, which I award. There is no deduction for contingencies because the payment is deemed to be for the plaintiff's remaining life.

Future medical care: The plaintiff will require a further operation, preferably to replace the knee-joint. The best alternative is arthrodesis, the cost of which is similar to a knee-joint replacement. The plaintiff has produced figures of pre- and post-operative treatment and the cost of the operation which total £23,724.90. As I understand it, these figures are not challenged by GSL.

GSL's argument is that under s.30 of the Social Security (Employment Injuries Insurance) Ordinance the plaintiff is entitled to receive this medical treatment in Gibraltar free of charge and in that case it is unreasonable for him to have the operation performed in Morocco, where he is not covered by Social Security and for GSL to have to foot the bill. This is an unattractive argument. The plaintiff is now living in Morocco and we know from Dr. Zian that the operation can be undertaken there. There is no evidence that the operation would be carried out in Gibraltar and indeed, Dr. Malik, the consultant surgeon at St. Bernard's Hospital, says that the operation will have to be carried out in the plaintiff's own country. The plaintiff had difficulty obtaining a visa to remain in Gibraltar for the whole of the hearing and we do not know what visa difficulties he will have in the future. Indeed, during the course of the proceedings an affidavit was presented on behalf of the Chief Secretary in which he stated that retired Moroccan workers are issued with visas for the purpose only of collecting their pensions.

In all the circumstances, I award the sum of £23,724.90 for the cost of the operation. The plaintiff will also require continuing medical and physiotherapy treatment. The figures for such treatment, based on the

evidence of Dr. Zian, are accepted by GSL. However, the multiplier adopted by the plaintiff of 17.63 is contested. The plaintiff has used the whole-life multiplier in table 11 of the actuarial tables presented, which is 18.63, and has deducted one year from that figure because the cost of medical care up to and immediately after the operation is taken care of in the figure of £23,724.90 above, and the future medical care and physiotherapy treatment will not be necessary until about one year from now. For the reasons given above, I accept the plaintiff's multiplier and award him £67,306.40, as claimed, under this head.

The total amount awarded for future medical care is therefore £91,031.30.

Aids and equipment: Francis Cassaglia, a Member of the Chartered Society of Physiotherapists, has testified about the aids and equipment required by the plaintiff in the future. The amounts for two of these items, £41.94 for a capstan tap turner and £57.97 for a contoured tap rail, are not disputed. Claims for a cordless telephone and the cost of installation of a telephone have been abandoned by the plaintiff.

In respect of the other items, I say at once that, for the reasons given previously, I adopt the multipliers suggested by the plaintiff. The plaintiff claims two pairs of special orthopaedic shoes annually at a cost of £193.55 per pair. However, it is pointed out that he has had only three pairs since the date of the accident and, although he was off his feet for some time, there will be some saving because he will be provided with a wheelchair. I am persuaded that the plaintiff will require just one pair of orthopaedic shoes per annum which, with a multiplier of 18.63, gives him £3,605.84 under this head.

GSL does not dispute that the plaintiff will need an electric wheelchair costing £2,258.06. This will need to be replaced every five years and, using the plaintiff's multiplier, the award under this head is £9,664.50. The plaintiff will require a folding ramp at a cost of £135.48, to be replaced every five years, which, using the plaintiff's multiplier, will give him £579.85. It is necessary for the plaintiff to have an orthopaedic bed which must be replaced every ten years. The plaintiff claimed for an electric bed but did not prove the need for such a sophisticated piece of equipment. GSL called evidence that a bed could be purchased at a cost of £748.39, which, using the plaintiff's multiplier, raises a figure of £1,721.30. Finally under this general head is the plaintiff's need for a transcutaneous nerve stimulator to relieve pain. The cost is £54.84 and, using the plaintiff's multiplier rather than that suggested by GSL, we reach a figure of £355.36.

The total award for aids and equipment is therefore £16,026.76.

Motor car: The plaintiff has run a motor vehicle, albeit not an expensive one. He is entitled to the use of a motor vehicle now and in the

future but in his present condition he cannot drive a conventional vehicle and requires one that is specially adapted. The plaintiff would have me award him the capital cost of a new car on the basis that he needs a car of quality for it to be suitable for adaptation. There is no evidence to suggest, however, that the type of car the plaintiff is used to driving could not be specially adapted to his needs.

I have been referred to the English case of *Moriarty* v. *McCarthy* (2), a case involving a young woman who was confined to a wheelchair by the negligence of the defendant, where O'Connor, J. had this to say ([1978] 2 All E.R. at 220):

> "Let me dispose at once of the claim that she should be provided for life with a motor car and have it running free of cost. It is suggested that I should provide her with enough money to have three motor cars over the next 15 or 20 years and to provide her with enough money to run all these cars, one at a time of course, for the rest of her life, making a deduction for the possibility that she may never buy a motor car and never drive a mile. It is said that her position is different from that of many plaintiffs in that she came from a walk of life where it was unlikely that she would ever be a car owner, either directly or as the wife of a car owner. I cannot accept that. It seems to me that the probability is if she had gone on working and got married that there would have been a family car around, and I do not see any reason to draw a distinction under that head. Just as the capital value of a house is not awarded as a separate item, so the capital value of a car is not to be awarded. What is to be awarded is the cost of adapting the car to fit it for use, and the agreed figure for that is £70. She is entitled to it, and in my judgment she is not entitled to anything by way of capital value of a car or anything towards the running of it, even if there had been any certainty that she was going to do so, and I will make no award under that head."

Respectfully, I agree with that passage and would award a figure for the cost of adapting a motor car to the plaintiff's needs, but not the capital cost of a new car. This GSL accepts, as it does the figure of £2,096.77 for the cost of adaptation. GSL's counsel also suggests a multiplier of 3.24 to allow for replacement vehicles which I understand is not opposed by the plaintiff. This raises a figure of £6,793.53.

Future accommodation: The plaintiff is currently accommodated in a flat in Tangier which is situated on the first and second floors. On the advice of his doctors, he is to move into a bungalow-type residence which will be adapted to meet his special needs, having wider doors and rails to facilitate his movement about the house, *etc.* The house is almost completed.

On the authority of *Roberts* v. *Johnstone* (3) the damages to be awarded in respect of the purchase of special accommodation

necessitated by the plaintiff's injuries should not be the net capital value cost of the purchase but the additional annual cost over the plaintiff's lifetime of providing that accommodation. In *Roberts* v. *Johnstone* the annual cost was held to be taken as 2%, but that has been raised to 3% by *Wells* v. *Wells* (5). It was held in *Roberts* v. *Johnstone* that there was no justification for reducing the full difference between the sale price of the plaintiff's former home and the acquisition of the new home by reference to any element of betterment due to factors not directly related to the plaintiff's need. However, that decision was based on a finding that the purchase of the new home was reasonable, having regard to the plaintiff's need and the non-availability of a suitable but cheaper house elsewhere.

There are two problems in applying the *Roberts* v. *Johnstone* formula in this case. First, although we have valuations for the plaintiff's new house, we do not know how much it has cost him to build. His evidence in that regard was extremely vague and unsatisfactory, and clearly he is involving his brother in the building project which will substantially reduce his costs. Second, from the evidence, the new home is substantially superior to the old accommodation and it is difficult for me to find, as the court did in *Roberts* v. *Johnstone*, that the element of betterment is reasonable in the circumstances. Mr. Culatto for GSL put forward a forceful argument that if one applies the *Roberts* v. *Johnstone* formula to the type of new accommodation that is reasonable to the plaintiff's needs one may well arrive at a decision that there has been no loss.

At the end of much argument I think Mr. McGregor for the plaintiff acknowledged the difficulty of applying the formula suggested. However, he agreed, and this I readily accept, that a more simplistic approach be adopted and the court should award a figure for the cost of adapting the new house to the plaintiff's needs. A figure of £2,000 was suggested, which in all the circumstances appears to be reasonable. That is the award I make.

Interim payments

There have been two interim judgments made to the plaintiff, of £40,000 on July 9th, 1997 and £10,000 on March 13th, 1998. There needs to be made an adjustment in respect of interest awarded at the rate of 4% from the dates of such payments, and using GSL's figures, the amount deducted for such interim payments totals £51,875.07.

Summary

In summary, therefore, I award damages as follows:

1. General Damages	81,400.00
2. Special Damages	
(a) Lost earnings	61,076.00
(b Domiciliary care	17,484.65

(c) Miscellaneous losses	2,038.00	
	80,598.65	
(d) Deductions		
(i) Contract and Tort Ordinance, s.15(1)	−5,069.70	
(ii) Social Security (E.I.I.) Ordinance, s.29	−14,512.50	
	61,016.45	
(e) Interest thereon	12,285.66	
Total	73,302.11	
3. Future Loss		
(a) Loss of Earnings		
141,937.45		
(b) Loss of Pension	11,047.44	
(c) Domiciliary Care	49,354.41	
(d) Future Medical Care	91,031.30	
(e) Aids and Equipment	16,026.76	
(f) Motor Car	6,793.53	
(g) Future Accommodation	2,000.00	
Total	318,190.89	
Total damages (1 + 2 + 3)	472,893.00	
Less deduction for interim payments	−51,875.07	
TOTAL	£421,017.93	

Order accordingly.