[2016] CCJ 17 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. GYCV2015/005
GY Civil Appeal No. 57 of 2009

BETWEEN

GUYANA SUGAR CORPORATION

APPELLANT

AND

TULSIERAM DUKHI

RESPONDENT

Before The Honourables **Mr Justice Nelson**
Mr Justice Saunders
Mr Justice Wit
Mr Justice Anderson
Mme Justice Rajnauth-Lee

Appearances

Mr Kamal Ramkarran for the Appellant

Ms Jamela A. Ali and Mr Sanjeev Datadin for the Respondent

JUDGMENT
of
The Honourable Justices Nelson, Saunders, Wit, Anderson and Rajnauth-Lee
Delivered by
The Honourable Mme Justice Rajnauth-Lee
on the 28th day of July, 2016

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Introduction

[1] This is indeed a sad tale. This appeal arises out of a road traffic accident which occurred nineteen years ago on July 15, 1997 on the Ogle Airstrip Road, East Coast Demerara, Guyana (the road). Tulsieram Dukhi (Dukhi) was standing with his bicycle on the road when he was struck by a pick-up truck belonging to the Guyana Sugar Corporation Inc. (Guysuco). The truck was being driven by Guysuco's employee, Michael Thakoordin (Thakoordin). Dukhi suffered injuries to his left leg, a broken tibia and fibula. In February 1998, Dukhi, a carpenter, commenced proceedings in negligence against Guysuco and Thakoordin. In July 2009, on the eve of her retirement from the Bench, the trial judge made an order giving judgment in favour of Dukhi and awarding damages in the sum of G$850,000.00 together with interest and costs. The judge did not provide either written or oral reasons for her decision. Dukhi promptly appealed the award of damages. The Court of Appeal heard the appeal in 2014 and delivered its judgment in January 2015 substantially increasing the trial judge's award of damages. The key issue before this Court is whether the Court of Appeal was entitled to interfere with the award of damages made by the trial judge when she gave no reasons for that award. Having considered the peculiar circumstances of this case, we can find no basis on which to reverse the decision of the Court of Appeal to re-assess and increase the trial judge's award of damages. We are, however, of the view that the judgment of the Court of Appeal contained errors in the calculation of damages which we have corrected in this judgment.

[2] Dukhi filed a writ on February 25, 1998 and statement of claim on August 5, 1998, seeking damages for injuries suffered and set out in the statement of claim. He alleged that he had suffered fractures to the tibia and fibula of his left leg, pain and shock; he had been hospitalised on three occasions for treatment and three surgical procedures; and had suffered from a permanent incapacity and loss of earning capacity. He claimed special damages in the sum of G$1,097,500.00, general damages and interest.

[3] Guysuco and Thakoordin filed a defence on November 11, 1999. They denied the sequence of events leading to the accident as alleged in the statement of claim and denied any liability in negligence. They alleged negligence or contributory negligence on the part of Dukhi in controlling his bicycle in such a way as to cause it to collide with the pick-up truck which was slowly overtaking a taxi on the road.

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[4] The trial of the action began before La Bennett J on December 12, 2005. The trial continued on December 19, 2005 and December 27, 2009. As the trial progressed, the pleadings were amended by the parties. Dukhi amended his statement of claim on February 6, 2006 to include further personal injuries, that is to say, lumbar scoliosis, shortening of the left leg resulting in a limp, difficulty dorsiflexing the left foot, scarring and indentation of the left leg and wasting of muscle. A further amendment to the statement of claim related to future medical care in the form of neurological intervention abroad. Amendments were also made to the particulars of special damages to include a claim for loss of earnings covering two separate periods: (1) from the date of the accident to September 15, 1999 and (2) from September 16, 1999 to January 16, 2006. Further claims were made for travelling expenses, medicine, a medical certificate, bicycle, crutches and x-rays. In sum, the amount claimed by way of special damages increased to G$2,794,000.00.

[5] An amended defence was filed by Guysuco and Thakoordin in April 2006. They pleaded that Dukhi negligently rode his bicycle from the eastern side of the road onto the western side and into the path of the pick-up truck thereby causing the accident. They took issue with the additional personal injuries claimed alleging that such an amendment effectively created a new claim to be answered and ought to be dismissed as it fell outside the limitation period. In his reply dated April 7, 2006, Dukhi emphasised that the additional personal injuries claimed were causally related to the accident.

[6] Before the trial judge, Dukhi gave evidence and so did Simon Agard, an eye-witness to the accident. Dr Ramsahoye, a neurologist, who saw Dukhi for the first time on December 8, 2005 gave evidence on Dukhi's behalf on December 12, 2005. His medical report dated December 9, 2005, was admitted into evidence without objection. Dr Rogers, who had treated Dukhi after the accident at the Georgetown Public Hospital, did not testify at the trial, but his medical report was admitted without objection during Dukhi's evidence in chief. Guysuco and Thakoordin presented no evidence before the trial judge.

Decision of the Trial Judge

[7] On July 13, 2009, on the eve of her retirement, La Bennett J, gave her decision by way of an order dated July 13, 2009, and entered on July 27, 2009. That order recorded that

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judgment had been entered for Dukhi with costs. It was ordered that Dukhi do recover against Guysuco and Thakoordin the sum of G$850,000.00 with interest at the rate of 6% from February 25, 1998, to July 13, 2009, and thereafter at a rate of 4% per annum until payment. Costs were also fixed in the sum of G$50,000.00. As noted earlier, the trial judge failed to furnish reasons for her decision, whether oral or written.

Judgment of the Court of Appeal

[8] Dukhi appealed to the Court of Appeal, arguing that the award of damages was wholly inadequate and inordinately low, calling for the intervention of the Court of Appeal. It was also contended on behalf of Dukhi that the trial judge failed to take into account that the evidence in support of the alleged special damages was uncontradicted and unchallenged. There was no cross appeal from Guysuco or Thakoordin, they being seemingly content to abide by the order of the trial judge.

[9] The Court of Appeal (Roy, Cummings-Edwards JJA and Persaud J, Additional Judge) allowed the appeal. In its decision dated January 20, 2015, the Court of Appeal set aside the trial judge's award and increased the quantum of damages to G$5,446,000.00. The court rejected the contention of Guysuco that the absence of written reasons from the trial judge operated to preclude appellate review of her award as contained in the order of July 13, 2009. They had argued that for meaningful appellate review, the decision of the trial judge must, at a minimum, have provided some insight into how the legal conclusion had been reached and what facts had been relied upon in reaching that conclusion. It had been further argued that in the absence of the reasons of the trial judge for arriving at the damages awarded to Dukhi, it was impossible for the appellate court to determine whether the trial judge was wrong in her assessment of the evidence and the calculation of the damages.

[10] The Court of Appeal observed that the appeal had come up in the chamber court of the Court of Appeal before a single judge where the issue of the settling of the record without the trial judge's reasons was addressed. There was no appearance on behalf of either Guysuco or Thakoordin before the single judge. The single judge agreed with the submissions of counsel for Dukhi, holding that owing to the peculiar circumstances of the case, the appeal could proceed to a full hearing in the absence of a written reasons of the trial judge who had retired. The single judge directed the Registrar to settle the

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record of appeal on the basis of the available documents from the High Court. These documents included the notes of evidence taken at the trial under the hand of the trial judge. There was no appeal from the order of the single judge.

[11] The Court of Appeal agreed with the test for appellate review of an award of damages set out in *Flint v Lovell*,[1] where Greer LJ noted that an appellate court would not reverse the finding of a trial judge as to the amount of damages unless the court was convinced that the trial judge acted on some wrong principle of law or made an award that was so high or low as amounted to an entirely erroneous estimate of damages to which the plaintiff was entitled. The court held that both limbs of the *Flint v Lovell* test had been satisfied. First, the trial judge erred in law in failing to itemise the various heads of damage which was in the view of the court an absolute requirement in modern practice.[2] Second, the award did not accurately reflect the full extent of Dukhi's loss. The court explained that the global award of G$850,000.00 was 'a gross under assessment'[3] of Dukhi's full loss and indicated that they could 'find no reasonable proportion between the amount awarded and the loss and damage and residual disability claimed and proved'[4] by Dukhi. In their view, there was abundant evidence to show that Dukhi was entitled to 'an award far over and above that which was awarded.'[5] Express reliance was placed on the decision in *Heeralall v Hack Bros*[6] in this regard. As such the court exercised what they referred to as their powers under section 7 of the Court of Appeal Act[7] to set aside the trial judge's award of G$850,000.00 and undertook a re-assessment of the damages to be awarded to Dukhi.

[12] The re-assessment of the Court of Appeal focused on special and general damages. By way of special damages, the court made an award in relation to loss of earnings for two separate periods: (1) February 1998 - August 1999 (inclusive) [from the date of the writ of summons for 18 months when Dukhi could not work] and (2) September 1999 - July 2009 (inclusive) [from the date when Dukhi returned to work to the date of judgment]. The loss for both periods amounted to G$1,178,000.00 and G$824,000.00 respectively. Further special damages were awarded to cover travelling expenses, medicine, damaged

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[1] [1935] 1 KB 354.
[2] Citing McGregor on Damages, 15th ed. para. 1447, *George v Pinnock* (1973) 1 WLR 118, *Jefford v Gee* (1970) 2 QB 130.
[3] Civil Appeal No 57 of 2009, unreported per Roy JA at [7].
[4] ibid at [9].
[5] ibid.
[6] (1977) 25 WIR 117.
[7] Cap. 3:01 of the Laws of Guyana.

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clothing, medical certificate, cost of bicycle, crutches and x-rays. The Court of Appeal, however, refused to make an award for future medical costs in relation to the neurological surgery and joint replacement surgery which they observed could possibly run into thousands of US dollars. Although the court accepted Dr Ramsahoye's evidence as 'fairly objective'[8] it held that Dukhi failed to prove these items of special damage. The Court of Appeal therefore awarded the sum of G$2,218,000 in special damages with interest at 6% per annum from the date of the writ to judgment in the High Court and at 4% thereafter until payment in full.

[13] Under general damages, the Court of Appeal held that Dukhi was entitled to an award under the heads of loss of earning capacity, pain and suffering and loss of amenities. In relation to loss of earning capacity, the court noted that Dukhi was able to return to his former employment as a carpenter, but with several restrictions of body movement on account of the injuries he had sustained. The court also observed that Dukhi had suffered permanent partial disability assessed at 50%. Dukhi's loss of earnings had been put at approximately G$12,000.00 per month. The court determined that G$12,000.00 should represent the multiplicand and chose a multiplier of 12 having regard to Dukhi's age at the time of judgment (45), his normal life expectancy and a retirement age of 65. Based on this formula, Dukhi's loss of future earnings was assessed at G$1,728,000.00. In relation to the pain, suffering and loss of amenities, the Court of Appeal took into account that Dukhi had suffered personal injuries and had undergone three separate surgical interventions with resultant pain, discomfort, inconvenience and the loss of the ordinary amenities of life. Having reviewed other conventional awards, the court made 'an award for pain and suffering'[9] in the sum of G$1,500,000. The court awarded interest on this sum at a rate of 6% per annum from the date of the writ to judgment in the High Court and at 4% thereafter until payment in full.

[14] Accordingly, the following was the breakdown of the award of damages as set out in the judgment of the Court of Appeal:

To:	Special Damages	---	G$2,218,000.00
To:	General Damages		
	(a) Loss of earning capacity	---	G$1,178,000.00

[8] ibid (n 3) at [14].
[9] ibid (n 3) at [13].

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(b) Injuries sustained and for pain and suffering and loss of amenities --- G$1,500,000.00

Total damages G$5,446,000.00

The Appeal and Cross Appeal

[15] Both Guysuco and Dukhi were dissatisfied with the outcome of the Court of Appeal proceedings. Leave having been granted by the Court of Appeal to appeal, Guysuco filed a notice of appeal and Dukhi cross appealed. Guysuco's main complaint was that the Court of Appeal erred in setting aside the award made by the trial judge and embarking on a re-assessment of damages in the absence of the judge's written reasons. Guysuco argued that in the absence of reasons it was impossible to determine whether the test for appellate review had been met, that is, that the trial judge acted on a wrong principle of law or made a wholly erroneous estimate of the damages to which Dukhi was entitled. In addition, Guysuco contended that the Court of Appeal was wrong to find that the damages awarded by the trial judge were inordinately low. Accordingly, the Court of Appeal ought not to have increased the trial judge's award.

[16] Dukhi's main complaint was that the Court of Appeal erred in its re-assessment and that the award made did not adequately compensate him for all the loss that he had suffered. Dukhi submitted that the amount of G$1,500,000.00 for pain and suffering and injuries sustained was inordinately low. In relation to loss of earnings Dukhi argued that the Court of Appeal made two errors: (1) in the computation of time for the loss of earnings for the eighteen (18) month period and (2) in the allocation, calculation and commencement date of the monthly award to cover his reduced earnings. Dukhi also contended that the Court of Appeal erred in failing to award general damages under various heads including future medical costs, medication, disfigurement and scarring, the resultant injuries to the left leg and the loss of amenities. Dukhi also challenged the interest awarded by the Court of Appeal. Dukhi therefore sought a further re-assessment of damages by this Court.

Was the Court of Appeal precluded from re-assessing the award of damages in the absence of the written reasons of the trial judge?

[17] Mr Ramkarran on behalf of Guysuco argued before us with much conviction that the trial judge's findings of fact ought to have been set out in a reasoned judgment. Without

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such reasoned judgment, he argued, the Court of Appeal was precluded from re-assessing the award of damages since it was not possible to ascertain the judge's primary findings of facts, her determination of the credibility of witnesses or her assessment of any expert evidence. In the absence of written reasons, it was impossible to ascertain whether the judge found Dukhi fully or partially responsible for the accident. Mr Ramkarran argued that this problem was rendered more acute in light of the contradictory and conflicting evidence led by Dukhi as to the sequence of events leading to the accident and the medical consequences arising therefrom. Mr Ramkarran submitted that the evidence of Dukhi and of his witness, Simon Agard, as to how the accident occurred could not be easily reconciled, particularly as to the issues of where the accident occurred and whether Dukhi was riding his bicycle or was stationary at the time of the collision. Mr Ramkarran argued that not only was the evidence contradictory, but it was highly implausible that the left side of a vehicle moving from west to east, could hit a person facing south on his left side, breaking his left leg. Rather the more plausible explanation was that Dukhi was carelessly crossing the road at the time of the collision.

[18] Mr Ramkarran further submitted that in the light of the conflicts and contradictions in Dukhi's case, it was a reasonable inference that the trial judge found that there was a measure of contributory negligence on the part of Dukhi and therefore reduced the damages to be awarded to him. This would account for the disparity between the damages claimed by Dukhi and the award contained in the judge's order.

[19] Mr Ramkarran also argued that the medical evidence of Dr Rogers and Dr Ramsahoye was replete with contradiction. On the one hand, Dr Rogers, whose report was prepared some ten months after the accident, indicated that Dukhi's injuries had healed satisfactorily, they were not life threatening but had caused a temporary partial disability of 50%. On the other hand, Dr Ramsahoye, who only saw Dukhi in 2005, days before he gave evidence at the trial and who was not a bone specialist but a neurologist, indicated that Dukhi's injuries were quite extensive and would require specialist medical intervention in the near future. However, it was submitted, it was not possible for Dr Ramsahoye to have made any determination as to whether Dukhi's worsened medical prognosis was attributable to the accident or some intervening event in the eight-year period which had elapsed.

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[20] Mr Ramkarran also emphasised that the duty to give reasons, which was now statutorily prescribed in Guyana by the Time Limit for Judicial Decisions Act 2009 which came into force one month after the judge's order, can be traced to English common law. This duty requires a judge to state clearly the primary facts and inferences in a manner sufficient to resolve the live issues at trial. The duty to give reasons also springs from the concept of due process: *Flannery and another v Halifax Estate Agencies Ltd*.[10] Mr Ramkarran underscored the importance attached to a written judgment, submitting that the appellate process cannot function properly unless the issues which were vital to the conclusion of the trial judge were identified and the manner in which she resolved them explained so that the judgment enabled the appellate court to understand why the judge reached her decision.

[21] On the other hand, Mr Datadin for Dukhi downplayed the absence of written reasons by emphasising that the judge's order clearly indicated that Guysuco and Thakoordin were found fully liable in negligence and that there had been no appeal from the judge's order on liability by Guysuco. It was therefore submitted that Guysuco was foreclosed from raising any arguments on appeal which attacked the judge's finding of liability. Mr Datadin also argued that although a plea of contributory negligence was raised in the defence, no particulars were provided by Guysuco. He therefore submitted that the Court of Appeal was entitled to re-assess the damages.

[22] It is interesting to note that despite his arguments, Mr Ramkarran did not wish this Court to remit the matter to the High Court for a new trial. That, he argued, would work serious injustice to all the parties, given the passage of time between the accident and the hearing before this Court. What he proposed was that the judgment of the Court of Appeal should be set aside and the order of the trial judge reinstated.

[23] The original common law position was that a decision maker had no duty to provide reasons. The rationale underlying that principle was perhaps best encapsulated by the advice of Lord Mansfield to a colonial governor in 1790: 'Consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong.'[11] However, the law in this area has thankfully evolved over time. A trial judge is now under a general duty to

[10] [2000] 1 All ER 373.
[11] Campbell, Lives of the Chief Justices, Vol. II, Chap. xi, p.572. Referred to in *R v London Borough of Lambeth* (1994) 26 H.L.R. 170.

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give reasons. This Court wholeheartedly agrees with the following decisions of the English Court of Appeal: *Eagil Trust Co Ltd v Pigott-Brown*,[12] *Flannery and another v Halifax Estate Agencies Ltd*[13] and *English v Emery*[14] which have considered the trial judge's duty to give reasons.

[24] *Eagil* arose out of a claim by the appellant company demanding repayment under a loan facility granted to the London Bridge Co and guaranteed by the appellant. The appeal involved a challenge to the decision of a single judge of the Queen's Bench Division which set aside the order of the master, which had struck out the plaintiff's action for want of prosecution. The appeal was dismissed. Griffiths LJ observed that in appeals of this nature, an appellate court has a very narrow scope for review, citing in support Lord Diplock in *Birkett v James.*[15] Griffiths LJ emphasised[16] that:

> A professional judge should, as a rule, give reasons for his decision. I say 'as a general rule' because in the field of discretion there are well-established exceptions. The most obvious and frequently used is the exercise of the judge's discretion on costs. As a general rule the judge gives no reasons for the way in which he is exercising his discretion on costs, although if he were to make an unusual award of costs, it is clearly desirable that he should give his reasons for doing so. Another recent example of the judge not being required to give his reasons is when he refuses leave to appeal to the Court of Appeal, having refused leave to appeal from an arbitrator (see Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 237, [1985] AC 191 at 205).
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> Apart from such exceptions, in the case of discretionary exercise, as in other decisions on facts or law, the judge should set out his reasons, but the particularity with which he is required to set them out must depend on the circumstances of the case before him and the nature of the decision he is giving. When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted, and if it be that the judge has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, this court should assume that he acted on those grounds unless the appellant can point to convincing

[12] [1985] 3 All ER 119.
[13] ibid (n 10).
[14] [2002] 3 All ER 385.
[15] [1977] 2 All ER 801, [1978] AC 297.
[16] [1985] 3 All ER 119, 122

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reasons leading to a contrary conclusion (see Sachs LJ in *Knight v Clifton* [1971] 2 All ER 378 at 392-393, [1971] Ch 700 at 721).

[25] The failure to give reasons has also taken on a constitutional/human rights dimension. In certain instances, the failure to give reasons can give rise to a breach of the right to a fair trial. This is evident from the jurisprudence of the European Court of Human Rights surrounding Article 6 of the European Convention. Relevant examples of ECHR case law include the decisions in *Helle v Finland,*[17] *Hirvisaari v Finland*[18] and *Karakasis v Greece.*[19]

[26] Guysuco in their grounds of appeal before this Court contended that the decision of the Court of Appeal to increase the award of damages in the absence of the findings of the trial judge occasioned substantial wrong and/or miscarriage of justice, caused severe prejudice and constituted a breach of its right to natural justice and to a fair hearing guaranteed by Article 144(8) of the Constitution of Guyana. We note, however, that this ground was pursued in the written but not the oral submissions of Mr Ramkarran. Instead, Counsel was content to base his argument on the absence of written reasons. Without the written reasons of the trial judge, he submitted, the Court of Appeal ought not to have re-assessed damages.

[27] We are of the view that Guysuco's submissions are misconceived. The trial judge's order clearly reflected that Guysuco and Thakoordin were found wholly liable in negligence. If that were not the case, the order of the Court would have expressly reflected the degree of contributory negligence which the trial judge had found, as Counsel before us have recognised. Mr Ramkarran has also suggested that the order may not have accurately reflected the decision of the trial judge since it was the practice in Guyana for Attorneys appearing for the successful party to write up the order and to lodge it for approval. In our view, that submission cannot be sustained. We note that the order of the trial judge was approved of and signed by the Registrar of the Court who was empowered to do so by the Rules of the High Court. We are of the view that given Guysuco's failure to appeal the judge's decision on liability, the Court of Appeal was correct not to undertake any evaluation of the evidence regarding how the accident

[17] [1997] ECHR 20772/92.
[18] (Application No 49684/99) (2001) 38 EHRR 139, [2001] ECHR 49684/99, ECtHR.
[19] (2003) 36 EHRR 507, at para 27.

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occurred and to focus on the evidence relevant to the loss and damage suffered by Dukhi. We can therefore find no basis on which to criticize the approach of the Court of Appeal in proceeding to hear the appeal on the obvious footing that Guysuco and Thakoordin were wholly liable in negligence. In addition, the Court of Appeal made mention that the single judge in the Chamber court of the Court of Appeal had directed the Registrar to settle the record of appeal in preparation for the hearing of the appeal. As noted earlier, there was no appeal from the order of the single judge and the record of appeal was prepared and included the notes of the evidence taken at the trial.

[28] We believe, however, that this is a convenient point to stress the importance of the duty of the trial judge to give reasons. A trial judge ought to be diligent to give reasons in a timely manner. The legislature of Guyana has sought to deal with the failure of judges to give reasons or to do so within a reasonable time by the enactment of the Time Limit for Judicial Decisions Act 2009. Whilst that Act has no doubt had the salutary effect of enhancing timeliness by judges in the delivery of their reasons for decisions, we are of the view that something more can be done by those responsible for the administration of justice, especially where the judge is due to retire or has resigned. We wish to suggest that where a judge is due to demit office, the chief judge ought to put in place appropriate administrative processes which would ensure the delivery of all outstanding reasons of the judge.

Was the Court of Appeal entitled to set aside the award of damages made by the trial judge and to re-assess damages?

[29] Mr Ramkarran's submission that the absence of reasons from the judge precluded the Court of Appeal from reviewing and re-assessing the award of damages can also be rebutted by reference to the well-established test for appellate intervention in the realm of damages with which this Court agrees. An award of damages will be subject to appellate review where the trial judge made an error of law or the quantum of damages is so disproportionate to the sum claimed that it appears to be entirely incommensurate with the nature and extent of the loss suffered. This test is routinely applied in Caribbean jurisprudence as illustrated by the decision of *Heeralall v Hack Bros*[20] from the Court of Appeal of Guyana.

[20] ibid (n 6).

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[30] *Heeralall* arose out of a personal injuries claim brought by the appellant who had to have his left leg amputated after being struck by a lorry belonging to the respondent. The appellant challenged the award of damages made by the trial judge amounting to G$26,544.00 as being erroneous and an unrealistic estimate of the full extent of his loss. The appellant attacked every item contained in the award. The court allowed the appeal and varied the award and awarded damages totalling G$46,405.00 in general and special damages. Haynes C described the test to be applied on appeal on a question of the quantum of damages as follows:

> The principles this appellate court will apply in an appeal on a question of *quantum* of damages are clear and well-established. Because a finding on damages is generally so much a matter of speculation, of estimate and of individual judicial discretion, this court will not increase or decrease an award only because every member or a majority of it would have awarded something more or something less. If the judge in making his assessment applied a wrong principle of law, we can interfere, for example, if he took into account some irrelevant factor or left out of account some relevant one or gave too much or too little weight to it. But even if this court is unable to locate, isolate, and identify any specific error of law, it can still interfere. If we are satisfied that the award at first instance is in one direction or the other plainly disproportionate to or not reasonably commensurate with the gravity of the injuries suffered and the consequences entailed, then we may conclude that somewhere along the line there was a faulty estimate or an error of judgment, sufficient to justify our interference on the ground of excess or insufficiency. We may think the award rather on the high side and still not interfere; or we may think it rather on the low side and still not interfere. In other words the award must be too much on the high side or too much on the low side.[21]

[31] The Court of Appeal noted that Dukhi had claimed items of special damage representing a total of G$2,794,000.00, and had also claimed general damages for his non-pecuniary loss such as the injuries sustained, pain, suffering and loss of amenities, and loss of earning capacity. They further recognized that Dukhi's evidence had been virtually unchallenged and that the claim for special damage, excluding all others which had been proved, far exceeded the global sum awarded by the trial judge. The Court of Appeal therefore observed that even if there was before them a written judgment, they failed to recognize the legal basis upon which the trial judge 'could have justified the making of an award'[22] which bore 'no resemblance to even one of the several proven claims'[23] that

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[21] ibid at 122.
[22] ibid (n 3) at [7].
[23] ibid.

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Dukhi had made for either economic and non-economic loss. Roy JA delivering the judgment of the Court noted that they could 'find no reasonable proportion between the amount awarded and the loss, damage and residual disability claimed and proved'[24] by Dukhi. He considered the award 'outrageous'[25] and 'derisory and a denial of justice.'[26] He further observed that there was 'abundant evidence'[27] to show that Dukhi was entitled to an award far and above that which was made.

[32] In our view, the approach of the Court of Appeal in the special circumstances of this case cannot be faulted. A brief examination of the evidence given at the trial relative to Dukhi's claim for loss of earnings supports the correctness of the approach. Dukhi's evidence was that after the accident he was unable to work for a period of about eighteen (18) months. His evidence was that at the time of the accident he worked as a carpenter earning G$18,000.00-$20,000.00 per week. The Court of Appeal held that on the basis of Dukhi's evidence, they were entitled to find that the sum for loss of earnings during that period amounted to G$1,178.000.00 after tax.[28] Dukhi's evidence was generally supported by the medical report of Dr Rogers which confirmed that Dukhi remained an out-patient until May 1998, when on examination, he was found to have 'satisfactory healing' and by the medical report and evidence of Dr Ramsahoye, whose findings were virtually unchallenged in cross-examination. The Court of Appeal observed that that sum by itself exceeded the global sum awarded by the trial judge. In those circumstances, we agree with the Court of Appeal that it was entitled to re-assess the award made on the basis of the obvious disparity between the sums claimed and the global sum awarded by the judge.

[33] Before passing on to the re-assessment of damages by the Court of Appeal, we wish to make some brief observations about the conclusion drawn by the Court of Appeal that the trial judge erred in making a global award. English law in this regard has shifted quite significantly from *Davies v Smith*[29] where itemisation was used as a ground to appeal the global award made, to *Jefford v Gee*[30] where itemisation was described as the modern practice. In Guyanese jurisprudence, the issue was directly raised in *Sarju*

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[24] ibid (n 3) at [9].
[25] ibid.
[26] ibid.
[27] ibid.
[28] We note as mentioned at [38] and [40] that there was a miscalculation by the Court of Appeal; and that the proper sum is G$1,291,400.00.
[29] Unreported; see Kemp and Kemp on the Quantum of Damages in Personal Injury Claims (2nd ed, 1961), Vol. 1, p. 353.
[30] [1970] 1 All ER 1202, [1970] 2 QB 130.

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v Walker (No 1)[31] where Persaud JA noted that 'awards must be made under the well recognised heads.'[32] Crane JA, however, held that the requirement for itemisation only arose where the 'trial court is seized with the question of what rates of interest are applicable to the various heads of damage… [there being] no question of interest or other compelling circumstance which arises in this case, … the trial judge's failure to itemise damages has occasioned no injustice to the appellant.'[33] In *Heeralall,* Haynes C quite curiously claimed that he did not know 'what is the rule today in the Caribbean. But it would surprise me greatly if this differed from the modern English practice … I propose that our judges should all follow the practice to itemise.'[34]

[34] The view that itemisation is only required when damages attract interest or that itemisation is not required in Guyana because the award of interest is discretionary under Guyanese law is an over-simplification of the function of itemisation. Itemisation is linked not solely to the award of interest but performs a broader function of demystifying awards of damages for the benefit of litigants. We agree with the principle set out by the English Court of Appeal in *George v Pinnock*[35] that the parties themselves are entitled to know what sum has been awarded for each relevant head of damage and would thus be able on appeal to challenge any error in the assessments. We therefore consider itemisation generally to be the better and prevailing practice, but we hesitate to agree with the Court of Appeal on the facts of this case that the making of a global award by the trial judge amounted to an error of law solely on that basis.

Should this Court interfere with the award of damages made by the Court of Appeal?

[35] It is well recognised that like any other appellate court, this Court ought not to review the award of damages made by the Court of Appeal, unless we are convinced that the Court of Appeal acted on some wrong principle of law or made an award that was so high or low as to amount to an entirely erroneous estimate of damages to which Dukhi was entitled. While we acknowledge and agree that a certain degree of deference is usually shown to the computation of damages by local courts, this Court does not face

[31] (1973) 21 WIR 86.
[32] ibid at 93.
[33] ibid at 104 – 105.
[34] ibid (n 6) at 128.
[35] [1973] 1 All ER 926.

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the disadvantages attendant on distance or unfamiliarity with local circumstances.[36] Further the length of time which this matter has taken to proceed through the court system militates against any order that would result in a further round of litigation. As such we are persuaded that this Court is well placed to take the necessary corrective action to achieve fair, reasonable and appropriate compensation for Dukhi for the injuries he has suffered. Reason, justice and common sense dictate that the chapter must be closed once and for all on the litigation between these parties. We will therefore proceed to consider the Court of Appeal's award under the heads of special and general damages.

Special Damages

[36] The Court of Appeal awarded special damages in the sum of G2$2, 218,000. The Court of Appeal awarded damages for loss of earnings for two (2) periods:

(i) February 1998 to August 1999 (that is, from the date of the writ of summons until eighteen (18) months thereafter) – G$1,178,000 and

(ii) September 1999 to July 2009 (from date when Dukhi returned to work to the date of judgment) – G$824,000.

We agree with Ms. Ali's argument that this computation of time is incorrect. The first period of compensation properly runs from July 15, 1997, the date of the accident, to eighteen (18) months thereafter, that is, January 15, 1999, the date of his return to work, (the first period) and the second from January 16, 1999 up to July 13, 2009, the date of judgment (the second period). We also accept Ms. Ali's submission that there was a miscalculation by the Court of Appeal in that the first period should have been calculated at 78.3 weeks and not 72 weeks for that eighteen-month period. The correct calculation is therefore 78.3 weeks x G$18,000.00 per week = G$1,409,400.00.

[37] As to the issue of taxation on the sums to be awarded for loss of earnings, this Court directed that both parties file further submissions on the varying tax brackets in Guyana. Guysuco submitted a letter from the Guyana Revenue Authority Secretariat dated April 22, 2016, and setting out *inter alia* the annual income tax thresholds and the annual rates of tax for the period 1997 to 2009. There is general agreement between the parties that the tax threshold for the period 1998 to 2003 was G$216,000.00 and that the rate of tax

[36] See also Lachana v Arjune [2008] CCJ 12 (AJ)

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on chargeable income for that period was 20% on the first G$134,000.00 and 33 1/3% on the remaining chargeable income. After 2003, the tax threshold increased almost on a yearly basis. Dukhi estimates that his tax deduction for the period 1997 to 1999 amounts to G$112,998.00 and notes that the Court of Appeal estimated his income tax liability for the first period as amounting to G$118,000.00. Dukhi regards this error in their calculation as being negligible and not warranting appellate intervention. We agree with his submission in this regard. We wish however to observe that despite the information provided by the parties, in the absence of evidence which gives this Court a more complete picture of the taxable income and tax liability of Dukhi, such as personal and other allowances, we do not think that we ought to interfere with the calculations as to tax computed by the Court of Appeal.

[38] As to the second period, we are of the view that the Court of Appeal was entitled to calculate Dukhi's damages on the basis of his evidence that he had suffered loss of earnings after his return to work as a result of the injuries suffered. Dukhi however renews his complaint that his reduced income of G$12,000.00 per month for the second period was below the tax threshold and thus the Court of Appeal erred in deducting income tax for that period. This submission is misconceived on several fronts. It bears note that the figure upon which Dukhi relies in making his submission does not represent his monthly earnings for the second period. Rather G$12,000.00 is the difference between his earnings pre- and post-accident on a monthly basis. On his own evidence, after his return to work after the accident he was making G$15,000.00 per week resulting in a monthly income of G$60,000.00. His income, though reduced, would still fall within the tax threshold as set out by the Guyana Revenue Authority; a threshold with which Dukhi raises no complaint. It is also well-established that any award of damages for loss of earnings must be based on net rather than gross income.[37] As such it cannot be said that the Court of Appeal was plainly wrong in making a deduction for taxation on the damages awarded for the second period. Neither is there sufficient information before this Court to suggest that the amount payable by way of taxes was incorrectly computed. It follows that Dukhi is not entitled to succeed on this portion of his cross-appeal.

[37] *British Transport Commission v Gourley* [1956] A.C. 185.

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[39] In sum, we will not interfere with the decision of the Court of Appeal in respect of the loss of earnings but we will adjust the award for obvious errors. Accordingly, the sum for loss of earnings for the first period amounts to G$1,409,400.00 less taxation of G$118,000.00 totalling G$1,291,400.00 and for the second period, the sum of G$1,599,600.00, that sum being subject to taxation in the amount of G$592,000.00 resulting in a total of G$1,007,600.00.

Other items of special damage

[40] We see no reason to interfere with the award of the Court of Appeal in respect of other items of special damage, that is to say, for travelling expenses, medicine and nourishment, damaged clothes and boots, cost of medical certificate, bicycle, crutches and x-rays.

General Damages

[41] In the well-known case of *Cornilliac v St Louis*[38] Wooding CJ set out the considerations which ought properly to be borne in mind in assessing general damages as follows: (a) the nature and extent of the injuries sustained; (b) the nature and gravity of the resulting physical disability; (c) pain and suffering; (d) loss of amenities; (e) the extent to which pecuniary prospects were affected.[39] Counsel for the Respondent argued that the Court of Appeal ought to have made separate awards for pain and suffering on the one hand and loss of amenities on the other.

Pain and suffering and loss of amenities

[42] At [12] of the judgment, the Court of Appeal made it clear that Dukhi was entitled to an award of general damages for loss of his earning capacity, as well as a separate award for the injuries sustained and pain and suffering and loss of amenities. At [13] of the judgment, the Court of Appeal, having considered various conventional awards made for pain and suffering in certain Guyanese cases, made an award for 'pain and suffering' in the sum of G$1,500,000.00. In the summary of damages, however, set out at [15] the Court of Appeal made it clear that the sum of G$1,500,000.00 represented the award for injuries sustained and for pain and suffering and loss of amenities.

[38] (1964) 7 WIR 491.
[39] This approach was quoted with approval in *Heeralall* (n 6) at 125.

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[43] Counsel for the Respondent placed reliance on several Guyanese cases, including *Kent Garment Factory v Sharmala Shiwdas*[40] where the Court of Appeal of Guyana on December 19, 2002, upheld an award of the High Court in the sum of G$2,500,000.00 for pain and suffering and G$2,000,000.00 for loss of amenities. Whilst admitting that the injuries in *Kent Garment Factory* were far more severe and that the plaintiff had been rendered paralysed by her injuries, counsel for the Respondent however argued for an increase in the award of general damages. Counsel for the Respondent also relied on *Candacie Johnson v National Insurance Board*[41] where the trial judge made separate awards for pain and suffering (G$800,000.00) loss of amenities (G$300,000.00) disfigurement/scarring of the abdomen (G$200,000.00) and side effects of the drugs (G$200,000.00). It is accepted that the injuries suffered in the *Candacie Johnson* case were far more severe. The case involved a claim for damages for personal injury arising out of an accident where a 12-year-old girl was hit by a car on her way to school. She suffered a head injury, had to have her kidney and spleen removed and spent four (4) days in intensive care. The injuries resulted in severe pain and in the aftermath her ability to concentrate and sleep were affected. She also suffered from black outs and had to give up her dream of becoming a police woman.

[44] Counsel for the Respondent submitted that the Court of Appeal had failed to take into account Dukhi's permanent disability, limp, shortening of leg and twisted spine. Counsel for the Respondent argued that the Court of Appeal ought to have included in its global award or made separate awards for the risk of side effects of drugs, the disfigurement and scarring and indentation of the left foot, damage to left ankle resulting in restriction of movement, shortening of left leg and resultant limp, development of lumbar scoliosis to the left and development of osteo-arthritis.

[45] The Court of Appeal had made clear that Dukhi had suffered personal injuries, had undergone three separate surgical procedures with resultant pain, discomfort, inconvenience and the loss of the ordinary amenities of life. The Court of Appeal also had regard to the medical reports which were tendered into evidence and to several conventional awards made by courts in similar or near similar cases in Guyana. We note

[40] Civil Appeal No 68 of 1999, unreported.
[41] No 560 of 1997, unreported, High Court of Guyana, Demerara.

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that Dr Ramsahoye's medical report referred to scarring and indentation of the left foot, restriction of movement of the left foot, shortening of left leg and resultant slight limp, degenerative changes to the spine, development of lumbar scoliosis and future development of osteo-arthritis. In all these circumstances, we are not persuaded that the Court of Appeal failed to take into account these items as contended by counsel for the Respondent or that we ought to set aside the award of G$1,500,000.00 for the injuries suffered, and for pain and suffering and loss of amenities.

Loss of earning capacity

[46] The Court of Appeal awarded G$1,728,000 under this head, using a multiplicand of G$144,000.00 (G$12,000.00 per month x 12 months) and a multiplier of 12. Dukhi has not appealed this aspect of the award. Guysuco on the other hand submits that the award made is an erroneous estimate of the loss suffered by Dukhi in two respects: first the Court of Appeal failed to explain adequately its choice of a multiplicand of 12, save to say it was to 'take care of all the contingencies'[42] and second that the award did not take taxation into account. We do not agree with either submission and can find no error in this aspect of the award made by the Court of Appeal. We note that the authority of *Ingelbirth Winston Hercules v Barama Company Ltd*[43] relied upon by Guysuco where George J, suggests that a range of 6½ to 11 was appropriate for a man aged 49, was delivered after the decision of the Court of Appeal. In this regard, it is merely persuasive and in any case the multiplier relied on by the Court of Appeal is not so far outside the range suggested by George J as to warrant the intervention of this Court. In addition, having regard to the difficulties mentioned earlier as to the computation of tax in respect of Dukhi's earnings, based on the evidence which is before this Court, we do not think that we should interfere with the multiplicand used by the Court of Appeal. The Court of Appeal's order of G$1,728,000 therefore stands.

Future Medical Costs

[47] It was submitted on behalf of Dukhi that the Court of Appeal erred in failing to award damages for future neurological surgery amounting to US$50,000.00 as well as hip and knee replacement surgery at a cost of US$85,000.00 each. Counsel for the Respondent

[42] ibid (n 3) at [12].
[43] High Court Action No. 540-W of 2010, unreported, delivered on January 26, 2015.

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primary contention was that an award under this head amounted to general damages and need not be specifically proven. In this regard, counsel for the Respondent relied on *Shearman v Folland*[44] which established that all damages which were prospective and had not crystallised at the date of hearing fell under the rubric of general damages. In any event, counsel for the Respondent submitted, these items have been proven through the evidence of Dr Ramsahoye, thus justifying an award to cover the costs of those future surgical interventions.

[48] Dr Ramsahoye testified that Dukhi would need neurological surgery as well as knee and hip joint replacement. The Court of Appeal found that Dukhi had failed to prove this item of special damage. Over fifteen years had elapsed between the accident and the hearing before the Court of Appeal, and there was still no evidence that Dukhi required these medical interventions. We do not think that the Court of Appeal can be faulted for failing to make an award for future medical care. In our view, the future surgeries required to address degeneration of Dukhi's spine, hip and knee were too remote to be described as causally connected to the accident. Accordingly, Dukhi failed to prove that there was an unbroken chain of causation between the accident and these future medical interventions such as to warrant an award of damages under this head. We wish to add that in matters such as these where there is a claim for future medical care and there is a significant lapse of time between the accident and the hearing before the Court of Appeal, it would be of great assistance to put before the Court of Appeal updated medical reports prepared independently by each party's medical expert or by a medical expert jointly appointed.

Did the Court of Appeal breach Guysuco's right to a fair hearing under section 144(8) of the Guyanese Constitution?

[49] Although counsel for Guysuco did not pursue this ground of appeal we feel constrained to make some observations on it because of the suggestion that the Court of Appeal might have denied Guysuco a constitutional right. The contention was that the Court of Appeal increased the quantum of damages by almost 541% without sufficiently explaining the rationale underlying this re-assessment, thereby violating its right to a fair hearing under Article 144(8) of the Constitution. Article 144(8) provides that:

[44] [1950] 1 All ER 976.

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> Any court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other tribunal, the case shall be given a fair hearing within a reasonable time.

[50] Guysuco relied on *English v Emery*[45] where the right to a reasoned judicial decision has been interpreted as a sub-set of the right to a fair hearing as contained in Article 6(1) of the European Convention. We note, however, that the case law on this issue, as set out above at [23] – [25] clearly demonstrates that the question whether the absence of reasons or the sufficiency of reasons triggers a breach of the right to a fair hearing is driven by context and circumstance. There is no standard test by which the sufficiency of reasons can be adjudged. This is expressly recognised in *English* by Lord Phillips MR who observed that 'It is not possible to provide a template for this process.'[46] It stands to reason that a high threshold would attach to any complaint as to the sufficiency of reasons provided by an appellate court. Taking the matter in the round, therefore, we are not persuaded that there has been a breach of Article 144(8) of the Constitution such as might have amounted to a denial by the Court of Appeal of the right to a fair hearing. In any event, Guysuco is not without a remedy in the circumstances of this case. They have appealed to this Court which is constitutionally empowered to correct any errors contained in the judgment of the Court of Appeal

Some brief observations

[51] During the hearing of the appeal, we discovered that no damages have been paid to Dukhi although he emerged victorious before the lower courts. There was no stay of the order of La Bennett J. Guysuco never appealed on the issue of liability or on the damages awarded by her. On appeal, the Court of Appeal increased the damages awarded and although a stay was imposed, it was only of six (6) weeks' duration. With this state of affairs, one would have expected Dukhi to pursue enforcement proceedings at least of the trial judge's award. This would have done something to assuage the

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[45] ibid (n 14).
[46] ibid at [19].

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obvious hardship which he must have endured since the making of the order of the trial judge in 2009. It is quite lamentable that no such action was taken.

[52] Lastly, we note that although Mr Datadin withdrew his appeal on interest in his written submissions, he appeared to renew that argument before this Court without providing any proper basis for interfering with the interest ordered by the Court of Appeal. In those circumstances the order of the Court of Appeal stands.

ORDER

[53] It is ordered as follows:

(i) The appeal is dismissed. The cross appeal is allowed in part. The order of the Court of Appeal is affirmed in part as set out at (ii) of this Order.

(ii) It is ordered that Guysuco shall pay to Dukhi damages (all in Guyanese dollars) as follows:

Special Damages

(a) Loss of earnings from July 15, 1998 to January 15, 1999 (less taxation)	$1,291,400.00
(b) Loss of earnings from January 16, 1999 to July 13, 2009 (less taxation)	$1,007,600.00
(c) Travelling expenses	$ $60,000.00
(d) Medicine and nourishment	$ 120,000.00
(e) Damaged clothing, boots etc	$ 10,000.00
(f) Cost of medical certificate	$ 3,000.00
(g) Cost of bicycle	$ 10,000.00
(h) Cost for crutches	$ 3,000.00
(i) Cost for X-rays	$ 10,000.00
	$2,515,000.00

General Damages

(a) Loss of earning capacity	$1,728,000.00
(b) Injuries sustained, pain and suffering and loss of amenities	$1,500,000.00
	$3,228,000.00
Total Damages	**$5,743,000.00**

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(iii) Interest

Guysuco is to pay Dukhi interest on the special damages of G$2,515,000.00 and on the sum of G$1,500,000.00 at the rate of 6% per annum from the date of the writ of summons to the date of judgment in the High Court, and thereafter at the rate of 4% per annum until fully paid.

(iv) Costs

Guysuco is to pay to Dukhi the costs ordered in the courts below and the costs of the appeal to be taxed in default of agreement. There shall be no order as to costs on the cross appeal.

/s/ R. Nelson

The Hon Mr Justice R Nelson

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

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