

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: BVIHCV2019/0038

BETWEEN:

HERMIONE ROSE WILLIAMS

Claimant

and

STACY-ANN WYNTER

Defendant

Appearances:

Mr. Michael Fay Q.C. with Mr. Shane Quinn of Counsel for the Claimant
Mr. Terrance Neale with Ms. Elizabeth Ryan of Counsel for the Defendant

**2020: July 14th
October 30th**

JUDGMENT ON ASSESSMENT OF DAMAGES

[1] **SANDCROFT, M. [Ag]:** On February 19, 2019, the claimant filed this claim for damages for personal injury. On the 14th day of September 2019, Judgment in Default of Defence was entered against the defendant and in favour of the claimant for damages to be assessed. The claimant has now brought this application for an assessment of damages. The defendant who did not refute liability, sought, as is her right, to be heard on the quantum to be assessed.

Background

[2] On February 12, 2016 at approximately 8.30am the claimant was jogging in the vicinity of the Port Purcell Roundabout in Road Town, Tortola when a vehicle driven by the defendant collided with the claimant causing her to suffer certain injuries.

[3] The claim is an action in negligence filed by the claimant, Hermione Williams, on February 19, 2019 against the defendant, Stacy -Ann Wynter, because of an accident which occurred on February 12,

2016 while the claimant was jogging in the Port Purcell Roundabout area and collided with the defendant as she was driving by resulting in certain injuries to the claimant. The defendant in her Defence filed in the matter did not dispute liability, however, she sought to be heard on the quantum of damages and the amount that the Court should award to the claimant.

- [4] The claimant consulted with Dr. Klaus Buring, an orthopaedic surgeon based at the Bougainvillea Clinic, Road Town, Tortola, who upon examination advised the claimant that she had suffered “a soft tissue injury over the outer right hip area with formation of a large haematoma and abrasions further over her right shoulder and elbow.” A subsequent x-ray taken of the claimant’s pelvis and both hips on February 22, 2016 revealed that there was no clinical evidence of any skeletal injury.
- [5] The claimant was advised “to rest at home, adhering to the usual recommendation for soft tissue injuries by the acronym RICE (Rest-Ice-Compression-Elevation).”
- [6] The claimant was also advised that it was necessary to “take time off from work as the haematoma was under tension and rest was required” however, contrary to this medical advice she returned to work the same day.
- [7] Over a period of approximately three months the swelling reduced in size and the haematoma underwent resorption. Miss Williams regained full function; however, “an area about the size of her palm over the right outer hip (trochanteric area) has a marked discolouration with a change in pigmentation of the skin was still clearly visible on December 21, 2016. This constituted a cosmetic change and is likely to remain permanent”
- [8] The claimant filed the present action on February 19, 2019 seeking special damages in the sum of \$1,132.00 and unquantified general damages for pain and suffering which she alleged she suffered because of the defendant’s negligence.
- [9] Judgment was entered for the claimant on September 14, 2019 with damages to be assessed.

[10] On March 23, 2020, the Court made the Order for the filing of submissions by the parties and the assessment of damages.

Claimant' Submissions

The Nature and extent of the injury

[11] The attorney-at-law for the claimant posited that the contents of the expert report and the Reply were repeated and relied upon. Dr Buring confirmed that the claimant sustained the following injuries:

- a. A “massive” haematoma over the right lateral hip (trochanteric) area with reabsorption after three months. 33 months post-accident, some discoloration over lateral hip area;
- b. Scarring over right shoulder - permanent;
- c. Scars over right arm on the elbow area – permanent; and
- d. Psychological impact from accident in the form of nightmares and flashbacks. Unable to resume running until 9 months after accident.

[12] The claimant also submitted that the photographs of the injuries, including the recent ones showed the scars on her arm and shoulder were permanent. Further, the claimant described the emotional impact of the accident as well as the physical impact on her.

[13] The claimant further posited that the expert report of Dr Buring indicated at page 3 that “this area was bruised and the skin very extended and tense”. That at page 5 the expert writes that “there was soft tissue injury over the outer right hip area”.

[14] The claimant also posited that the expert report stated that “the clinical examination revealed the formation of a ‘massive’ haematoma over the right lateral hip (trochanteric) area.” The report continues, “I thus performed an aspiration with an 18 G needle but was only at that time able to get out 20 ml blood, assuming that clotting had occurred. I advised her to rest at home, adhering to the usual recommendation for soft tissue injuries by the acronym RICE (Rest-Ice-Compression-Elevation).”

The nature and gravity of the resulting disability

[15] The claimant submitted that she suffered a “massive” haematoma which, though it partially subsided over many months, caused a discoloration which persists. The area covered by the haematoma in the 3 months during which it lasted was the size of a rugby ball (see paragraph 24 of the Claimant’s Witness Statement). The area of discoloration which now remains is the size of an adult human hand. The expert has determined that the permanent disability resulting from this haematoma is 3% (see page 5 of the Expert Report). The Claimant submits that this discoloration amounts to a single disfiguring scar as described in the Judicial College Guidelines.

[16] The claimant further submitted that the permanent scar to the arm covered an area of approximately 4cm x 4cm (approximately 1.57in x 1.57in). Accordingly, it fell to be considered as a single noticeable scar under the leg as described in the Judicial College Guidelines.

[17] The claimant also submitted that the permanent scar to the shoulder covered an area of approximately 4cm x 2 cm (approximately 1.57in x 0.79in). Accordingly, it fell to be considered as a single noticeable scar as described in the Judicial College Guidelines.

Pain and Suffering

[18] The claimant posited that the soft tissue injury to her hips/pelvic area and the haematoma occasioned pain and suffering and a limp. Daily activities such as shopping, walking and even lying and sitting became difficult or painful.

[19] The claimant further submitted that the suffering occasioned by the collision included anxiety. This anxiety manifested itself in flashbacks and nightmares which persisted for six (6) months and nervousness about outdoor running which persists even today. This is even more upsetting for the Claimant since running was a particular favourite pastime of hers before the event of February 2016.

[20] The claimant also submitted that her distress shortly after the collision was noted at page 3 of the expert report. Further, at page 5 of the expert report, Dr Buring writes:

“The injury required a rehabilitation period that I estimate to 3-6 months.

**My judgment is that there were two components to this:
The large haematoma gradually resorbed within 3 months.**

At the follow up visits it was obvious, that Ms. Williams suffered from posttraumatic psychological effects such as “flash backs” of the accident and she was not confident to resume her regular running exercises until about 6 months after the accident.”

Loss of Amenities

[21] The claimant posited that no sum of money can truly compensate for personal injury and the sense of humiliation meted out to her by a tortfeasor, but as far as money can compensate for pain and suffering for the physical injuries, in making a suitable award in damages to compensate the Claimant the Court should be guided by the principles laid down by Wooding CJ in **Cornilliac v St. Louis** (1965) 7 WIR 491 in its assessment of general damages. These are:

- (i) The nature and extent of the injuries suffered.
- (ii) The nature and gravity of the resulting physical injuries.
- (iii) The pain and suffering endured.
- (iv) The loss of amenities. (v) Future pecuniary loss.

[22] The claimant posited that the pain occasioned by the injuries impacted her daily life and was affected by the collision. In summary:

- a. The claimant found daily activities such as walking, lying, and sitting to be difficult and painful. This persisted for 2-3 months;
- b. The claimant had a limp in her walk for 2-3 weeks;
- c. The claimant had to take painkillers every-day for at least 2 months;
- d. The claimant found dressing herself to be difficult;
- e. The claimant was unable to undertake simple duties such as shopping;
- f. The claimant could only sit with any comfort at an angle and for short periods only. This persisted for 2-3 months.

[23] The claimant also posited that in the past the Eastern Caribbean Supreme Court has looked to the Judicial College Guidelines (“**the Guidelines**”) used in England & Wales for an indication of what ranges are suitable for certain injuries.¹ The below passages reflect the areas of concern in this matter, namely

¹ See *Badenock v Hazells* SVGHCV2013/0114 (20 March 2014); *Taliam v Duncan* SLUHCV2018/0418 (26 April 2019)

- a. injury to the leg;
- b. scarring

Injury to hips/pelvic area; haematoma

[24] The claimant further posited that the Guidelines provide for ranges for injuries to the pelvis and hips at 7 (D). Under the heading “Lesser Injuries”; the Guidelines state, “(ii) Minor soft tissue injuries with complete recovery”. The range is up to £3,370 (up to 3,710 with 10% uplift).

Scarring

[25] The claimant submitted that the Guidelines give the following guidance for scars:

“10. SCARRING TO OTHER PARTS OF THE BODY

This is an area in which it is not possible to offer much useful guidance. The principles (including the approach to awards for different genders) are the same as those applied to cases of facial disfigurement. [...]

A large proportion of awards for a number of noticeable laceration scars, or a single disfiguring scar, of leg(s) or arm(s) or hand(s) or back or chest fall in the bracket of £6,680 to £19,390 (£7,350 to £21,330 with uplift).

[...]

A single noticeable scar, or several superficial scars, of leg(s) or arm(s) or hand(s), with some minor cosmetic deficit. £2,020 to £6,680 [£2,220 to £7,350 with uplift].”

[26] The claimant also submitted that it was difficult to estimate a value to place on fright and fright reaction. The Guidelines do, however, provide sums for psychiatric damage at the lower scale. Less Severe is described as follows: “In these cases a virtually full recovery will have been made within one to two years and only minor symptoms will persist over any longer period.” The range given is £3,370 to £6,980 and £3,710 to £7,680 with 10% uplift.

[27] The claimant further submitted that if the Court was not prepared to award a sum independently of the other heads of loss, that the prolongation of her recovery as described in the aforementioned paragraphs can be dealt with fairly if the Court:

- a. factors the psychological impact into its assessment of the proportionality and fairness of the overall award; or

- b. enhances the sums awarded for scarring and hip/pelvic injury to reflect the added recovery time by virtue of the loss of amenity ground identified in **Cornilliac v St Louis**.

[28] The claimant also posited that any such enhancement should be between 25% and 30%. This, it was submitted, was reasonable and would reflect:

- a. the additional time of recovery noted in the expert report;
- b. The fear of someone bumping into the Claimant's right leg;
- c. The fact that the Claimant took over two years to build up the confidence to run outside again; and
- d. The fact that the Claimant still finds it difficult to run outside, jumping at the sound of cars.

[29] The claimant further posited that the case of **St Lucia Distillers Limited v Cox** (SLUHCV2018/0394; 28 April 2020), in that very recent case, Philip J (Ag) applied the seminal case of **Cornilliac v St Louis (supra)**. This was a case where the Defendant successfully counterclaimed for damages arising out of the accident the subject matter of the case. The Defendant suffered, among other things, a haematoma in the area of her right knee and a laceration to her left foot. The Claimant had made a substantial recovery within 10 weeks but still suffered pain and discomfort over an extended period which prevented her from performing many basic activities like bathing, cooking, washing, and driving. Philip J (Ag) awarded the Defendant \$25,000 in General Damages for pain, suffering and loss of amenity (reducing it by 55% for contributory negligence).

[30] The claimant submitted that while the award in the aforementioned case also reflected a closed fracture to the collar bone, the considerable speed with which the injured party recovered counterbalances that. While the Claimant in these proceedings suffered no broken bones, the effect of her injuries was still being felt long after the collision, with her return to running only taking place one month after the accident. Adjusting for these factors, the claimant submitted that the **Cox case** is comparable to hers.

[31] The claimant also submitted the case of **Ronald Rossi v Stephanie Peters** (DOMHCV2013/0308; 22 March 2016), in that recent case, the Court awarded a 50-year-old male \$80,000 in General Damages where the injured party had suffered a ruptured knee ligament. While the injured party was bed-ridden

for one year after the incident, no permanent disability resulted. The Claimant in that case suffered less than Mr. Rossi in that she was not bedridden for one-year post accident, but the Rossi case indicates that the lack of a permanent disability is no bar to a substantial monetary award. The Claimant in this case was unable to run for 10 months after the collision and was unable to run outside for over two years. Considering that this was a great pleasure to her (and considering the well-known eggshell skull rule – i.e., a wrongdoer takes his victim as he finds him), the collision had a significant effect on the claimant's enjoyment of life.

[32] The claimant posited the case of **Andrella Wickham v Deshawn Gordon** (SVGHCV2016/0116; 10 April 2018), in Wickham, the Claimant was involved in a motor vehicular accident suffered

- (i) severe soft tissue injury to the right elbow;
- (ii) severe full thickness abrasions and lacerations to the lateral elbow;
- (iii) severe scarring/disfigurement to the elbow;
- (iv) small subcutaneous foreign body palpable to the lateral elbow;
- (v) elbow pain;
- (vi) slight stiffness at the site of the injury;
- (vii) bruise to the lateral aspect of the right thigh.

The Court was also informed of the psychological effect of the accident on the injured party. The injured party was left with a scar on her left arm, which, at 26 years of age as she was, was particularly embarrassing for her. The Court, after reviewing relevant authorities, awarded the injured party \$70,000 for her pain and suffering and loss of amenities.

[33] The claimant also posited while the initial injury to the claimant in this matter was not quite so severe, the Court is reminded that the claimant in the present matter has suffered two scars; one to her elbow and shoulder, together with the skin discoloration in the area of her pelvis.

[34] The claimant further posited that the Court take some guidance from the following cases decided in England & Wales which bear some resemblance to the injuries suffered by her.

- (i) **Brown v Clark (1987)**; Awarded £6,000 comprising £2,500 for pain, suffering and loss of amenity and £3,500 for scars

- (ii) Cuts to the forehead, left knee, and hands – permanent duration
Current value - £17,193.33

- (iii) **Patterson v Whitbread & Co plc** (1992); Awarded £2,842.80 comprising £2,500 for pain and suffering and loss of amenity and £342.80 for special damages
Scars on right dominant, right, and middle finger tendons cut
Current value - £5,959.48

- (iv) **Thomas O'Brien v SA Brain & Co Ltd** (2204); Awarded £3,250 for pain and suffering and loss of amenity.
Laceration to lower left shin requiring treatment. Scarring.
Current value - £5,171.66

- (v) **Dawson v Oldham MBC** (2007); Awarded £4,147 comprising £4,000 for pain, suffering and loss of amenity (£63 interest) and £84 in special damages plus interest.
Permanent scars from significant lacerations and muscle strain to right arm
Current value - £5,962.21

- (vi) **S (a child) v Barker (2010)**; Approved a settlement of £6,600 for pain and suffering and loss of amenity.
Cuts to right arm, abdomen, feet and right thumb, surgery required. Laceration to right thumb left a scar.
Current value - £8,534.99.

Quantum

[35] The claimant also submitted that based on the foregoing reasons, cases and principles, the Court was invited to make an overall award of between US\$24,000 and US\$36,000. This sum can be broken down as follows:

- a. Between US\$10,000 and US\$15,000 for pain, suffering and loss of amenities;
- b. Between US\$4,000 and US\$6,000 for the scar to the Claimant's shoulder;
- c. Between US\$4,000 and US\$6,000 for the scar to the Claimant's elbow;
- d. Between US\$8,000 and US\$10,000 for the discoloration to the Claimant's pelvic area; and
- e. For fright and fright reaction, the Claimant invites the Court to make an additional award of between US\$6,000 and US\$10,000.

[36] In the alternative, the claimant invited the Court to enhance the overall award at paragraph 42 by between 25% and 30%.

- a. A 25% enhancement would give a range of US\$6,000 and US\$9,000
- b. A 30% enhancement would give a range of US\$8,400 and \$10,800.

[37] The claimant further submitted that an award within the above range would be fair and reasonable compensation for her injuries in all the circumstances.

[38] The claimant also posited that the claim for special damages was as set out in the Particulars of Claim. The total sum sought was \$1,132.00. The defendant had not sought to challenge this aspect of the claim and it was submitted that the claimant should be awarded this sum in full.

Defendant's Submissions

General Damages

[39] The defendant submitted that in the event that an award for unquantified general damages for pain and suffering should be made. That the principles which should guide the court in awarding general

damages as compensation for personal injuries are well established as was set out by Sir Hugh Wooding CJ in the case of **Cornilliac v St Louis**² and are as follows:

- a. **The nature and extent of the injuries sustained;**
- b. **The nature and gravity of the resulting physical disability;**
- c. **The pain and suffering which has to be endured;**
- d. **The loss of amenities suffered;**
- e. **The extent to which, consequentially, the appellant's pecuniary prospects have been naturally affected**

Nature & Extent of Injuries

[40] The defendant submitted that the two expert reports from Dr Buring, who treated her immediately after the accident were inconsistent. That the first report was dated December 21, 2016 (the **"First Buring Report"**) whilst the second report was dated January 8, 2020 (the **"Second Buring Report"**). And that to the extent that if there were any inconsistencies between the two reports that the 1st Buring report which was written a few months after the accident was to be preferred.

[41] The defendant also submitted that both reports confirmed that she suffered "a soft tissue injury over the outer right hip area with the formation of a large haematoma [A localized swelling that is filled with blood caused by a break in the wall of a blood vessel i.e. a severe bruise], abrasions further over the right shoulder and elbow", and that a subsequent x-ray of the claimant's pelvis and both hips taken on February 22, 2016 did not show any clinical signs of skeletal injury.

[42] The defendant further submitted that the claimant was advised "to rest at home, adhering to the usual recommendation for soft tissue injuries by the acronym RICE (Rest-Ice-Compression-Elevation)." However, the claimant on her own initiative returned to work after her initial consultation with Dr. Buring but the doctor further "insisted that she take time off work as the haematoma was under tension and rest was required."

² 1965 7 WIR 495. See also ANUHCv 2007/0294 Yvonne Francis v Pestaina v Pestania para 16 [unreported]

[43] The defendant posited that Dr. Buring's 1st report concluded that "Gradually over a time span of about three months the swelling reduced in size as the haematoma underwent resorption. Miss Williams has regained full function; however, an area about the size of her palm over the right outer hip (trochanteric area) has a marked discolouration with a change in pigmentation of the skin still clearly visible on 21.12.2012-see photo."

[44] The defendant also posited that since the medical evidence presented by the claimant the duration of the injury was approximately three (3) months. That the claimant's contention at paragraph 27 of her witness statement that her injury lasted ten months i.e. "More importantly, as a consequence of my injuries, I was physically unable to run for ten months", must therefore be rejected."

[45] The defendant further posited that there were some discrepancies between the First and Second Buring Reports, the most important of which was the contention that "At the follow up visits it was obvious, that Ms. Williams suffered from post-traumatic psychological effects such as "flash backs" of the accident and she was not confident to resume her regular running exercises until about 6 months after the accident". This observation cannot however be accepted for the following reasons:

- a. Firstly, Dr. Buring examined the claimant immediately after the accident and did not make a note of this observation since it is not recorded in his medical notes or the First Buring Report. The assumption must therefore be that he did not, at the relevant time, consider this to be of any importance. The Second Report was written approximately four (4) years after the accident and in the absence of any notation of this matter in the initial medical notes the logical assumption must be that this information was recently provided by the claimant to Dr. Buring who improperly included same in his Second Report.
- b. Secondly, Dr. Buring is an orthopaedic surgeon and not a psychologist and he is therefore not qualified to make findings on a patient's psychological state and his observations in this regard are improper and should be disregarded. There is no indication of any psychological test carried out on the claimant at the time of the accident by Dr. Buring or any other medical

practitioner, as such this general and unsupported assessment of the claimant's state of mind cannot under any circumstances be relied upon.

- c. Thirdly, Rule 32.4 (4) requires an expert to state whether a particular matter or issue falls outside his or her expertise which has not been done by Dr. Buring in this matter. It should also be noted that while confirming in his response to the Written Questions that the matter filed outside the scope of his expertise Dr. Buring did not however as required under Rule 32.4 (4) set out this limitation in his Report.
- d. Fourthly, the Claimant having applied to admit Dr. Kapur, a clinical psychologist based in London, England, as an expert and the Defendant having objected to the application on the grounds that no allegation of any psychological damages was pleaded in the Claim and also the great length of time which has elapsed since the injury and the claimant withdrew the application and as such should not be allowed to introduce psychological evidence "through the back door".
- e. Finally, Dr. Buring's neutrality as an objective expert must be seriously called into question as he was the claimant's medical practitioner and his responses to the written questions put to him pursuant to Rule 32.8 were far from adequate. Even Dr. Buring's response to the Court's questions on the level of pain endured by the claimant was quite questionable given that it is a known medical fact that there are no criteria for determining pain which is subjective and can only be determined by the patient hence the reason why upon admission to a medical facility patient are required to provide information on the level of pain being experienced. Dr. Buring having indicated that on a scale of 1-10 the claimant's pain level was at one time between 8-9 could not upon cross examination explain why no prescription pain killer medication was prescribed. The evidence of the claimant was that she was taking paracetamol, an over-the-counter medication, which of course would have absolutely no effect on a patient whose pain level was 8-9 on a scale of 10.

[46] The defendant also posited that based on the medical evidence, the claimant's injury could therefore be summarized as a soft tissue injury specifically a severe bruise (haematoma) on her outer right hip which fully resolved itself within three (3) months without further treatment as well as abrasions over

her right shoulder and elbow which required any treatment. That during the course of the Court hearing the claimant showed the court the scars from the abrasions which by any objective assessment were quite negligible and barely visible.

[47] The defendant submitted the case of **Robin and Peters v Ulysses Auguste and Ors**, DOMHCV 2003/0141, where the 2nd defendant who was in a vehicular accident sustained “a 15-centimeter diameter swelling on the right leg just below the knee. This was very painful and associated with an area of bruising that extended for 30cm from the edges of the swelling. Movements of the neck were limited and painful. X-rays revealed no bone injury. She was treated with analgesics. By the time she was reviewed by Dr. Paul some 15 months after the accident neck movements were free but mildly painful. There was still some mild pain with skin discoloration on the right leg.” The claimant was awarded, in November 2010, the sum of EC\$10,000 (US\$3,700) for pain and suffering and loss of amenities.

[48] The defendant also submitted the case of **Mc Millan v Warren & Ors**, SVGHCV 2013/0183. The claimant, in August 2010, in a motor vehicular accident sustained “a blunt injury to the right chest and neck, bruises, abrasions and minor cuts on both legs. The injuries caused fluid in his lung and lower zone lung pneumonitis.” The Claimant made a full recovery from his injuries by 2012. The Court after reviewing several authorities in the jurisdiction that dealt with similar injuries awarded the Claimant in June 2015 the sum of EC\$10,000 (US\$3,700) as general damages for pain and suffering and loss of amenities.

[49] The defendant further posited the case of **Helious Trocard v Edmund and George**, DOMHCV 2008/0206 the Claimant as a result of a vehicular accident suffered multiple minor injuries such as a nine cm abrasion in the left posterior aspect of arm involving elbow and distal aspect of arm and abrasions to various parts of his body. The Court awarded the Claimant in May 2010 the sum of EC\$7,500 (US\$2,777) for pain and suffering and loss of amenities.

[50] The defendant posited the case of **Yvonne Francis v Pestania and Pestania**, ANUHCV 2007/0294 where the Claimant was struck in the face and knocked down by a falling object from a building. The medical report submitted by the Claimant confirmed that “She had a large haematoma (swelling

containing blood) on the left side of her forehead and a bruise on her upper left cheek...She was diagnosed with haematoma of the forehead secondary to trauma and was given a course of antibiotics prophylactic ally. She was followed over the next few weeks and the haematoma resolved with some tenderness remaining in the area and discoloration of the overlying skin.” The Claimant was awarded in September 2013 the sum of \$ 13,000 (US\$4,814) for pain and suffering and loss of amenities.

[51] The defendant further posited the case of **Wickham and Ors v Deshawn Gordon**, SVGHCV 2016/0116, where the Claimants were involved in a vehicular accident. The third and fourth Claimants (these Claimant injuries were more consistent with the injuries of the Claimant in the present case) suffered “head trauma, headache and a 1.5 x 2 cm in diameter, to the right posterior ear, superficial abrasions between her fingers and a 7cm x 3cm abrasion to the proximal one-third of the forearm.” The Claimants completely recovered from their injuries within six months and were both awarded EC\$8,500 (US\$3,148) in April 2018.

[52] The defendant also posited that **The Judicial Guidelines For the Assessment of General Damages in Personal Injury Cases 14 ed.** which was perhaps the most authoritative work relied on by legal practitioners and Judges in the United Kingdom for guidance on the level of general damages to be awarded in personal injury matters, is of the view that minor injuries (defined as injuries which are of short duration and for which there is usually a complete recovery within 3 months) would be between L1,200 (\$1,476) and L2,150 (US\$2,644).

[53] The defendant submitted that the claimant’s injuries in the present case were far less severe than most of the injuries in the aforementioned cases being merely a large haematoma (swelling containing blood) on her right hip as opposed to her head, and some bruises on her right shoulder and elbow. Dr. Buring having previously not suggested that the Claimant suffered any permanent disability has now sought to contend in his Second report (issued approximately 4 years after the accident) that because the claimant had some mild discolouration and scar from the healed abrasions that “these cosmetic defects have a permanent disability of 3%”.

[54] The defendant further submitted that when the written questions were put to Dr. Buring as to the medical basis for his conclusion he was unable to justify same and merely contended that “One can

argue about the level but in my opinion had the accident never occurred she would definitely not have had these defects". It was also interesting to note that in the First Buring Report no reference was made to any scar from the healed abrasions suggesting that Dr. Buring did not consider this to be significant enough at the time to make a note as his only observation was in respect of an "area about the size of her palm over the right outer hip (trochanteric area) has a marked discoloration with a change in pigmentation of the skin still clearly visible on 21.12.2016 (see photo)."

[55] The defendant also posited that the marked discolouration, because of the location namely, the claimant's right hip would usually not be visible and therefore not merit serious consideration as a cosmetic defect or permanent disability. That it should also be noted that in none of the medical reports in the cases cited above was a haematoma regarded as a permanent disability and this would also once again call into question Dr. Buring's independence as an expert witness.

[56] The defendant further posited that the claimant had also sought to contend that she suffered some psychological injury from the accident particulars of which is set out at paragraph 27 of her witness statement as follows:

"I also suffered from acute anxiety after the accident. I suffered from nightmares and flashbacks for at least six months and even now, some four years on, I still find it difficult running outside and find myself jumping when I hear a car behind me. It actually took me over two years to build up my confidence to run outside again."

[57] The defendant also submitted that the claimant did not plead any psychological injury in her Statement of Claim and as such is not permitted under the Civil Procedure Rules 2000 to raise this issue at such a late stage. Secondly, the claimant has also not produced any medical evidence to support such a claim. In **Page v Smith 28 BMLR** pg 133 at pg 135-136 the House of Lords made the following observations with respect to claims for psychological damage:

"It is necessary at the outset to particularize what is meant by "nervous shock", such as may result in liability for damages. The decided cases indicate that it means a reaction to an immediate and horrifying impact, resulting in some recognisable psychiatric illness. There must be some serious mental disturbance outside the range of normal human experience, not merely the ordinary emotions of anxiety, grief or fear."

[58] The defendant further submitted that it was quite clear that the claimant's "acute anxiety" after the accident does not fall into the category of a "recognisable psychiatric illness" in the absence of medical

evidence to support such a conclusion. As previously indicated Dr. Buring is as an orthopaedic surgeon and not a psychologist and therefore not qualified to make findings on the Claimant's psychological state. Consequently, his observations in this regard are improper and must be disregarded. There is also no indication of any psychological test which had been carried out on the Claimant at the time of the accident by Dr. Buring or any psychologist or psychiatrist as such Dr. Buring's general and unsupported assessment of the Claimant's state of mind cannot under any circumstances be relied upon in a court of law to support psychological injury.

[59] The defendant posited the above authorities suggested that for soft tissue injuries such as those suffered by the claimant that an appropriate award for general damages would range between US\$2,644 to US \$4,814. The claimant's injuries are at the lower end of the scale being a simple haematoma on the right hip and we would therefore suggest that based on the cited authorities and making allowance for some degree of inflation that a sum of \$3,500 would be appropriate compensation for pain and suffering.

General Damages

[60] The defendant further posited that the claimant had also claimed special damages in the sum of \$1,132 which included an item of 15 chiropractor treatments at \$52 per treatment for a total of \$780 and objected to the reimbursement of the costs of chiropractor treatments for the following reasons:

- a. The recommendation of Dr. Buring was for "rest at home, adhering to the usual recommendation for soft tissue injuries by the acronym RICE (Rest-Ice-Compression-Elevation)". As such there is no indication that any further medical treatment was required or recommended.
- b. The accepted treatment for minor soft tissue injuries is in fact rest, ice compression and elevation and it is difficult to understand why the Claimant would need to consult with a chiropractor for a swelling on her hip or why the Defendant should pay for these costs.
- c. No receipts have been produced by the Claimant as proof that these consultations took place and payments were made.

[61] The defendant finally posited that an appropriate award of damages for the Claimant would be as follows:

- a. General Damages \$3,500

b. Special Damages \$352

Costs

[62] The defendant posited that the claimant's submission with respect to general damages is flawed from the perspective that she appears to fail to appreciate that her injury is a minor one being, according to her own medical expert merely a "a soft tissue injury over the outer right hip area with formation of a large haematoma, abrasions further over right shoulder and elbow" which did not require any hospitalization or from the medical reports and the documents submitted prescription pain killer medication. It should be noted that although the medical reports disclosed did not indicate any pain killer prescription and Dr. Buring himself when questioned appeared not to be clear on the issue. The Claimant nevertheless contends that she took paracetamol every day for at least 2 months [see para 24 of claimant's witness statement]. That paracetamol was however an over-the-counter drug and as such of limited effect in relieving serious pain.

[63] The defendant further submitted that the claimant's injury healed without the need for further medical intervention in approximately three (3) months (Dr. Buring's advice to the Claimant was "to rest at home, adhering to the usual recommendation for soft tissue injuries by the acronym RICE (Rest-Ice-Compression-Elevation)." The claimant is therefore essentially trying to "make a mountain out of a mole hill" by claiming inflated damages for minor injuries.

[64] The defendant also posited that the claimant in assessing quantum appeared to have disregarded the authorities submitted in support of her claim and had instead literally "plucked figures out of the air" to arrive at damages which cannot be supported. For example; the claimant, stated that the appropriate damages for pain and suffering and loss of amenities was between US\$10,000 and US\$15,000 despite the fact that such a level of award was not supported by her authorities then further averred that there should be separate substantial sums for minor scarring from scratches ("abrasions") over her right shoulder and elbow despite the fact that these matters would obviously have been taken into consideration in making the award for pain and suffering and loss of amenities in calculating general damages.

[65] And in **McGregor on Damages** 16th edition [2003] paragraph 43-006 states as follows:

“Where the precise amount of a particular item of damage has become clear before the trial, either because it has already occurred and so becomes crystallised or because it can become measured with complete accuracy, this exact loss must be pleaded as special damage.”

[66] The defendant further submitted that it was reasonable that all receipts presented flow from the injury and are on a balance of probabilities medicines and treatments reasonably required as ordered by the Medical Practitioners, that is, recede topical gel, burn cream, recede mini peel pads. The Case relied on here is the case of **Liverson Sandy v. Antigua Public Utility Authority**.

Court Analysis

General Damages for Psychiatric Suffering

[67] A debate that was necessarily engaged by the parties as the claimant led no medical evidence to prove any known medical illness as having been sustained because of the accident. I say it is academic as firstly, the common law developed in most of the Commonwealth is pellucid, no award for damages can be made for nervous shock or its kindred psychiatric illnesses which is a psychiatric illness in the absence of evidence. **Charlesworth and Percy on Negligence 10th Ed.** paragraph 2-78 states that:

“The first limiting mechanism is the type of symptoms that can attract compensation. It has long been recognized that there is no recovery of damages in tort otherwise than certain specialized types of claims for mere injury to feelings. Only where the injury which arises is so intense or potent in its symptomatology that it can be regarded as an illness can the claim be entertained. Claims for symptoms which cannot be characterized as “psychiatric illness” should fail at the outset.”

[68] Some of the applicable principles are set out by Lord Ackner in *Alcock* [1992] AC at p 400:

“1. Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as by the experience of having to cope with the deprivation consequent upon the death of a loved one, attracts no damages. Brennan J in *Jaensch v Coffey*, 155 549, 569, gave as examples, the spouse who has been worn down by caring for a tortuously

injured husband or wife and who suffers psychiatric illness as a result, but who, nevertheless, goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result also has no claim against the tortfeasor liable to the child.

2. Even where the nervous shock and the subsequent psychiatric illness caused by it could both have been reasonably foreseen, it has been generally accepted that damages for merely being informed of, or reading, or hearing about the accident are not recoverable.

3. “Shock,” in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.”

[69] In **Vernon v Bosley** [1997] 1 All ER 577 Evans LJ summarized the condition that had to be satisfied as:

“The person who seeks to recover damages must prove that he or she has suffered mental illness (nervous shock) as the result of the traumatic experience.”

[70] It was in the landmark decision of **McLoughlin v O’Brian** [1983] 410 which advanced the law on nervous shock that Lord Wilberforce observed:

“There can be no doubt that these circumstances, witnessed by the appellant, were distressing in the extreme and capable of producing an effect going well beyond that of grief and sorrow.” That effect was described as “severe shock, organic depression and a change of personality.”

[71] Brennan J usefully makes the observation that not only is the notion of a psychiatric illness important but perception as distinct of mere knowledge of a distressing fact is compensable. In **Jaensch v Coffey**, 155 C.L.R at p. 566/7 he said:

“The notion of psychiatric illness induced by shock is a compound, not a simple, idea. Its elements are, on the one hand, psychiatric illness and, on the other, shock which causes it. ...I understand “shock” in this context to mean the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff’s mind and causes a

recognizable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential.”

[72] **In Australia Wilson v Lund** [1971] 80 Wash 2d 91, 491 p2d 1287, in which the court stated that for purposes of proving grief, mental anguish, or suffering of a surviving parent, expert psychiatric testimony will often be useful and proper, if not absolutely necessary, in action by surviving parents for the death of children to provide a reasonably reliable basis for considering an award of mental anguish damages, to prevent the trier of fact from falling into the realm of mere speculation and conjecture, and to prevent the trier of fact from resorting to legal assumptions and conclusions which have little or no supporting medical or other reasonably reliable data.

[73] **In McDermott v Ramadanovic Estate** [1988] 27 BCLR (2d) 45; **Rhodes v Canadian National Railway** [1990] 75 DLR (4th) 248; **Cox v Fleming** [1993] 13 CCLT (2d) 305; and **Anderson v Wilson** [1999] 175 DLR (4th) 409. These cases approved of Southin J’s analysis that the current law on actionable nervous shock makes an artificial distinction of intense human suffering:

“But what is the logical difference between a scar on the flesh and a scar on the mind? If a scar on the flesh is compensable although it causes no pecuniary loss, why should a scar on the mind be any the less compensable? In both cases, there are serious difficulties of assessment. That has not been allowed to stand in the way of the court’s making awards for non-pecuniary losses. Nor has it prevented awards for pain caused by physical injury which is, to use Mr. Fleming’s words, “a bad memory”.”

In these cases, the secondary victims bore witness to the suffering of the deceased.

[74] In assessing damages herein, it is undoubtedly the law, that the purpose of damages insofar as the law of tort is concerned, is to place the successful party in the position that he would have been in, insofar as compensation to be paid to the successful party by the party that committed the wrong is concerned; if that wrong had not in fact occurred. Insofar as the law of tort is concerned and thus, by extension, the law relating to the tort of negligence, damages can be recovered by a party, solely for emotional distress caused, even wherein the same has not arisen either from any physical injury to a party that seeks to claim redress, or from any economic loss to such a party. For many years, the term used to describe the type of ‘damage’ to a person that would be recoverable as such, was ‘nervous shock.’

This has been stated by the learned authors – **Winfield and Jolowicz on Tort, 14th Edition** (1994), at page 119. The learned authors after having so stated, go on to state on the same page of that text, that this terminology has the advantage of serving as a reminder that this head of liability requires something in the nature of a traumatic response to an event. The learned authors also state on that same page that – **‘The sensations of fear or mental distress or grief suffered as a result of negligence do not themselves give rise to a cause of action and this was held to be so even where the victims of a disaster were trapped, fully conscious, for some time, before they suffered a swift death from asphyxia’** – **Hicks v Chief Constable of South Yorkshire** – (1992) 2 ALL E.R. 65. Continuing the extract from Winfield and Jolowicz on Tort, 14th Edition at page 119 – **‘Where a Claim alleged negligence in the conduct of a police disciplinary investigation, the submission that actionable damage had occurred in the form of anxiety and vexation was described in the House of Lords as unsustainable – Calveley v Chief Constable of Merseyside (1989) A.C. 1228. Where, however, there is some other tangible injury, damages may be awarded for mental distress, usually as part of general damages for pain and suffering, or in the case of intentional torts, as aggravated damages. Putting those cases aside, what is required is some ‘recognizable psychiatric illness.’ Hinz v Berry (1970) 2 Q.B. 40, at page 42 and Alcock v Chief Constable of South Yorkshire [1992] 1 A.C. 310, at pages 399 and 406.**

[75] There can be but little doubt, as case law so reflects, that posttraumatic stress disorder has been deemed as being a recognized psychiatric illness and in fact, there is a precedent from another Court which makes it clear that damages for the same, in a case not involving physical injury negligently caused to anyone, nor negligence causing economic loss, is recoverable. See :- **Joan Morgan and Cecil Lawrence v Ministry of Health, University Hospital of the West Indies and the Attorney General for Jamaica** – Claim No. 2005 HCV00341. Nonetheless, Courts in England - from which the vast majority of the guiding case law on this subject emanates, no doubt fearful of the wide-ranging liability and also, the greater possibility of there being fraudulent claims which might be associated with these types of cases, that being nervous shock cases, have remained reluctant to apply the ordinary principles of liability without qualification. As *Ld. MacMillan* had recognized from quite some time ago: **‘...in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and those elements may give rise to debate as to the precise scope of legal liability...’** **Bourhill v Young** (1943) A.C. 92, at page 103. In **Dulieu v White** (1901) 2 K.B. 669,

it was held that psychiatric injury was actionable only if it arose from the plaintiff's reasonably sustained fear for his own safety. However, in a majority Judgment of the Court of Appeal of England, in the case – **Hambrook v Stokes Bros.** (1925) 1. K.B. 141, this narrow test was rejected. The **Hambrook case** was one in which a mother suffered psychiatric injury from an apprehension of injury to her children from whom she had just parted. In the **Hambrook case**, the Court of Appeal (England) rejected the **Dulieu v White** limitation, because it would favour a plaintiff who thought only of her own safety and deny a remedy to a mother who, like Mrs. Hambrook, was, 'courageous and devoted to her child.' However, it was made clear in the Hambrook case, that liability would only arise if the injury resulted from what the victim saw or realized by her own unaided senses, and not from what someone else told her – **See at page 152 of the Court of Appeal Judgment in that case, per Bankes, J. and at page 159, per Atkin, L.J.** This latter – mentioned point will be of great relevance for the purposes of this Court's Judgment as to damages, particularly insofar as the claimant herein is concerned. This however is addressed in this Judgment in far more detail, below.

[76] The law in this area has been settled ever since the Judgment of the House of Lords was rendered in **Alcock v Chief Constable of South Yorkshire (1992) 1 A.C. 310**. In the **Alcock case**, the ten (10) appellants had suffered psychiatric trauma as a result of the disaster in 1989 at the Hillsborough stadium, Sheffield, in which, as a result of the admitted negligence of the Defendants, some ninety-five (95) people were crushed to death and over four hundred (400) were physically injured. None of the appellants had suffered any physical injury, nor been in any danger. Indeed, most of them were not at the stadium, though they saw part of the events on television. All of the plaintiffs whose appeals were before the House, failed. From the House of Lord's Judgment in the **Alcock case**, there still exists limitations on the range of situations giving rise to a recognized psychiatric illness, which can give rise to liability. Those limitations are to be exercised by reference to three (3) elements, these being:-

- (i) the class of persons whose claims should be recognized; and
- (ii) the proximity of such persons to the negligent act or acts about which legal complaint is made; and
- (iii) the means by which the psychiatric disorder was caused.

As regards the first of these limitations, the test to be applied is one of reasonable foreseeability. The second limitation is that there must be sufficient proximity of time and place to the event leading to the psychiatric trauma. The extent of such proximity has been taken as extending only to 'immediate aftermath.' On this point, see: **McCloughlin v O'Brian** (1983) 1 A.C. 410. The House of Lords in the **Alcock case** expressly approved of the earlier House of Lords' Judgment in the **McCloughlin case**. However, in the **Alcock case** the **McCloughlin case** was distinguished, because in **Alcock**, the interval between the accidents and the sight of the bodies by the plaintiffs was longer than nine (9) hours, whereas in **McCloughlin**, the period would have been approximately two (2) hours. In the case at hand, the distress and emotional trauma and consequential alleged psychiatric disorder, were caused to the claimant sometime after the accident.

[77] In the present case, there is some doubt that the claimant has overcome, by her evidence as given at the assessment of damages hearing, all the limitations as set out in the **Alcock case**.

[78] It is to be noted that whether the claimant is in fact suffering from such a recognized psychiatric illness, has been placed in serious dispute during the assessment of damages hearings, because there was no expert evidence in Court regarding same. There is no expert assessment by a psychiatrist, in respect of the claimant, that she neither suffers from depression, nor post-traumatic stress disorder. I have however, made no finding of fact in this regard, since to my mind, as a matter of law, for the reasons already given, even if the claimant does in fact suffer from a recognized psychiatric illness, nonetheless, on the basis of the presence of sufficient expert opinion or evidence even based on that which has been admitted to by the defendants in her Defence as it relates to the personal injury, the defendant clearly cannot properly be held liable for any psychiatric injury as may have been suffered by the claimant as a consequence of the defendant's actions or inactions.

[79] This matter is now one in which there exists a judgment on admission against the defendant. Can this Court, in such circumstances, judgment having been entered against the defendant in favour of the claimant, refuse to award any damages to the claimant, based on this legal standpoint? That the evidence as provided to this Court at the assessment of damages hearing herein and the nature of the claimant's claim and the defendant's defence as pleaded, particularly insofar as the extent of the defendant's admission is concerned, are collectively such that any 'damage' or 'loss' caused to the

claimant, is not legally recoverable as a matter of law. This Court is of the considered opinion that it cannot be unmindful of the law as to liability for the purpose of assessing damages herein, this even where Judgment is entered against a defendant whether by way of a default, or even if arising by some admission. This is because, in either such scenario, this Court must always be guided by the law and must always ensure that, in assessing damages for the tort of negligence, it concludes in terms thereof, on an award which constitutes compensation to the claimant for the loss suffered by that claimant, to put that claimant in the same position as if the 'wrong' had not occurred.

[80] The claimant did state in her witness statement that she did suffer some psychological effects from the accident and that they continue to affect her immensely until today, but this is not corroborated by independent expert psychiatric evidence. The cause of this and the symptoms of the claimant as she recounted to Dr. Buring, will not be referred to by this Court and have not been considered for the purposes of the rendering of this judgment, as I consider such to be hearsay evidence which cannot be accepted by this Court as proving the truth of its contents. See **English Exporters London Ltd. v Eldonwall Ltd.** (1973) Ch. 415.

[81] Negligence, on the other hand requires proof of a duty of care owed to the claimant, a breach of that duty and proof that the defendant's negligent conduct was the cause of harm to the claimant and that the claimant was, in fact, harmed or damaged. In the law of negligence, the test of causation not only requires that the defendant was the cause in fact, but also requires that the loss or damage sustained by the Claimant was not too remote, that is it was foreseeable.

[82] Therefore, only reasonably foreseeable damage may be recovered by an action in negligence. This means that at the time the tortfeasor committed the negligent act, it must have been reasonably foreseeable that damage of the same kind as the plaintiff suffered would ensue from it. The extent of the damage need not be foreseeable; and it matters not what the plaintiff in fact foresaw - the test is a purely objective one.

[83] I would say, that plainly in the absence of medical evidence or a psychiatric illness there may be grounds for an award of damages if the injury proven is severe enough that it is greater than the acceptable grief and anxiety associated with the accident. This is the common thread in the

controversial Canadian and American authorities. To permit a claim such as this one will make light of the limitations in recovery of damages in negligence and certainly unnecessarily open the floodgates in this area of the law.

Law on General Damages

[84] The bedrock principle by which I am to be guided is *restitutio in integrum*. That is, so far as money can do it the claimant must be restored to the position he would have been in if the tort had not been committed. The compensation contemplated in the area of personal injury is best encapsulated in the judgment of Lord Reid in **H. West & Son Ltd. And Another v Shephard** [1964] A.C. 326,341:

“Unless I am prevented by authority I would think that the ordinary man is, after the first few months, far less concerned about his physical injury than about the dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man’s consequential difficulties in his daily life.”

What the claimant is being compensated for is “the extent to which the injury will prevent [him] from living a full and normal life and for what [he] will suffer from being unable to do so,” per Lord Reid, *ibid*.

[85] The dictum of Lord Reid was applied by the local Court of Appeal of Jamaica in **Beverley Dryden v Winston Layne** SCCA 44/87 delivered 12th June 1989. So, in arriving at a just award, I should take into consideration the fact of the physical injury and the consequential difficulties it poses, weighing the latter over the former. Furthermore, in seeking to discover the judicial consensus of awards, as far as possible, I am to compare like injuries and arrive at an award that is not inflated. As Campbell J.A. said in **Beverley Dryden v Winston Layne**, *supra*:

“personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards.”

[86] In seeking to compare personal injury cases, the pitfall of attempting to standardise damages must be scrupulously avoided. The decided cases are a mere guide to avoid making “a wholly erroneous estimate of the damage suffered” or, awarding either an inordinately low or inordinately high sum. In fine, the damages awarded should be moderate and just. Birkett L.J. summed up the position with admirable clarity in **Bird v Cocking & Sons, Ltd.** [1951] 2 T.L.R. 1263:

“The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a judge has to perform ... The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard, the courts have been making these assessments over many years, and I think they do form some guide to the kind of figure which is appropriate to the facts of any particular case, it being for the judge, ... to consider the special facts in each case; ... one case cannot really be compared with another. The only thing that can be done is to show how other cases may be a guide, and when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases?”

This comparative approach is in essence a gathering, or more precisely an unveiling, of the consensus of opinion as to what the claimant in contemporary society should be awarded: **Rushton v National Coal Board** [1953] 1 All ER 314,317.

[87] The court also has to be guided by the principles as expressed by my brother Sykes J as he then was in **Icilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & Anor**. Claim NO.2005 HCV 294. Sykes J as he then was, at paragraph 3, stated that he was guided by the principles enunciated by both Lord Morris and Lord Devlin in **H. West & Sons Ltd v Shephard** [1963] 2 All ER 625 at pages 633 D-G and 636E, respectively. Sykes J summarized these principles at paragraph 4 of his judgment:

The principles derived from these passages are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite some time is part of the subjective portion of the assessment...The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant...

[88] In **Harrisons Assessment of Damages**, 2nd edition, 2011, page 1 the learned author makes the point that in comparing awards for physical injuries one is comparing like with like and although no two cases are ever the same, justice requires consistency between awards.

[89] It is also recognised that pain, suffering, and loss of amenities cannot be measured in money. Nonetheless, the court tries to assess a fair award, which is not to be challenged unless it is wholly erroneous. This principle was stated by Lord Scarman in **Pickett v British Rail Engineering Limited** [1980] AC 136, at page 167-168 as follows:

“There is no way of measuring in money pain, suffering, loss of amenities, loss of expectation of life. All that the court can do is to make an award of fair compensation. Inevitably this means a flexible judicial tariff, which judges will use as a starting-point in each individual case, but never in itself as decisive of any case. The judge, inheriting the function of the jury, must make an assessment which in the particular case he thinks fair: and, if his assessment be based on correct principle and a correct understanding of the facts, it is not to be challenged, unless it can be demonstrated to be wholly erroneous: **Davies v Powell Duffryn Associated Collieries Ltd** [1942] A.C. 601.”

[90] In **Glenford Anderson v. George Welch** [2012] JMSC Civ. 43 at paragraph 26, Harris, JA stated the relevant principle that is applicable in a claim of negligence.

It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant’s care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities.

[91] It is therefore settled law that the burden rests on the claimant to prove her case on a balance of probabilities. She can discharge that burden by evidence which is established as proven and the inferences which the court may draw from proven facts (**Ng Chung Pui and Ng Wang King v Lee Chuen and Another** Privy Council Appeal No. 1/1988, delivered on 24 May 1988, pp. 3,4 per Lord Griffiths).

[92] In relation to road users, whether they are pedestrians or drivers, there is a shared duty to use the roadway in a manner which is safe. This requires them to exercise reasonable care for themselves and

others. The motorist also has a statutory duty to take such action as may be necessary to avoid an accident (Road Traffic Act, s. 51 (2)). In the case of a driver, this would include travelling at a speed within the established limits, keeping a constant lookout for other users of the road, swerving, braking and/or tooting the horn where necessary, and observing traffic rules and signals (See also **Bourhill v Young** [1943] AC 92). The pedestrian must, among other things, never enter a roadway without first looking in both directions to be certain that there is no vehicle which is closely approaching.

[93] In the instant case, the claimant alleged that she was jogging on the sidewalk, which was some seven feet wide, when she was hit by the defendant's vehicle. Counsel for the claimant has asked the court to find that the words "along the sidewalk" as used in the pleadings were consistent with her evidence.

[94] In **Adamson v Roberts** (1951) SC 681, the pedestrian was walking along a pavement at a point where it narrowed by a projecting building. In order to pass, the pedestrian had to put one foot over the edge of the pavement into the gutter. She was struck from behind by a motor van as she did so. The defendant was aware of the projection and that pedestrians would have had to step in the roadway to negotiate the project. For these reasons, a special duty was imposed on the driver in relation to the speed at which he travelled, the warning which he gave and the path of the road in which he directed his vehicle.

[95] In **Parkinson v Parkinson** (1973) RTR 193, the pedestrians were walking 4 feet and 6 inches into the roadway. The defendant was negligent because the pedestrians were well into their side of the roadway which was wide enough for the defendant to have passed without incident. It was also found that the driver had seen the pedestrians in the road when he was some thirty-eight yards away. In the instant case, the evidence is that the claimant had been on the sidewalk prior to the collision and at the point of collision she had stepped off the sidewalk into the roadway.

Assessment of Damages

Pain & Suffering

[96] In calculating a fair award, compensation is based on comparable awards. This was stated by **Campbell JA in Beverley Dryden v Winston Layne** (unreported), Jamaica Court of Appeal, Appeal No Supreme Court Civil Appeal No 44/1987, judgment delivered 12 June 1989:

“...personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards.”

[97] It is desirable that a trial judge indicate the reasons for awards made (see **McKenzie v Campbell** (1999) 29 JLR 123).

[98] I now turn to the issue of damages. I will first look at the claim for General Damages. The claimant was a thirty-two (32) year old barrister at the time of the accident. Her evidence of pain and suffering was supported by one/two medical expert reports.

[99] The particulars of injuries as according to the expert report of Dr. Buring claimed are as follows:

The clinical examination revealed the formation of a “massive” haematoma over the right lateral hip (trochanteric) area. This area was bruised and the skin very extended and tense. [Can you please say something about the cuts on my elbow and shoulder? You have the photos which should them at the time of the accident]

I thus performed an aspiration with a 18 G needle but was only at that time able to get out 20 ml blood, assuming that clotting had occurred.

I advised her to rest at home, adhering to the usual recommendation for soft tissue injuries by the acronym RICE (Rest-Ice-Compression-Elevation).

[100] The claimant stated in her Witness Statement that because of the accident she saw Dr. Buring on the said day of the accident but did not see him. Ms. Williams went back to see Dr Buring later that day, as a hematoma had developed on my thigh and the build-up of pressure was extreme. The leg throbbed and I could not walk or sit down. If I stood, I had to stand on my left leg as I could not bear any weight on my right leg. Dr Buring said that he could try to drain some of the blood, and he

managed to do this. It did not make much of a difference however, she remembered that the pressure eased slightly.

[101] The report of Dr. Buring also stated inter alia:

Resulting in a soft tissue injury over the outer right hip area with formation of a large haematoma. Abrasions further over right shoulder and elbow.

After initial examination the day of the accident, I saw Ms. Williams on four follow up visits until 3 March 2016.

The injury warranted a sick leave and inability to work for 3 weeks (12 Feb – 4 March 2016).

During this period she had pain, discomfort and difficulty to mobilize.

The injury required a rehabilitation period that I estimate to 6-9 months.

My judgment is that there were two components to this:

The large haematoma gradually resorbed within 3 months.

At the follow up visits it was obvious, that Ms. Williams suffered from posttraumatic psychological effects such as “flash backs” of the accident and she was not confident to resume her regular running exercises until about 9 months after the accident.

On re examination 33 months after the accident I did not notice any physical nor psychological effects of the injury.

The only remaining issue is visible scars from the healed abrasions over the right shoulder and elbow and some discolouration over the lateral right hip area. These are likely to remain permanently.

I would estimate that these cosmetic defects have a permanent disability of 3 %.

[102] Ms. Williams stated that Dr Buring provided her with a note, and she was excused from work on medical grounds, initially for a period of seven (7) days. In the event, she never returned to work at Appleby. For the remainder of that day, she rested on her bed. That she did not have any appetite and would not have been able to make herself anything as she was in too much pain. She did not sleep much at all that evening, as it was impossible to get into a position that was comfortable. In the end she dropped off for a couple of hours due to exhaustion but kept waking up with excruciating pain in her leg.

[103] Ms. Williams submitted that the first 6 to 8 weeks after the accident were very traumatic for her. She had not been in the BVI overly long, so she felt very lonely and isolated. She was unable to sit

down due to the size of the hematoma as it was rugby ball size. Walking was also difficult, so the only thing she could do was lie down on her left-hand side with a pillow propped up underneath the hematoma. Dr Buring advised her to get into salt water whenever she could so a few times a week she would get a taxi to the beach. For the initial period she did not drive. The haematoma and injuries to her elbow and shoulder were incredibly painful so she took paracetamol every day for at least 2 months.

[104] Ms. Williams also submitted that she had difficulty dressing herself due to the elbow and shoulder injuries. She also had to rely on takeaway meals as she found supermarket shopping too challenging. She was also incredibly nervous about anyone bumping into her right leg. It was not possible for her to walk any longer than a few minutes at a time before she would need to rest, and as for sitting, this was the most painful thing. She could only sit on a chair at an angle – leaning to her left side. After around 10 minutes, she would need to get up. This continued for at least 2-3 months.

[105] Ms. Williams further stated that aside from the physical injuries, which included the skin discolouration from the large subcutaneous hematoma over the trochanter area of her right hip and scars to her elbow and shoulder, she also suffered from acute anxiety after the accident. She said that she also suffered from nightmares and flashbacks for at least six months and even now, some four years on, she still finds it difficult running outside and finds herself jumping when she hears a car behind her. It actually took her over two years to rebuild the confidence to run outside again. More importantly, as a consequence of her injuries, that she was physically unable to run for ten months.

[106] Ms. Williams stated that as a result of the accident, she also found that she needed to have chiropractic treatments in order to relieve some pain in her lower back and align her spine and pelvis. The chiropractor who treated me was called Nicolle Schultze and the name of her business is Pura Vida Chiropractic in the BVI.

[107] Ms. Williams also stated that Pura Vida was destroyed during hurricane Irma and Ms. Schultze had told her that she was unable to produce any invoices for her as she had lost everything. Ms. Williams exhibited screen shots of their conversation on Facebook messenger, which images were captured and reproduced. The lack of invoices caused some difficulty because much of the time she paid for her

sessions in cash. That cash payment was cheaper, saving \$2 per session (US\$50 as opposed to US\$52). That for the purposes of this claim she was claiming for fifteen (15) treatments, even though this was a conservative estimate of the number of times she was attended to at Pura Vida there were possibly more than this.

[108] On the facts therefore, this case is distinguishable from **St. Lucia Distillers Limited v Cox supra, Godfrey Ferdinand & Ors v AG of St Lucia (citation needed)** and **Harvey Taliam & Ors v Duncan and Ferdinand (citation required)**. In those cases, the claimants endured varying injuries. It should be also noted that the 1st Claimant in the latter case was awarded the sum of EC\$25,000 (US\$9,250) however in addition to a whiplash injury to the cervical spine, the 1st Claimant also suffered soft tissue injury to the upper and lower back as well as right index finger sprain and as such his injuries were far more serious than the claimant in the present case. Therefore, I will look at some additional cases from another jurisdiction to assist me in calculating the appropriate award for General Damages to be awarded to Ms. Williams.

[109] In the case of **Talisha Bryan v Anthony Simpson**, Claim No. 2011 HCV 05780 (unreported); the claimant sustained whiplash injury to the neck as a result of a motor vehicle collision in which she was a back seat passenger. After physiotherapy, she started feeling better but continued to experience occasional lower back pains especially when she sat for extended periods or bent to pick up objects. Damages were assessed in March 2014 Consumer Price Index from Jamaica (CPI: 214.6) and the claimant was awarded the sum of \$JM1,400,000.00 for pain and suffering and loss of amenities which today would yield the sum of \$JM1,617,893.76 using the Jamaican Consumer Price Index (CPI) of 248 at January 2018.

[110] In the case of **Dalton Barrett v Poncianna Brown anor**, Claim No. 2003 HCV 1358, reported in Khan 6 at p. 104; the claimant suffered tenderness around the right eye and face; tenderness in the lumbar spine; and tenderness in the left hand. He was treated and discharged. Four days later, he was observed to have been suffering from pain in the lower back, left shoulder and left wrist and contusion to the hip, lower back, and left shoulder. Nine months later, because of continuing pain, he consulted an Orthopaedic Surgeon who diagnosed mechanic lower back pain and mild cervical strain. He was prescribed physical therapy which proved highly effective and the claimant was pain free a few months

later. There was no PPD. Damages were assessed in November 2006 (CPI: 99.6) and the claimant was awarded the sum of \$JM750,000 for pain and suffering and loss of amenities which today would yield the sum of \$JM1,867,469.88 using CPI of 248 at January 2018.

[111] In the case of **Melford Ricketts v Claudius Dennis**, Claim No. 2006 HCV 04152 (unreported), the claimant sustained a whiplash injury for which he was incapacitated for four months. He complained of neck and lower back pain. He was treated with analgesics and a soft cervical collar for six weeks. Physiotherapy was recommended but there was no evidence of that being done. He was awarded the sum of \$JM950, 000 for pain and suffering and loss of amenities, in May 2008. Counsel submitted that the updated sum is \$JM1, 800,000 but the court was not provided with the relevant Jamaican Consumer Price Index (CPI) or the calculations.

[112] The defendant contended that the expert reports were incongruous and should not be relied on in determining an appropriate figure for General Damages. In the alternative, counsel submitted that the Court should rely on the first expert report prepared by Dr. Buring closer to the accident, who saw the claimant first in July 2016 and [whose] assessment of her impairment at that first time was more in keeping with the mechanics of the accident. I do not agree with this submission, for the reasons outlined at paragraphs 84 and onwards.

[113] On the present facts, it would appear that the injuries suffered by these claimants were not of the severity and spread as some of the above cases. Nevertheless, the cases were of comparative value to this exercise, as these claimants suffered multiple soft tissue injuries as well. Greater scrutiny was placed on the cases that were similar to the one at bar, which aided in arriving at the award, and these were viewed in the context of the evidence of pain and suffering provided.

[114] In the case of **Sherine Williams v AG** [2016] JMSC Civ.12, the claimant was hit by a motorcycle and suffered an abrasion to the right elbow and leg, swelling and tenderness to the right leg and haematoma to the right posterior lateral aspect of the leg. She was fitted with a plaster of paris back slab which was worn for two weeks. Three and a half years after the collision she consulted an Orthopaedic Surgeon who found a healed superficial scar behind the right elbow; full range of movements in the right elbow, knee, and ankle and that she walked without a limp. He was of the

opinion that she suffered soft tissue injuries from which there had not yet been full recovery and assessed her as having a 3% PPD of whole body. The PPD was arrived at from a physical examination and history provided. The learned Judge did not find the Orthopaedic Surgeon's report to be reliable or that the injuries were as serious as they were made out to be in that report. \$JM700, 000 was awarded in January 2016 for pain and suffering and loss of amenities, using the Jamaican CPI of 231.3. The updated award is \$JM752, 356.24 using the Jamaican CPI of 248.6 at January 2018.

[115] Of the cases cited overall, I find **Sherine Williams** and **Dalton Barrett** to be the most helpful. However, the latter case involved more injuries and those in common seemed more serious, as in the injury to face and specialist diagnosis of mechanic lower back pain.

[116] The claimant and defendant also referred to and cited the factors outlined in the case of **Cornilliac v St. Louis**³ which are to be considered in arriving at a figure for damages for pain, suffering and loss of amenities. These are:

- i) the nature and extent of the injuries sustained;
- (ii) the nature and gravity of the resulting physical disability;
- (iii) the pain and suffering endured;
- (iv) the loss of amenities; and
- (v) the impact the injuries had on the claimant's pecuniary prospects.

Discussion & Findings

[117] In seeking to arrive at an award for pain and suffering and loss of amenities, the court adopts the following dictum by Lord Hope of Craighead in **Wells v Wells** [1998] 3 All ER 481:

“the amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the claimant's general damages”.

[118] In assessing the general damages, I am guided by the cases cited and have considered the nature and extent of the injuries sustained by the Claimant as well as the loss of amenities and the extent to

³ (1965) 7 WIR 491

which, as a consequence of the assault, she has been affected. I also consider that the degree of pigmentation and cosmetic changes of the whole person is a guide for making comparisons and in arriving at a reasonable award.

[119] Having considered the similarities and distinguishing features of cases provided for comparison, it is my view that the injuries to Hermione Williams are less severe than those sustained by the Claimant in the cases cited, notwithstanding the PPD assessment, and while the case of **Sherine Williams** and **Dalton Barrett** are closer in comparison, I find that there was no evidence of need for an extensive reconstruction surgery as there was in relation to **Liverson Sandy v Antigua Public Authority and Another**. While in the case at bar there is evidence that the claimant's pain was intense for several weeks and she still has emotional pain, I find that the injuries suffered by the Claimants Sherine Williams and Dalton Barrett were more serious than those sustained by the claimant in the case at bar.

[120] In view of all the circumstances it is my view that the sum of US\$15,000.00 would be adequate compensation for pain and suffering.

Special Damage

[121] The claimant suffered, in addition to her general damages, the following special damage

Description of expenses incurred/treatments required following accident	Amount
Visits to the doctor (orthopaedic surgeon, Dr Klas Buring, Eureka Medical)	\$252.00
Medical report	\$100.00
Chiropractor appointments (15 treatments at \$52.00)	\$780.00
TOTAL	\$1, 132.00

Order

[122] In the circumstances the defendant is ordered to pay the following in damages to the claimant:

- (a) Special damages for medical and other related expenses in the sum of \$US1,132.00;

- (b) Interest on special damages at a rate of 3% per annum from 19th July 2019;
- (c) General Damages for pain, suffering and loss of amenities in the sum of \$US15,000.00;
- (d) Interest on general damages at a rate of 5% per annum from the date of the delivery of this judgment.
- (e) No award is made for Psychiatric Illness or nervous shock;
- (f) Prescribed costs calculated in accordance with the Civil Procedure Rules 2000.

Ricardo Sandcroft
Master [Ag]

By the Court

Registrar