

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

SAINT LUCIA

CLAIM NO: SLUHCV2018/0511

BETWEEN:

**ANSELMA MEDERICK
Of St. Lawrence Estate, Anse La Raye**

Claimant

and

**(1) SYLVESTER JAMES of Marigot
(2) ANGUS ANDAS of Collie Town, Marigot**

Defendants

Appearances: Mr. Tiris M. Frederick of counsel for the claimant
Mr. Duane Jean Baptiste of counsel for the defendants

2020: February 18th,
2020: May 27th

JUDGMENT ON ASSESSMENT OF DAMAGES

Background Facts

[1] **SANDCROFT, M [Ag.]:** On the 23rd day of December, 2017 at about 2:45 p.m. the claimant was a passenger on board a motor vehicle with registration number M198. The said vehicle was driven by the 2nd defendant along the Anse Gallet Road in the quarter of Anse La Raye toward Ti Kaye Resort, where the claimant worked at the time. At the material time, the claimant was in the company of several of her co-workers on the bus heading to work. The 2nd defendant lost control of the said motor vehicle and caused the vehicle to violently collide with a tree causing the claimant to sustain several injuries arising from the said collision.

[2] As a result of the collision, the claimant suffered the following injuries:

- a. Headaches to left-side of head, blurred vision and numbness;
- b. Cerebrum concussion;
- c. Whiplash injury;
- d. 1 cm laceration to the face and swelling of left upper lip;
- e. Neck pains;
- f. Back pains;
- g. Pain to the right third finger;
- h. Tingling to calves and cramps to legs
- i. Pain to soles and occasional swelling to left foot;
- j. Bruising palmar aspect of mucosa left upper inner lip;
- k. Post-traumatic brain injury syndrome
- l. Cervical spondylote myelopathy decompensation by trauma (MVA) causing whiplash injury and cordial concussion.

[3] The claimant was taken to the emergency room at the Victoria Hospital where x-rays and ultra-sound were performed on her. She was placed on medical leave.

[4] Judgment in Default was entered by the Court on 7th of December, 2018 for quantum of damages to be determined by the Court. Special damages and General damages were also to be assessed by the Master.

[5] The claimant filed a witness statement annexing her documentary evidence in support of the assessment on 30th May 2019, pursuant to an Order of the Master dated 29th April, 2019. Counsel for the parties were to file submissions and authorities to assist the Court in relation to the assessment of general damages and these were filed by the claimant on 30th of June 2019. However, at the time of

filing submissions, the defendants and the claimant were still conducting negotiations with a view to settling the matter in relation to quantum.

General Damages

- [6] In **Livingstone v Rawyards Coal Co** (1880) 5 App. Cas. 25, Lord Blackburn stated the general principle that should guide this Court when assessing damages in tort. He said:

“I do not think there is any difference of opinion as to its (sic) being a general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation or damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong...”

- [7] In assessing general damages, the Court is guided by the well-known case of **Cornilliac v St. Louis**¹ which sets out the considerations which must be borne in mind by the court when assessing general damages. Those considerations are:

- (a) the nature and extent of the injuries sustained;
- (b) the nature and gravity of the resulting physical disability;
- (c) the loss of amenities, if any, and;
- (d) the extent to which, consequentially, pecuniary prospects are affected.

The nature and extent of the claimant’s injuries

- [8] The claimant, Ms. Mederick, suffered the following injuries as a result of the accident which are detailed in the medical report of Dr. Curby Dwaine Sydney (MD., DM.) at the Tapion Hospital:

¹ (1965) 7 WIR 491.

- a. Headaches to left-side of head, blurred vision and numbness;
- b. Cerebrum concussion;
- c. Whiplash injury;
- d. 1 cm laceration to the face and swelling of left upper lip;
- e. Neck pains;
- f. Back pains;
- g. Pain to the right third finger;
- h. Tingling to calves and cramps to legs
- i. Pain to soles and occasional swelling to left foot;
- j. Bruising palmar aspect of mucosa left upper inner lip;
- k. Post-traumatic brain injury syndrome
- l. Cervical spondylote myelopathy decompensation by trauma (MVA) causing whiplash injury and cordial concussion.

[9] The claimant was seen in the Accident and Emergency department on the 23rd of December, 2017, where she was examined. The claimant was assessed as not being in any distress at the material time. Few excoriations were seen on the left cheek, swelling of the left upper lip, a 1cm horizontal superficial laceration, bruising mucosa to left upper inner lip and bruising to palmar aspect of left hand. The claimant was assessed by Dr. R. Aimable as having soft tissue injury secondary to a motor vehicular accident, and mild concussion. The claimant was also given five (5) days sick leave and head injury instructions.

[10] The claimant had another evaluation done by Dr. Curby Dwaine Sydney (MD., DM.), who examined the claimant and found that there were no skull fractures, no intracranial collections, no midline shift nor brain contusions appreciated on that study, subarachnoid spaces and basal cisterns were present and normal. EOM was okay, cranial nerves were okay, a mild right shoulder atrophy (Deltoid region),

mild static ataxia. The final assessment of the claimant revealed that there was a concussion, whiplash injury and a cervical spondylotic myelopathy decompensation by whiplash injury. It is also to be noted that the claimant had no remarkable past medical history.

- [11] Ms. Mederick was diagnosed with a cervical spondylotic myelopathy decompensation by whiplash injury, and cerebral concussion, the course of the claimant's symptoms was assessed as indefinite and her symptoms could persist or worsen in spite of medical treatment or may be controlled on medication or be spontaneously resolved. The claimant was also said to require follow-up care as a neurosurgery out-patient.

The nature and gravity of the resulting physical disability

- [12] Ms. Mederick was discharged from the hospital and was unable to do anything for herself. The claimant had to depend on her best friend Claudia Mercier of Mole Street in the village of Anse La Raye to do everything for her including bathing her, cooking for the claimant and helping the claimant to the bathroom.
- [13] Ms. Mederick stated that she had been in extreme pain and discomfort as a result of the injury from the date of the accident with no end in sight. The claimant had also been taking pain killers and other sedatives to relieve the constant and severe pain that she had been experiencing on a daily basis. The claimant stated that her social life and self-esteem had been negatively affected. She used to enjoy walking and jogging but since the accident, she is unable to do those activities anymore. The claimant also used to enjoy dancing but has had to desist since she was unable to bear the constant pain in the post-accident period.
- [14] Ms. Mederick also stated that her condition worsened and she had to again visit Cana Neuro Services. At that point in time the claimant was seen by Professor, Dr. Ray, a consultant neurosurgeon) who further extended her medical leave because of complaints of being unwell. The claimant remembered having chest and

shoulder pains, headaches and dizziness. It is to be noted, that the claimant has not produced a medical report from Professor, Dr. Ray to substantiate this claim.

- [15] The claimant's symptoms of discomfort and pain continued and on the 30th day of November, 2018, she again visited the Cana Neuro Services for intervention. The claimant stated at that point she had intense neck pain, particularly when rotating the head to the right, difficulty hand washing, weakness to the left arm, intermittent back pains, difficulty sitting or standing for long periods, pain in her shoulder blade, numbness and weakness to the arm, numbness and weakness to the left leg with difficulty walking and she had to be dragging her legs at times.
- [16] Consultant Physician, Dr. Curby Dwaine Sydney (MD., DM.), in a CT report dated the 30th of November, 2018, also stated that the Hoffman was absent, there was hypoesthesia (decreased sensation to the C4-C5 dermatome), deep tendon reflexes; decreased on the left side of her body, left toe dorsiflexion 4+/5 and decreased range of motion of neck to the right. It is noted that the claimant's MRI cervical spine images were reviewed again and it corroborated stenosis at C4-C5, C5-C6 with spinal cord impingement which is part of the region of the back which plays a key role in the structural and physical support of the human skeleton. That in my mind is significant as it suggests that the claimant would be left with some spinal deformity as a result of such a post-traumatic brain injury syndrome, and whiplash injury and excruciating pain as a result of the attendant decreased muscle sensation being experienced by Ms. Mederick, which would also affect her prolonged periods of standing or sitting in any one position. This no doubt would also limit the physical activities of Ms. Mederick who also stated that her pre-accident extra-curricular activities were drastically impacted by the accident she was involved in.
- [17] **Cervical spondylotic myelopathy (CSM); is defined as spinal cord dysfunction secondary to extrinsic compression of the spinal cord and/or its**

vascular supply² from degenerative disease of the cervical spine. It is the most common cause of spinal cord dysfunction in patients who are older than fifty-five.^{3,4} The pathology may be associated with congenital or developmental stenosis of the cervical canal. The pathogenesis begins with degenerative changes in the disc and this causes changes in the osseous and soft tissue structures. Encroachment of the available space in the spinal canal and spinal cord is caused by deformation of the facet and uncovertebral joints with associated osteophytic spurring. Soft tissue compression results from intervertebral disc herniation and invagination of the ligamentum flavum into the canal. This is thought to be due to decrease in disc space height and loss of elasticity of the ligamentum flavum⁵. There may also be thickening of the ligamentum flavum⁶. Ligamentous laxity from degenerative changes, inflammatory disease, or trauma may allow anterior or posterior subluxation of the cervical vertebrae which may cause cord compression through a pincer mechanism⁷. Physiologic motion of the neck without subluxation can produce a pincer mechanism when there are morphologic changes of the posterior vertebral body, spurring, and protrusion of the anterior lamina or ligamentum flavum into the canal⁸.

² Parke, W. W. Correlative anatomy of cervical spondylotic myelopathy. *Spine* 13:831-837, 1988.

³ Bernhardt, M., Hynes, R. A., Blume, H. A., and White, A. A., III. Current Concepts Review: Cervical spondylotic myelopathy. *J. Bone and Joint Surg.* 75A:119-128, 1993.

⁴ Whitecloud, T. S. Anterior surgery for cervical spondylotic myelopathy. Smith-Robinson, Cloward, and vertebrectomy. *Spine* 13:861-863, 1988.

⁵ White, A. A., III and Panjabi, M. M. *Clinical Biomechanics of the Spine*. Second edition. Philadelphia, J. B. Lippincott, 1990, pp. 314,511-528.

⁶ Epstein, N. E., Hyman, R. A., Epstein, J. A., and Rosenthal, A. D. Technical Note: "Dynamic" MRI scanning of the cervical spine. *Spine* 13:937-938, 1988.

⁷ Epstein, N. E., Hyman, R. A., Epstein, J. A., and Rosenthal, A. D. Technical Note: "Dynamic" MRI scanning of the cervical spine. *Spine* 13:937-938, 1988.

⁸ Adams, C. B. T. and Logue, V. Studies in cervical spondylotic myelopathy. I. Movement in the cervical roots, dura, and cord and their relations to the course of the extrathecal roots. *Brain* 94:557-568, 1971. Adams, C. B. T. and Logue, V. Studies in cervical spondylotic myelopathy. II. The movement and the contour of the spine in relation to the neural complications of cervical spondylosis. *Brain* 94:569-586, 1971. Adams, C. B. T. and Logue, V. Studies in cervical spondylotic myelopathy. mI. Some functional effects of operations for cervical spondylotic myelopathy. *Brain* 94:587-594, 1971.

- [18] **Characteristically, patients with CSM complain of neck pain, difficulty walking, and unsteadiness of the feet. In the upper extremities, pain, numbness, paresthesias, weakness, and loss of dexterity are common complaints. There is usually coexisting compression of the nerve roots causing a radiculopathy of the involved nerve. Bladder dysfunction may occur but is not common. Coexisting lumbar spinal stenosis is common⁹.**
- [19] The medical reports of Ms. Mederick detailed inter alia that since she was discharged from the Victoria Hospital in 2017, she has had multiple visits up to 2019. Each time she is advised of physiotherapy and pain medication to manage her symptoms. It was even recommended that she undergo further neuro-surgical intervention (Cervical Spinal Cord Decompression), but that it was unlikely to relieve her symptoms. She also reports frequent visits to her private physician in Tapion due to on-going pain and other physical challenges. The severity of daily episodes of pain has reportedly affected her ability to perform certain activities of daily living which posed no challenges prior to her injury, such as certain household chores, gardening and driving. She further described difficulty functioning on a daily basis at her job as a hotel waitress due to excessive pain and numbness to her limbs. Despite modification of her work duties/job description from more physical duties, she still found it difficult to complete a full work-day. She has had many certified and uncertified sick days over the last 2-3 years.
- [20] Dr. Curby Dwaine Sydney (MD., DM.) assessed that Ms. Anselma Mederick was suffering from a chronic muscular and radicular/neuropathic pains secondary to previous poly-trauma and post-traumatic brain injury syndrome. He referred the claimant to the physiotherapist to assist in her management. The following medications were prescribed: Dicoliv 2 tablets bd and Bevidoxin po bd. Dr. Curby Dwaine Sydney (MD., DM.) recommended that Ms. Mederick continued follow-up care by a multi-disciplinary team including but not limited to a psychotherapist (to assist in coping with her condition), physiotherapist, neurosurgeon, and

⁹ Epstein, J. A. The surgical management of cervical spinal stenosis, spondylosis, and myeloradiculopathy by means of the posterior approach. Spine 13:864-869, 1988.

orthopaedic surgeon. She would also require neuro-surgical intervention (Cervical Spinal Cord Decompression) in the future, if her neurological symptoms worsened.

- [21] **The non-operative management of CSM consists of immobilization in a firm cervical orthosis, anti-inflammatory medications, physical therapy emphasizing isometric muscle strengthening, and other symptomatic measures such as heat, ice, and massage. Patients being treated nonoperatively should be monitored closely. In patients who have a high operative risk or significant co-morbid factors such as many of the elderly, cervical epidural steroid injections may be useful¹⁰.**
- [22] **The erudite authors of the said article on CSM also stated that the primary goal of surgery for CSM is decompression of the spinal cord. There is a secondary goal which is to stabilize the region of the spinal column where there is myelopathy and instability. The goals of decompression are to remove the spinal cord and root impingement with the least surgical risk and the least disruption of the structural integrity of the spinal column¹¹. Decompression may be achieved using an anterior, a posterior, or a combined approach.**

Quantification of the Award

General Damages

- [23] **In the Court of Appeal case of *Derrick Munroe v Gordon Robertson* [2015] JMCA Civ 38, Sinclair-Haynes JA (Ag) (as she then was) enunciated the following:**

“There are established principles and a process to be employed in arriving at awards in personal injury matters. In

¹⁰ Murphy, M. J. and Lieponis, J. V. Nonoperative treatment of cervical spine pain. In: *The Cervical Spine*. Edited by the Cervical Spine Research Society Editorial Committee. Edition 2, Philadelphia, J. B. Lippincott, 1989, pp. 670-677.

¹¹ White, A. A., III and Panjabi, M. M. *Clinical Biomechanics of the Spine*. Second edition. Philadelphia, J. B. Lippincott, 1990, pp. 314,511-528.

determining quantum, judges are not entitled to simply “pluck a figure from the air”...Regard must therefore be had to comparable cases in which complainants have suffered similar injuries.”

The loss of amenities

- [24] An award for loss of amenities is to compensate the claimant for the loss of quality or reduced enjoyment of life. (See **Angeleta Brown v Petroleum Company of Jamaica Limited and Juici Beef Limited** (unreported), Supreme Court, Jamaica, Claim No. 2004 HCV 1061, judgment delivered 27 April, 2007).
- [25] Ms. Mederick, in her witness statement stated that upon her return to work, her condition progressively worsened. On several occasions she had to be out of work and was placed on medical leave. She had blurred vision, headaches to the left side of the head and numbness. She would also feel pressure from the back of her head down to her neck and dizziness at times especially in the mornings. She also stated that she would have plenty of discomfort with her bra over the left shoulder, Numbness and tingling to the 2nd and 3rd fingers and it also became very difficult for her to concentrate and focus.
- [26] In **Angeleta Brown v Petroleum Company of Jamaica Limited and Juici Beef Limited** (supra) McDonald-Bishop J (Ag.) (as she then was) declared that the claimant is entitled to an award for any prospective pecuniary losses that are reasonably likely to flow from the injuries sustained.
- [27] Ms. Mederick also stated that since the accident her performance on the whole has seriously diminished. She was employed as a waitress in the restaurant Department at Ti Kaye resort and Spa at Anse Cochon in the quarter of Anse La Raye. She was paid a fortnightly wage of about \$1,500.00 and if she did a month's work, the claimant earned approximately \$3,000.00.

- [28] In her witness statement, Ms. Mederick stated that as a result of the consistent back and neck pains she suffered, she felt dizzy and light-headed during work hours. The claimant was removed from the night shifts because the night shifts were said to be usually more strenuous and hectic and she was permitted to work on only day shifts from 7-3, I took that to mean 7:00 a.m. to 3:00 p.m. The claimant was observed to still not be productive on the day shift as a result of the intensity of her pain. She had to be sitting down every hour to rest, because the pain in her neck and back became unbearable.
- [29] It was very pellucid from Ms. Mederick's medical report that her injuries had affected her physical ability to carry out her job and that they caused her severe discomfort in the work environment. That Ms. Mederick's job as a waitress in the restaurant Department at Ti Kaye resort and Spa required her to be standing and doing work which required her to engage in the use of her muscles and her skeletal structure is not lost on the Court. Even though it is to be noted that Ms. Mederick did provide evidence from her former employer which stated that **"before the accident, the claimant had no problem working night shifts. Her performance was exemplary. Since the accident she has been unable to perform to the best of her abilities due to the injuries sustained from the accident."**
- [30] Ms. Mederick averred that her situation at her work place grew progressively worst and on the 7th day of January, 2019 her position at the Resort was made redundant with effect from the said day. The situation caused immense hardship to the claimant because she is a single parent with two (2) minor children who are still in school and it had become very difficult to provide for them. It is to be noted that Ms. Mederick averred to a termination letter from her former employer, which was exhibited.
- [31] Ms. Mederick also averred, in her witness statement, that she tried to open a small grocery shop in the community where she was from but because of the intensity of the pain, the business was not sustainable. Most times because of how

unbearable the pain was, she had to close the shop. Lately, she has not been able to attend to the shop because of the sharp pain that would like electricity pass through her body.

[32] Ms. Mederick stated that the accident has seriously affected her life and made some basic things that she used to do like her household chores become a huge mountain, she has had to make some serious adjustments in her daily living because of the constant pain that she has to endure on a daily basis. And that at this point she is willing to do whatever is necessary to return to some normalcy of life.

[33] Dr. Curby Dwaine Sydney stated in a subsequent medical report that it was very likely that Ms. Mederick's condition would remain permanent and that if her condition continued to deteriorate that surgical intervention would become necessary.

Assessment guidelines

[34] In assessing general damages, the court must have regard to recent comparable awards in its own, and other jurisdictions', with comparable social and economic circumstances, to assist in arriving at the quantum of damages which is to be regarded as fair compensation to the claimant. As was stated by Lord Diplock in **Wright v British Railways Board**,¹²

“... Non-economic loss constitutes a major item in the damages. Such loss is not susceptible to *measurement* in money. Any figure at which the assessor of damages arrives at cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on the idiosyncrasies of the assessor, whether jury or judge, **the figure must be ‘basically a conventional figure derived from experience and from awards in comparable cases.’**” (my emphasis)

¹² [1983] 2 All ER 698 at 699.

[35] In the case of **Wells v Wells**,¹³ Lord Hope of Craighead observed as follows:

“The amount of the award to be made for pain, suffering and loss of amenity 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 plaintiff’s general damages.” (my emphasis)

The approach is therefore to look at comparable cases in making an assessment of damages. In the United Kingdom, the Judicial Studies Board (“the Board”) has provided guidelines to assist in the assessment of damages and to achieving a measure of consistency in awards in personal injuries claims. The categorisation of facial injuries and range of awards suggested by the Board is particularly helpful as it assists in assessing the nature and extent of the claimant’s injuries. The Board considers that the assessment of facial injuries is an extremely difficult task, there being three elements which complicate the award. First, while in most cases the injuries described are skeletal, many of them will involve an element of disfigurement or at least some cosmetic effect. Second, in cases where there is a cosmetic element the courts have invariably drawn a distinction between awards for damages to males and awards for damages to females, the latter attracting the higher awards. Third, in cases of disfigurement there may also be severe psychological reactions which put the total award at the top of the bracket, or above it altogether.¹⁴

[36] I am also guided by Gordon JA in the case of **Philmore Skepple v Joseph Weekes**¹⁵ in which he quoted with approval the dicta of Singh JA in **Fenton Auguste v Francis Neptune**¹⁶ as follows:

“It is my considered opinion, that the practice of non-itemization should be used where it is impracticable to itemise the awards under different heads. This can happen where there is vagueness of the evidence and lack of specific diagnosis of the injury... But where the evidence is such that it is practicable to itemise, such practice should be followed. This is the modern approach, and it is necessary especially when dealing with the issue of interest that is to be awarded under different heads.”

¹³ [1998] 3 All ER 481 at 507.

¹⁴ Guidelines for the Assessment of Damages in Personal Injury Cases, 10th edn., Oxford University Press.

¹⁵ Antigua and Barbuda High Court Civil Appeal No. 10 of 2009 (delivered 25th January 2010, unreported).

¹⁶ Fn. 4 at p. 5.

The claimant and defendants are entitled to know what is the sum assessed for each relevant head of damage and thus to be able, on appeal, to challenge any error in assessments.¹⁷

Pain and Suffering and Loss of Amenities

- [37] It is well established that the assessment of damages has two components. There is the objective part and the subjective part (see **H. W. West & Sons v Shephord** [1964] A.C. 326). The objective component deals with the actual injury and the subjective part takes account of the non-physical injury on the claimant. Additionally, there is a distinction between pain and suffering on the one hand and loss of amenities on the other (see Lord Scarman in **Lim Poh Choo v Carnden and Islington Health Authority** [1980] A.C.174, 189G, reaffirming what was said in **H. West & Son Ltd. v. Shephord** [1964] A.C. 326). Lord Scarman made the very important point, often overlooked, that pain and suffering depend on the claimant's awareness of and capacity for suffering. Thus, it is entirely possible for there to be a low award in a personal injury case for fairly serious injuries if the evidence shows that the claimant is unable to appreciate the suffering or has no capacity for awareness of the pain. On the other hand, the lack of awareness of pain and the lack of capacity for suffering does not necessarily mean that the award for personal injury will be low. It can be quite high, if the injuries in and of themselves are so serious that the claimant has, on an objective view, suffered a significant loss. This was indeed the case in **Lim Poh Choo** where the claimant was unable to appreciate her suffering and pain but suffered a substantial loss.
- [38] The combined effect of these principles is that where the claimant suffers a substantial loss and is acutely aware of his suffering and undoubtedly suffers greatly from the injuries, then the award is going to be a high one.

¹⁷ See Sachs LJ in *George et al v Pinnock et al* [1973] 1 WLR 118.

[39] It is settled law that in these courts, compensation for pain and suffering and loss of amenities is achieved by an award of a sum of money calculated on the basis of established principles and the use of comparable cases as a guide. This principle was approved in the case of **Beverly Dryden v Winston Layne** SCCA 44/87 delivered 12 June 1989 where Campbell JA stated as follow:

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

[40] The current trend of awards for whiplash injuries in recent decisions of the Jamaican Court suggests a range of between \$900,000.00 (See unreported decision in 2012 HCV 02211 **Amanda Braham v Donaldson**) to \$1,000,000.00 (see 2011 HCV 03997 **Green v Harris Myrie**), for a mild to moderate whiplash injury which is resolved within a period of about 3 to 4 months. Whiplash injuries are usually accompanied by the other minor injuries such as abrasions, contusions and pain of varying duration to other areas of the body, especially where the whiplash or soft tissue injury is as a result of a motor vehicular accident. As a consequence there are many combinations of injuries which have manifested themselves in the various claimants appearing in these courts.

[41] The claimant submits a figure of \$ECD100, 000.00 for pain and suffering and \$ECD20, 000.00 for loss of amenities as the appropriate award to be made under this head. The claimant also submits a figure of \$ECD147, 009.89 as General Damages for future loss of earnings, Special damages of \$ECD6, 846.91 and prescribed costs in accordance with the CPR rule 65.5. The claimant and defendant have helpfully submitted authorities for the court's consideration which I will now consider. I will also examine other cases that will be able to give assistance in deciding the fair and reasonable amounts to be ordered.

- [42] In **Peter Douglas v Sean Roberts and Maurice O'Garro**¹⁸ the claimant who suffered severe whiplash and was still incapacitated at the time of the assessment, was awarded \$85,000.00 for pain and suffering and loss of amenities. The medical report indicated that the injuries exacerbated a condition which the claimant may have long - term degenerative disease of the cervical spine initiated or otherwise exacerbated by the injury sustained in the car accident.
- [43] **Danny Bramble v William Danny et al**¹⁹ : the court in 2004 awarded general damages in the sum of \$50,000.00 to a 56 year old who suffered from a pre-existing degenerating joint disease, suffering injuries to the knee and lower back from a motor vehicular accident. The injuries aggravated his pre-existing degenerative joint disease. He experienced considerable pain in his right loin and right hip region.
- [44] **Lenroy Connor v. Cynthia Flemming** (Unreported)²⁰ in determining whether damages could be apportioned, the learned Master considered whether the claimant's injury was divisible or indivisible. The whiplash injury, according to the evidence of Dr. Hodge, exacerbated his pre-existing disc herniation. Dr. Hodge was unable to say how much the tortious acts of the respective tortfeasors contributed to the claimant's present condition, but stated that the claimant's current condition would not have been so "severe, extensive and crippling" if he did not sustain the whiplash injury. In the erudite Master's view the claimant's injury was indivisible. And applying the 'but-for' test the medical evidence showed that the whiplash was clearly a cause, though not the only cause of the claimant's injury, and consequently the claimant would be fully liable for all damages.
- [45] The claimant in the aforesaid case did not make a full recovery. He would continue to experience pain and discomfort indefinitely which would continue when secondary arthritis sets in within a few years resulting in a diagnosis of cervical spondylosis. He is a farmer whose ability to farm had been affected by his injuries.

¹⁸ SVGHCV2010/0125.

¹⁹ ANUHCV 1999/0160 delivered on 15th January 2004.

²⁰ SKBHCV2012/0353 delivered on 14th January 2016.

Taking into consideration the evidence and the awards made in other cases, the learned Master awarded the claimant the sum of \$65,000.00 as general damages.

[46] In the case of **Philmore Skepple v Joseph Weekes**,²¹ the claimant suffered the following injuries: laceration of about 2 cm long in the right supraorbital area with mild ipsilateral periorbital hematoma, fracture of the mandible with displacement and active bleeding, fracture of the hard palate with loss of the upper incisors and canine teeth with active bleeding, dislocation of the right sterno-clavicular joint, a bulging deformity in the dorsum of the base of the first metacarpal bones of the left hand with tenderness and limited range of movements, laceration of about 3 cm long in the thenar region of the left hand and tenderness and crepitation in the distal phalanx of the ipsilateral thumb, swelling and tenderness of the right shoulder, though with full movements, and abrasions of about 4 x 1 cm on the anterior aspect of the left leg. The claimant in this case could no longer play basketball because of the pain and he indicated that he felt embarrassed to smile because of the loss of teeth and did not consider himself handsome any longer. The Court awarded \$100,000.00 damages for pain and suffering and loss of amenities, which figure was upheld on appeal.

[47] In the case of **Ulbana Morillo v. LEEANNE FORBES**,²² the claimant lost consciousness as a result of the collision, and suffered injuries described as contusions to the head, neck, upper back, right knee, and ankle. There was tenderness in the right knee and ankle, and in the costo-chondral joint of the chest, inflammation in the left shoulder, biceps, tendon and rotator cuff. She had muscle spasms in her cervical, thoracic and lumbo-sacral spine, numbness in the upper left extremity, paraesthesia and pain. She was suffering from a posterior subligamentous disc protrusion at the L5S1 level associated with radial annulus tear posteriorly and adhesive capsulitis of her left shoulder, and she complained of hearing loss in her left ear. She will require intermittent oral, intra-muscular and intra-articular medications and

²¹ Supra, fn.8.

²² BVIHCV2003/005

continuous physical therapy. Her prognosis was fair to poor, and her overall impairment as a result of her injuries was assessed at 19% whole body impairment. After considering the evidence and the authorities relied upon by both sides, the learned trial judge awarded damages for injuries, pain and suffering and loss of amenities in the sum of \$40,000.00. He awarded the respondent the sum of \$30,000.00 in respect of loss of earning capacity, and \$66,250.50 for cost of future medical care including medication and procedures. He awarded as special damages the sum of \$9,344.79 for loss of income and medical expenses, interest on the award for pain and suffering and loss of amenities at the rate of 5% per annum for 2 years, and interest on the award in respect of loss of income and medical expenses at the rate of 2.5% per annum for 2 years.

[48] In the case of **Denroy Baptiste v. Tortola Yatch Services Ltd.**²³ where the claimant suffered injuries which were detailed in Dr. Caesar's report are as follows:- (i) Temporary loss of feeling and ability to move his right arm immediately after the accident, (ii) Hills Sachs lesion to right humeral head, (iii) Labral tear in right shoulder, (iv) Continuous pain in right shoulder and back, (v) Radicular syndrome involving radicular pain, paresthesias and/or weakness in both upper extremities and left lower extremity, (vi) Dorsal and lumbosacral strain and sprain, (vii) Compression fracture of T12 and mild compression fracture of L1 discs, (viii) Bulging and/or herniated discs at levels C4-5; C5-6; C6-7; L4-5 and L5-S, (ix) Multiple levels of cervical and lumbar spinal stenosis, (x) Traction injury to brachial plexus on the right, (xi) Right index finger spasm and (xii) Bicipital tendonitis.

[29] The injuries suffered by Mr. Baptiste, to my mind, are serious as Mr. Baptiste is partially disabled as a result and he will remain so. He will require further medical attention in the form of therapy, injections and surgery to alleviate his pain and discomfort. He will never make a complete recovery as

²³ BVIHCV2006/0130

the surgery recommended is only in relation to his shoulder and not for the degenerative disc disease.

[30] I have considered all the authorities cited and the respective submissions and I have taken into consideration the matters to be regarded as per the Cornilliac. In all the circumstances, in my judgment an award of US\$45,000.00 will represent fair and reasonable compensation for the injuries sustained by Mr. Baptiste.

[49] The Jamaican case of **Duhaney v Electoral Office of Jamaica et al**²⁴ is instructive as the claimant's injuries though not all the same as Ms. Mederick's, bear some similarity. The claimant in the **Duhaney** case suffered severe and extensive personal injuries primarily to the head, face and neck. He sustained numerous facial fractures to his cheek-bones and jaw-bone, concussion, loss of teeth and whiplash injuries necessitating treatment by two Facio-maxillary Surgeons. In that case the doctor confirmed that the area of impaired sensation on the claimant's face indicated injury to the right infraorbital nerve, which was crushed against the facial bones at the time of impact and had healed with a traumatic neuritis which gave rise to the facial discomfort of which the claimant complained. The award made in this case for pain and suffering and loss of amenities was J\$8,000,000.00 which is equivalent to EC\$241,800.00.

[50] In **Fenton Auguste v Neptune**²⁵, the court awarded \$74,000 to the 24 year old claimant for pain and suffering and loss of amenities, which rendered him a paraplegic confined to a wheelchair for the rest of his life.

[51] In **Daphne Alves v the Attorney General**²⁶ the Court awarded \$35,000 to the 33 year old claimant for general damages for pain and suffering and loss of amenities for injuries to L4-L5 annular disc tear, S1 joint arthropathy- disco genic disease of the lumbar spine, lumbar facet joint syndrome, which left the claimant in constant

²⁴ Jamaica Supreme Court Suit No. C.L.D. 56 of 2001 (delivered 17th September 2009).

²⁵ (2000) 56 W.I.R. 229.

²⁶ 3 Claim No. BVIHCV 2006/0306, Judgment delivered on 25 November 2008 [unreported]

pain and rendered her unable to walk for long distances, sit for long periods, lie on her back for more than 10 minutes or carry any weight in excess of 10 pounds.

[52] In **Kissoon v Lalla**,²⁷ the nature of the plaintiff's injuries, who was a 20 year old male, included dizziness, extensive lacerations to the left side of the face, laceration of the left temporal region, severing the temporal artery resulting in extensive blood loss, pain and swelling in the right knee joint, damage to the branches of the left facial nerve, fracture of the left orbit, left molar bone fracture, multiple lacerations in the region of the left temple and both sides of the face as well as his upper lip. These resulted in marked scarring, blurring of the vision in the left eye, weakness of the right knee, inability to open mouth fully, facial asymmetry, headaches and flattening molar bone as residual effect of healing. There was also flattening of the left zygoma. General damages were awarded in the sum of TT\$7,000.00 adjusted to TT\$76,910.00 as of April 2007 which is equivalent to EC\$32,384.49.

[53] In **Darel Christopher v. Benedicta Samuels dba Samuels Richardson & Co.**, prior to the collision, Mr. Christopher worked as a plumber/plumbing supervisor. He was engaged in strenuous physical activities as he was a competitive cyclist, cycling at least once a day, swimming, walking and jogging. He also states that he was very active socially and attended various church and other social functions. He also enjoyed an active sex life with his wife. It is clear from the medical evidence, and uncontested by Mrs. Samuels Richardson that, as a result of the collision, Mr. Christopher sustained severe injuries, both physical and neurological. Taking that into consideration and the guidance on the quantum of damages awarded in the court of similar cases, Mr. Christopher suggests that the appropriate figure for his pain and suffering and loss of amenities would be \$150,000. Taking all matters into consideration including the injuries suffered by Mr. Christopher, his age and the fact that he will no longer be able to enjoy his

²⁷ Trinidad and Tobago, HCA No. 411 of 1971 (delivered 12th December 1977).

hobby of cycling and other physical activities, I make an award of \$60,000 which in my view, represents fair and reasonable compensation for the injuries sustained by Mr. Christopher.

[54] I have considered the submissions of both Counsel and the authorities relied on in addition to the other authorities that I have reviewed. In **Ulbana Morillo v Leanne Forbes**, the court awarded \$40,000 to the fifty-year-old claimant for pain and suffering and loss of amenities for spinal injuries to the L5-S1 disc which disabled her from raising her hand fully, lifting moderate weights or doing housework.

[55] The only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords “with the general run of assessments made over the years in comparable cases.”²⁸

[56] I am mindful that the approach of comparison and adjustment of similar awards in personal injuries cases is not flawless and that each case must be assessed on its own facts. As stated by Rattray J in the Jamaican case of **Duhaney** which I adopt:

“It is readily accepted that no two cases of persons sustaining personal injuries are exactly alike. And yet our system of justice requires that, as far as is possible, there be consistency in awards involving similar injuries. The award of a sum of money as compensation for severe and extensive injuries suffered in an accident, ... can never put a person back in the position he was prior to the accident, nor provide adequate solace for his misfortunes. The unenviable task of the Court is to arrive at a fair money value as redress for a claimant’s afflictions, in effect doing what is described as “measuring the immeasurable.”

[57] It is at this juncture that I must register my staunch disagreement with Counsel for the defendants who was of the humble view that the injuries suffered by Lenroy Connor were more severe than the injuries suffered by the claimant at bar,

²⁸ 4 See *Bird v Cocking & Sons Ltd* [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ.

especially in light of the evidence of the long-term impact and resulting disability suffered by Mr. Connor. Counsel must have read a different case from the Court; where Dr. Hodge stated inter alia: **“The area affected by the disc herniation could therefore be damaged again very easily even by something like bad posture much more a whiplash injury. A further injury, such as the whiplash injury, can reactivate or make the existing injuries worse as the body would be more intolerant of the injury. As a person gets older he gets weaker and you can’t put injury upon injury. The claimant’s condition as set out in his 2012 report would have happened anyway as result of the injuries sustained in 2004 but would not have been so severe, extensive and crippling if he did not also sustain the whiplash injury.”** Dr. Hodge went on to say in oral evidence that: **“both the injuries sustained in 2004 and the whiplash injury sustained in 2006 would have contributed to the current condition. It is cumulative and he cannot say what percentage of the current condition would have been caused by the 2004 disc herniation and what percentage by the whiplash.”**

[58] Hence, my understanding of the previous case is that there was an existing injury which was exacerbated by the second accident which occurred after. This case is to be distinguished from the present case at bar; where the claimant was 49 and did not have a previously-existing condition or any substantive previous injury or injuries.

[59] I also disagree with Counsel for the defendants when he submitted that there was a notable absence of any indication as to the long-term impact of the injuries on the claimant, and that there was no evidence that Ms. Mederick had or will suffer a permanent disability. Again, there is palpable evidence from the witness statement of Ms. Mederick which is supported by the medical reports of Dr. Curby Dwaine Sydney. Also, even the letter of the employers of the claimant lends some credence to her claim of her injuries affecting her industry after the accident.

[60] In the circumstances, I have taken into account the nature and extent of the claimant’s injuries which were substantive in nature although confined to her

shoulder and back region, and the fact that this is a 49 year old woman who still is in the prime of her life, still has two minor children dependent on her and has to contend with excruciating pain and to be dependent on physiotherapy and pain-killers for relief and comfort from the severe pains.

- [61] In the circumstances, and having considered all the authorities and the evidence, I consider the sum of \$ECD55, 000.00 for pain and suffering and \$ECD25, 000.00 for loss of amenities to be an appropriate, fair and reasonable award and I so award.

Handicap on the Labour Market

- [62] As was helpfully elucidated by Harrison, J.A in: **Monex Ltd. v Mitchell and Grimes** – SCCA 83/96 (judgment delivered December 15, 1998), ‘**loss of future earnings represents a distinctive different set of circumstances where the victim who, earning a settled wage has suffered a diminution in his earnings on resuming his employment or assuming new employment due to his disability. The net annual monetary loss in terms of the reduction in earnings is easily recognizable and quantifiable in such circumstances.**’ Thus, as was stated in **Fairley v Thompson** – [1973] 3 All ER 677, by Lord Denning, ‘**compensation for loss of future earnings is awarded for real assessable loss proved by evidence.**’

It is very important to note that, as was stated by Browne J in **Moeliker v A. Reyrolle and Co. Ltd.** – [1977] 1 All ER 9, ‘**As I have said, this problem generally arises in cases where a plaintiff is in employment at the date of the trial. If he (the claimant) is earning as much as he was earning before the accident and injury, or more, he has no claim for loss of future earnings. If he is earning less than he was before the accident, he has a claim for loss of future earnings which is assessed on the ordinary multiplier/multiplicand**

basis. But in either case he may also have a claim, or an additional claim, for loss of earning capacity, if he should ever lose his present job.'

[63] In some of the case law vis-a-vis claims for loss of future earnings, such claims are set out as a sub-head of the overall special damages, items/sums being claimed for. In other cases though, such claims are treated as an item of general damages and therefore, are not specifically particularized.

[64] By now it should be accepted, based on case law, that there is a distinction between handicap on the labour market and loss of future earnings. The Court of Appeal of Jamaica in **Monex Limited v Mitchell and Gmines** S.C.C.A. 83/96 (delivered December 15, 1998) held at pages 12 and 13 that there was a difference between handicap on the labour market and loss of future earnings. Harrison J.A. who delivered the leading judgment, accepted as correct, Lord Denning's distinction between the two. This Lord Denning did in **Farley v John Thompson** 119731 2 Lloyd's Rep. 40. Harrison J.A. also held that loss of earning capacity arose where the claimant had resumed work without any loss of earning or resumed work at a higher rate of earning but there was a risk of losing the current job and the claimant will be at a disadvantage in the labour market which will make it less easy to secure employment (see pages 12 and 13). His Lordship cites **Moeliker v Reyrolle** [19771 1 W.L.R. 132. Harrison J.A. repeated this view in **Dawnette Walker v Hensley** Pink S.C.C.A No. 158/01 (June 12, 2003).

[65] In **Atlas v Briers** 144 C.L.R. 202 Barwick C.J. of the High Court of Australia, notwithstanding the vacillatory reception of the other members of the court, stated the true position of what handicap on the labour market is being compensating. His Honour stated at page 209:

The plaintiff in Gourley's Case had been deprived of some part of his earning capacity. It was for this deprivation that compensation was to be awarded. Undoubtedly that capacity is a capital asset, though like other capital assets capable by its use or employment of

producing income. Logical adherence to this concept would, in my opinion, avoid much of the confusion which to my mind has crept into the assessment of damages for loss of earning capacity tortiously caused. Although statements can be found in decided cases to the effect that it is for loss of earning capacity that compensation by way of damages is to be assessed, in other cases the method of determining, or the factors employed in determining, the value of such an asset as earning capacity have been confused with the identity of the asset itself. It can be seen in the reasons in *Gourley's Case* itself, where loss of earnings or non-receipt of remuneration is treated as synonymous with loss of earning capacity: compensation for the non-receipt of earnings is what is sought rather than compensation for the deprivation of a capital asset, albeit one capable of producing earnings. The confusion is exacerbated, in my opinion, by the practice of determining the compensation for non-receipt of earnings by estimating the value of an annuity to produce the actual earnings which the earning capacity might have been expected to produce during the remaining working life, some endeavour being made by arbitrary discounting to take account of the vicissitudes of life. A multiplier is applied to the estimated periodic earnings.

But the plaintiff has not in a relevant sense lost the earnings either to the period before verdict or the future thereafter: he has lost the capacity to earn perhaps the equivalent of his current earnings or perhaps more or less according to the reasonable expectations of the employment of his earning capacity. If the award of damages for such an injury destroying or diminishing his earning capacity were merely a matter of replacing those earnings, the amount of the award would be taxable: but it is not, for the reason that the award is for a capital loss, however much the amount of the award is quantified by

a consideration of what the use or employment of that capacity might be expected to produce. In other words, the assessment of damages for loss of earning capacity is in truth an exercise in valuation.

[66] Here, his Honour is making a pellucid distinction between the capacity to earn and the assessment of the loss. The learned Chief Justice makes the telling point that confusion has arisen because of the methodology of computing the damages. The usual mode of computation is by reference to what the claimant has earned but that should not obscure the fact that the capacity to earn is more in the nature of a capital asset than it is simply loss of income. This is brought out by the fact that a person may not be earning but there can be no doubt that his capacity to work has been impaired. In this circumstance, the only difficulty, if it could properly be characterised as a difficulty is, what would be the correct amount for compensation of the injury to this asset?

[67] This was brought out with greater clarity by the High Court of Australia in the case of **Medin v Stote Government Insurance Commission** 182 C.L.R. 1, In that case, the claimant was injured in a motor vehicular accident. He resumed work but was forced to take early retirement because of the effect of the injuries. At the trial, the claimant indicated that his injuries did not make him able to perform at the level that he wanted. It appeared that his employer did not have any difficulty with his work. The issue was whether he could claim for handicap on the labour market. The court held that he was entitled to recover under that head. McHugh J. at page 15 summed up the distinction in this way:

In Australia, a plaintiff is compensated for loss of earning capacity, not loss of earnings. In practice, there is usual little difference in result irrespective of whether the damages are assessed by reference to loss of earning capacity or by reference to loss of earnings. That is because the injured plaintiff recovers not merely because his earning capacity

has been diminished but because the diminution of his earning capacity is or may be productive of financial loss". Nevertheless, there is a difference between the two approaches, and the loss of earning capacity principle more accurately compensates a plaintiff for the effect of an accident on the plaintiff's ability to earn income. Earning capacity is an intangible asset. Its value depends on what it is capable of producing. Earnings are evidence of the value of earning capacity but they are not synonymous with its value. When loss of earnings rather than loss of capacity to earn is the criterion, the natural tendency is to compare the plaintiff's pre-accident and post-accident earnings. This sometimes means that no attention is paid to that part of the plaintiff's capacity to earn that was not exploited before the accident. Further, there is a tendency to assume that if pre-accident and post - accident incomes are comparable, no loss has occurred. (my emphasis)

- [68] The last sentence is important. It points out the fallacy of equating loss of income or the absence of loss of income with impaired working capacity. In the Anglophone-Caribbean, we have followed the English approach in this regard. In **Forley v John Thompson** [1973] 2 Lloyd's Rep. 40 Lord Denning held at page 42:

It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence, Compensation for diminution in earning capacity is awarded as part of general damages. If I may give an instance, a manual worker may be incapacitated for manual

work, but after the accident he may learn a clerical trade. At his new trade he may actually earn more than he would have done before, He will have diminished earning capacity, but he has not lost any future earnings.

- [69] This line of reasoning is consistent with the Australian position. It is the damage to the loss of the capital asset that is being compensated. In this analytical framework, it is obvious that it matters not whether or not the claimant is working at the time of the trial.
- [70] This reasoning of Browne L.J. in **Cooke** is consistent with the decision in **Glady's Smith (feme sole) v Lord Mayor, Aldermen and Citizens of Manchester** (1974) 17 K.I.R. 1. In that case the claimant did not suffer any loss of future earnings because her employers agreed to keep her on. She did suffer a loss of earning capacity because, as her lawyer submitted, she was not able to leave the job she was in and go out into the open labour market and compete on equal footing with her competitors. However, if it were not for the generosity of her employers, she would have been out in the cold. This decision demonstrates the point made by the court in **Medin** - one is not to confuse loss of earnings with loss of earning capacity.
- [71] Once it is accepted that the true and main object of compensation is the claimant's intangible asset of his earning capacity and not his actual earnings, what can it matter if it is the case that the claimant never worked at all? The fact that a claimant did not use his working capacity, his intangible asset, does not make it any less an asset which, if damaged, is a proper object of compensation. If this is the case, it is not quite clear what is the relevance of the risk of losing the current job.
- [72] A step in the right and progressive direction was made by **Monex**. The claimant in that case was 10 years old at the time of the accident and twenty four years at the time of trial. She had never worked. An award of loss of earning capacity was

upheld by the Court of Appeal. This could only have been on the basis that the claimant had an intangible asset that was now impaired. As Harrison J.A. said at page 14:

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

[73] The real loss referred to in this passage could not possibly be loss of income since if the claimant has never worked, was not working at the time of the trial and unlikely to work in the future, Harrison J.A. could not possibly have been referring to loss of future earnings. The only possible loss that the court could have had in view is the capacity to earn as distinct from the earnings themselves. Thus, at least in this case, the Court of Appeal of Jamaica and the High Court of Australia are at one, never mind the contradictions inherent in the **Moeliker** formulation.

[74] Ms. Mederick has suffered hypoesthesia (decreased sensation to the C4-C5 dermatome); deep tendon reflexes decreased on the left side of her body, left toe dorsiflexion 4+/5 and decreased range of motion of the neck to the right, which have all been documented. It is true that the medical reports have not explicitly addressed the issue of handicap on the labour market and the Court of Appeal of Jamaica has said that before an award under this head can be made there must be medical evidence supporting the claim (**Dawnette Walker v Hensley Pink** S.C.C.A No. 158/01 (June 12, 2003)). The Court of Appeal also held that the claimant must be working at the time of trial to become eligible for an award under the head of handicap on the labour market. It would seem to me that the decision of the court has to be seen in the context of the case that was before it. There was no evidence that the claimant in that case had such extensive injuries as Ms. Mederick. In other words, the severity of the injuries of the claimant in the Walker

case did not make it immediately obvious that the claimant must necessarily have suffered an impaired capacity on the labour market. I do not understand the Court of Appeal to be saying that if the injuries are so extensive that it does not require medical evidence to confirm that the claimant would suffer a handicap on the labour market, the Trial Court could not make such an award. This would be like saying that a mason who has lost both hands and legs cannot get an award under this head if the doctor does not indicate that he has suffered a handicap on the labour market.

- [75] By parity of reasoning, from the injuries suffered by Ms. Mederick there can be no doubt that she has suffered damage to her capacity to work, or if one prefers more familiar language, she is not able to compete with other able bodied persons on the open market.
- [76] The prospect of work for a severely injured, inadequately educated fifty-year-old woman is not very good. If Mrs. Smith in **Gladys Smith** could secure an award under this head, even more so Ms. Mederick.
- [77] In deciding whether the multiplicand or the lump sum method, in awarding under this section, if any to accept, it is clear from the English approach, which has been adopted in several countries in the Anglo-phone Caribbean, that the lump sum payment is not meant to be derisory because it is real loss that is compensated. I would award the sum of \$ECD50, 000.00 to the claimant under this head of damages.

Loss of Future Earnings/Loss of Earning Capacity

- [78] In the case before me, there is no longer a risk of unemployment as a result of the claimant's injuries, the risk materialised within a few years after the accident. Her pains and spondylosis myelopathy have made it particularly difficult to cope in the work environment. She also experienced discomfort when she had to stand for lengthy periods. Though the medical evidence does not state that the claimant

cannot work, her spondylosis myelopathy diagnosis and her written evidence concerning the effect of her injuries on her ability to perform her work are in my view sufficient to justify making the award.

[79] What, to my mind, ought to be done as a matter of practice is to claim for loss of earnings up to the date of trial/assessment, as an item of special damages and to particularize the same accordingly. At the commencement of the trial, the particulars of the claim can be amended, to specify what the specific sum of loss has been to the claimant, in terms of his earnings, from the time of the defendant's alleged wrong done to him, up until the date when the trial of that claim, has actually commenced. That is in fact, a claim for 'loss of earnings'. That is a claim which is specifically calculable and ought, to my mind, to be specified in the special damages particulars, in terms of the precise calculation thereof, once the trial has commenced.

[80] As such, the claim for loss of future earnings, refers to my mind, to a claim for anticipated loss of earnings, after the trial of the claim has been concluded. Considered in that context, the claim for loss of future earnings is, in reality, an item or aspect of the claimant's overall claim for general damages.

[81] I am fortified in my view as expressed above, by dicta from the case earlier cited in these reasons, which for ease of reference, will now simply be referred to as, '**the Monex case**.' Rattray P, who delivered the Court of Appeal's judgment in that case, stated, as recorded at page 21, that, '**it is worthy of note that from the date in 1991 when the respondent commenced her working life until the date of trial, real quantifiable losses were sustained, which could have been claimed as loss of earnings, an item of special damages.**'

[82] In further support of that position of mine, I refer to paragraph 35-061 of the text – **Mcgregor on Damages**, 18th ed., 2009, where the following is stated: '**The claimant is entitled to damages for the loss of his earning capacity resulting from the injury; catastrophic injuries, where cost of care predominates,**

apart, this generally forms the principal head of damage in a personal injury action. Both earnings already lost by the time of trial and prospective loss of earnings are included. While the rules of procedure require that the past loss be pleaded as special damage and the prospective loss as general damage, there would appear to be no substantive difference between the two (2), the dividing line depending purely on the accident of the time that the case comes on for hearing. Thus it has been accepted that the rule in British Transport Commission v Gourley in relation to the incidence of taxation applies equally to the loss of income till judgment and the loss of earning capacity in the future. Similarly, the courts must take account of relevant changes of circumstances occurring before and after judgment, the only difference being that the former are a reality and the latter a matter of estimate. However, interest is to be awarded on the past loss but not on the prospective loss of earnings.’ See: *Jefford v Gee* – [1970] 2 QB 130.

- [83] *British Transport Commission v Gourley* – [1956] AC 185, is authority for the proposition, as stated by the author in his quotation above, that, ‘the rules of procedure require that the past loss be pleaded as special damage and the prospective loss as general damage’. (See per Ld. Goddard, at 206).
- [84] As stated at paragraph 35-065 of the same text, ‘the courts have evolved a particular method for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the claimant’s present annual earnings less the amount which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now, instead of periodical payments over the years. This latter figure has long been called the multiplier; the former figure has come to be referred to as the multiplicand. Further adjustments however, may or may not have to be made to multiplicand or multiplier on account of a variety of factors, namely the

probability of future increase or decrease in the annual earnings, the so-called contingencies of life and the incidence of inflation and taxation. There are, exceptionally, situations in which the court is entitled because there are too many imponderables in the case, to regard this conventional method of computation as inappropriate and to arrive simply at an overall figure after consideration of all the circumstances.’ See: **Blamire v South Cumbria Health Authority** – [1993] P.I.Q.R Q1.

- [85] The anticipated loss, which is that which, to my mind, can properly be categorized as, ‘loss of future earnings,’ would pertain to the anticipated income losses of the claimant between the time, post-trial and his expected date of retirement, based upon evidence as to his date of birth or, at the very least, his age at the time when trial was underway. That anticipated loss is typically to be calculated using the multiplier/multiplicand method and no interest is payable on any damages or sum awarded in respect of such anticipated loss. On the other hand though, interest is to be awarded, in respect of the claimant’s actual loss of income.
- [86] In England, the ‘Ogden tables’ are used to determine the multiplier. Those are actuarial tables created by a team of experts in the United Kingdom and which pertain to persons who live there. I note that we are in St. Lucia but Ms. Reid has pointed me to the Court of Appeal in the case of **Auguste v Neptune** (supra) at pp. 3-4 of the judgement, which set out the principles for selecting a multiplier and cited previous multipliers fixed by earlier courts for persons of varying ages and indicating a multiplier of 12 for a 45 year old man and 10 for a 57 year old man. Ms. Reid further contended that given the learning in the cases cited, submitted that an appropriate multiplier of 11 should be used; this is in line with the Court of Appeal case in **Ramnath v. Alphonso** cited in **Paul v. Blyden** at paragraph 20, and that this sum be reduced by one quarter to account for the vicissitudes of life leaving a multiplier of 8.25.
- [87] ‘When determining the multiplicand, that is, the annual loss of earnings, it is required that the court first settle on what is the likely pattern of employment

and earnings that the claimant would have had if it were not for the tort. Then the likely pattern of employment and earnings in the circumstances of the case is decided, in order to determine the loss.’ See: *Ward v Allies* and *Morrison Architects* (op. cit.); and *Leesmith v Evans* – [2008] EWHC 134.

- [88] Thus, to determine both actual loss of earnings and loss of future earnings, it is very clear that what must be provided to the court, first and foremost, is evidence as to the claimant’s earnings up until the time when he either ceased altogether, to earn at all, any income, or alternatively, ceased to earn as much income as he or she used to earn, prior to the commission of the tort, in relation to him, by the defendant.
- [89] This court recognizes that it is always open to a court to draw reasonable inferences from the facts found to have been proven to the requisite standard, which is proven as being more probable than not; or in other words, proven on a balance of probabilities. This court also recognizes and has applied the requisite standard of proof, that being proof on a balance of probabilities.
- [90] It must be recalled, what was stated by Browne LJ in ***Moeliker v A. Reyrolle & Co. Ltd.*** (op. cit.), which is that – ‘... If the claimant is earning as much as he was earning before the accident and injury, or more, he has no claim ...’ Also, it must be recalled what was stated in ***Fairley v Thompson*** (op. cit.), by Ld. Denning, that being that, ‘compensation for loss of future earnings is awarded for real assessable loss proved by evidence.’
- [91] The onus was on the claimant to prove, to the requisite standard, that she was earning an income as of December, 2017 and that, as a consequence of the commission of the relevant tort, by the defendants, she was negatively impacted to the extent that, amongst other losses suffered by her, she also suffered the loss of the income that she was earning prior to the commission of that tort. The claimant has proven same and accordingly, an award will be made by this court to her,

either for loss of earnings up until trial, or for loss of future earnings, which in reality, should relate to loss of earnings, post-trial.

[92] The claimant's witness statement and supplemental witness statement divulged her earnings before and after the accident. However, though not much consistent documentary proof was submitted to the Court. In my view, this is astonishing because her job was not informal in nature. In other words, the claimant was not in the position of the pushcart vendor.²⁹ No explanation was proffered as to why documents in proof of her earnings were not submitted. Due to the claimant's failure to strictly prove her earnings, I will use the weekly wage to calculate the award. The figure of seven hundred and fifty Eastern Caribbean dollars (\$ECD750.00) will therefore be used.

[93] This figure would have to be multiplied by 52³⁰ to ascertain a yearly figure. The resulting figure, the multiplicand, is thirty-nine thousand Eastern Caribbean dollars (\$ECD39, 000.00).

[94] A suitable multiplier has to be applied to the multiplicand. To ascertain the multiplier one has to subtract the claimant's age at the date of the assessment from the age she is expected to retire. This is done to find out the remaining period of her working life³¹.

[95] Having been born on December 28, 1969, the claimant was almost 50 years old at the date of the judgment in default order on April 29, 2019. The retirement age for women is sixty five (65). When 50 is subtracted from 65, 15 is the result, the

²⁹ In **Desmond Walters v Carlene Mitchell** (unreported), Court of Appeal, Jamaica, SCCA 64/91, judgment delivered 2 June 1992, Wolfe J.A (Ag) (as he then was), concluded that one could not expect a sidewalk or a push cart vendor to prove his or her loss of earnings with the mathematical precision of an organized company.

Harrison's Assessment of Damages: Cases on Personal Injury and Fatal Accident Claims (2 edn, 6), page 36- "Where it is impossible to ascertain what the earning capacity of the victim is, or will be in the future, the Court, may assume that, at least, the claimant (victim) would be able to earn an amount equivalent to the national minimum wage. See **Douglas v KSAC and Ors** (Consolidated) 18 JLR 338" 7 52 weeks are in 1 year.

³⁰ See *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] A.C. 729.

³¹ See *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] A.C. 729.

multiplier. This number should be discounted to take account of the following factors: receipt of earnings lost as a lump sum and the vicissitudes of life (the claimant might have lost her job at some point in the future through redundancy or illness).

- [96] I believe that an appropriate multiplier would be 15. Consequently, the mathematical calculation for the claimant's loss of earning capacity is as follows: \$ECD39,000*9= \$ECD351,000.

Special Damages

- [97] This court accepts and understands it to be the law, that as a general rule, special damages must be specially pleaded and specially proven. In appropriate cases however, where there exists a proper basis to do so, that general rule will give way to common-sense, which is that in some circumstances, to insist on strict proof of each and every item of special damages, by means of documentation in particular, would be, as has been stated in at least one reported judgment, **'the vainest form of pedantry.'** See: **Desmond Walters v Carlene Mitchell** – [1992] 29 JLR 173; and **McGregor on Damages**, 12th ed. at paragraph 1528; and **Radcliffe v Evans** – [1892] 2 QB 524.
- [98] In **Carlton Greer v Alston's Engineering Sales and Service Ltd** Privy Council - 20 - Appeal No. 61 of 2003 from the Court of Appeal of Trinidad and Tobago, in support of the submission that although special damages are to be strictly proven, in the absence of such evidence in certain circumstances it is open to the Court to consider an award of nominal damages. In this case there is also evidence of the claimant's need for or reliance on extra help, and damages will be awarded under this particular head.
- [99] That general rule therefore must, to my mind, give way to common-sense, in circumstances wherein, items of special damages are not particularized, but yet

the claimant, during trial, seeks to recover for those alleged losses and the defendant agrees to permit recovery for same. In circumstances such as that, for all of those items of special damages that the claimant is seeking recovery of, by means of an award of damages, since the defendant has consented to the claimant's recovery of same, then, even though some of those items were not particularized in the claimant's particulars of claim, the claimant ought to be and will be able to recover for same. If the absence of notice does not perturb the opposing party and thus, the failure to particularize does not perturb that party, and in addition, the opposing party consents to claims for items of special damages which either could or ought to have been particularized, but which were not, then the court should award same to the claimant.

- [100] What will be awarded to the claimant as special damages therefore, will be those items of loss that were claimed for, in the claimant's particulars of claim, as well as for those items which were not itemized in the claimant's particulars of claim, as being claimed for, and which have been agreed to, by defence counsel. The sum of those items is \$ECD6,846.91. That would be the aggregate sum for the following items which were claimed as special damages: air fare, medication, consultation and medical reports – Dr. Curby Dwaine Sydney, cost of CT scans and cost of physiotherapy, consultation and the medical reports. On that aggregate sum, interest will be awarded from as of the date when the claimant's particulars of claim was served on the defendants up until the date of judgment. The sum to be awarded to the claimant as special damages therefore is \$ECD6,846.91.

Future Medical Services

- [101] The claimant seeks an award of \$ECD85, 475.00 for future medical care. Dr. Curby Dwaine Sydney in his report states that the claimant needs a Cervical Spinal Cord Decompression to release the compression of her cervical spinal cord. The procedure is to be performed at the Tapion Hospital in Saint Lucia by Dr. Curby Dwaine Sydney who is a Consultant Neurosurgeon.

- [102] The defendants concede the necessity of the surgery but necessarily the amount of \$ECD85, 475.00 and the evaluation as advised by the medical practitioner in the event that the claimant's condition deteriorates and surgery is needed in the future, and also object to the unsubstantiated additional sum of \$ECD10, 000.00 requested by the claimant for incidentals and out of pocket expenses. However, it is to be noted that the medical report of Dr. Curby D. Sydney dated the 30th day of August 2019 under the rubric **Recommendations** clearly stated inter alia that: **Neurosurgical intervention: Anterior Cervical Discectomy and Fusion (2 levels).**
- [103] I make a nominal award of \$ECD8,000.00 to cover the costs of house-keeping expenses and other incidentals thus making a total sum of \$ECD93,475.00 for future medical care.
- [104] Finally, I wish to thank learned Counsel for their submissions in this matter.

Orders

- [105] The order on the assessment of damages is as follows:

General damages:

- a. pain and suffering \$ECD55, 000.00 at 6% interest from the date of the service of the claim form to the date of payment and \$ECD25, 000.00 for loss of amenities;
- b. loss of future earnings/loss of earning capacity - \$ECD351, 000.00 at no interest;
- c. handicap on the labour market - \$ECD50, 000.00 at no interest;

- d. future medical expenses in the amount of- \$ECD93, 475.00 at no interest;
- d. 'Special damages' is awarded to the claimant, in the sum of \$ECD6, 846.91, with interest at the rate of 3% per annum from the date of service of the claim to the date of payment.
- e. Prescribed costs pursuant to Appendices B and C of Rule 65 **Civil Procedure Rules 2000** as amended).

**Ricardo Sandcroft
Master [Ag]**

By the Court

Registrar