



[2017] JMSC Civ 95

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2007 HCV 03390**

<b>BETWEEN</b>	<b>ETTA BROWN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>DEFENDANT</b>

**Ms. Christine Mae Hudson instructed by K. Churchill Neita & Co Attorneys - at –  
Law for the Claimant**

**Msr. Gail Mitchell instructed by the Director of State Proceedings for the  
Defendant**

**Heard: 11<sup>th</sup> July 2017**

***ASSESSMENT OF DAMAGES: personal injuries; handicap on the labour market; extra help; cost of  
future care and special damages.***

**CORAM: GEORGE, J.**

### **Background**

[1] This matter involves an action brought by the Claimant, Etta Brown, against the Attorney General of Jamaica to recover damages for personal injuries she sustained following an accident which occurred during the course of her employment as a flag woman by the National Works Agency (NWA). The Claimant's action also includes a claim for all subsequent losses and expenses incurred because of the said accident.

- [2] The particular facts giving rise to the Claimant's injuries are that on the 2<sup>nd</sup> November 2006, the Claimant pursuant to her duties as a flag woman was directing Traffic along the Moorse Road in the parish of Clarendon. Mr. Winston King, the operator of one of the motor trucks owned by the NWA and which was engaged in road repairs on the fateful day, was seated in the truck, which was parked on a gradient along the road. Mr. King through his negligent actions caused the truck to reverse into the path of Ms. Brown thereby causing the truck's right wheel to run over her left foot and thereafter knocking her to the ground.
- [3] The Claim Form and Particulars of Claim were initially filed on August 27, 2007. These documents were thereafter amended and refiled on May 7, 2008 and February 6, 2014 respectively.
- [4] The Defendants failed to file their defence and on December 10, 2007, the Claimant filed an application for Default Judgment. In response, on the 16<sup>th</sup> April 2008, the Defendant filed an Application to Extend time to file their Defence and on the 15<sup>th</sup> May 2008, permission was eventually granted for the Defendant to file and serve their Defence.
- [5] The matter came on for trial on the 10<sup>th</sup> July 2014, at which time judgment on Admission was entered against the Defendant with damages to be assessed.
- [6] On the 26<sup>th</sup> of October 2015, the Claimant filed an Application for interim payment amounting to \$4,000,000.00. The said application was set for hearing on the 13<sup>th</sup> November 2015.
- [7] On the 13 November 2015, His Lordship Justice Rattray ordered that the sum of \$3,000,000.00 as interim payment to be paid by the Defendant.
- [8] **Evidence**

The following medical reports were relied on:

**Medical Report of Dr. Grantel Dundas (Consultant Orthopaedic Surgeon)**  
**Orthopaedic Associates, dated the 26<sup>th</sup> March 2008**

Dr. Dundas' Medical Report outlined the following:

- The Claimant was seen on the 19<sup>th</sup> March 2008, her complaints which span a seventeen-month period were:
  1. Pain in the left heel and ankle
  2. Pain in the lumbar region
  3. Inability to place her foot flat
  4. Absence of left heel pad.
- The report outlined that in November of 2006, the Claimant was injured when a NWA truck had become disabled and ran over her left foot. She was taken to the May Pen Hospital, spent three nights there, and was thereafter transferred to the Mandeville Hospital. It was outlined that the wound was cleaned in May Pen under general anaesthesia and Intravenous fluids were administered.
- Whilst at the Mandeville Hospital, the Claimant had about four or five surgeries. These include a failed skin graft procedure that had to be repeated. He also outlined that the Claimant was ambulated on auxiliary crutches from December 2005 to January 2008. In December of 2007, she had been encouraged to discard all walking aids. However, because of the awkwardness of her gait she observed the onset of low back pain.
- The Claimant's ankle was in equinas and her pelvis and spine had to be twisted with each step. Her back pain radiated down the buttock down to the left leg.

- The entire limb often became numb and walking exacerbated her symptoms, despite these problems, there was insistence that she should wean herself off the walking aids.
- Dr. Dundas also highlighted that in 2008 she went to the Mona Rehabilitation Centre and had a special shoe designed for her deformed foot but this, has not been utilized.
- He assessed her current status (2008) as follows:
  1. Pain in left ankle
  2. Inability to neutralize left ankle
  3. Burning sensation in left heel
  4. Left foot aches and swells
  5. She walks on her metatarsal heads
  6. There is pain from the awkward gait transferred to her low back with subsequent radiation to the leg and foot.
  7. The left heel and medial arch of her foot are very sensitive to light touch.
- In relation to her past medical history, Dr. Dundas outlined that this was unremarkable; upon examination her respiratory system, cardiovascular system and abdomen were unremarkable. Her lumbo-sacral spine was mobile but she had mild central L4/5 intervertebral tenderness. No deformity was noted.
- There was a 15x14 cms graft donor site and a 20x13 cms graft donor site at the left gluteal and lateral aspects of the thigh respectively. There was a graft recipient site measuring 9x9 cms on the anterior and medial aspects

of the left ankle and heel. The heel itself was severely truncated and there was blunting of sensation distal to the unsightly residual scar.

- He further outlined that there is significant loss of the heel fat pad. Her forefoot contours were irregular and there were scars of surgical intervention. The ankle was in 23° of plantigrade attitude on the left compared to a range of 11° of dorsiflexion to 35° of plantar flexion on the right. There was a loss of rotary range in the forefoot.
- The Claimant was diagnosed as having:
  1. Crush injury to the left heel with loss of fat pad
  2. Fracture-dislocation of left foot.
- Investigations revealed:
  1. In the left calcaneum there was some osteopenia at the posterior aspect of the bone, probably indicative of bone loss
  2. In the projections of the forefoot, there were some tarso-metatarsal disruptions with fractures of the bases of the first and second metatarsals and disorganization of the metatarso-cuneiform joints adjacent to these bones.
- Using the American Medical Association Guides, it was assessed that the residues experienced by this patient amounts to 49 percent of the affected left lower extremity or 20 percent of the whole person.
- Amongst the recommendation given was that the abnormal position of her ankle, that is, the Plantigrade Posture would be improved by Arthodesis of the ankle in a neutral position, which would leave a residue of 37 percent of the affected extremity or 15% of the whole person.

**Medical Report of Dr. Guyan Arscott (Cosmetic and Reconstruction), dated September 24, 2010**

[9] The findings detailed by Dr. Arscott are as follows:

- The Claimant was found to have a deformity of the left foot. There was a 5x5 cms area of callosity over the distal outer aspect of the sole, and all of the left heel area, was covered with a tethered hypertrophic hyperpigmented skin draft. The left foot was held in approximately 25 degrees of fixed planter flexion deformity at the ankle and the left thigh had an area measuring 25x18 cms which had a markedly hyperpigmented blemish, this represented the skin graft donor site.
- He outlined that corrective surgery from a Plastic Surgeon standpoint would provide Soft Tissue Cover to replace the lost heel pad. This will involve a Sapheno-sural flap from her left leg. This he outlined would provide adequate padding to the left heel. The Sapheno-sural flap would be taken from her left leg, the result being a marked and obvious scar. The anticipated improvement was estimated to be fifty to sixty percent.

**Medical Report of Dr. Melton Douglas dated September 17, 2013 as outlined in Defendant's submissions**

[10] The findings of Dr. Douglas are as follows:

- Marked equines deformity of the ankle joint measuring 170 degrees. There were no arithmetic changes of the ankle or subtlar joint. The intermediate cuniform bone was absent from the midtarsal joint and the first metatarsal joint was in exaggerated cavus. There was arthritis affecting the tarso-metatarsal joint of the lateral 4 digits.
- Dr Douglas' diagnosis was:

1. Severe crush injury to left foot
  2. Arthritis of the mid-tarsal joints left foot
- His prognosis:
    1. She has permanent impairment of her function from the following:
      - i. The loss of the entire fat pad from the heel;
      - ii. The bone injuries and
      - iii. The gross equines deformity of the hind foot
  - His impairment ratings were as follows:
    1. Loss of fat pad: 36 percent whole person impairment from the loss of the heel pad
    2. Skin disorders regional grid: Skin disorder signs and symptoms present greater than 60-90 % of the time and require intermittent to constant treatment with a topical or systematic medication on a regular basis and there is moderate interference with some activities of daily living and assigned class 3 with mid range impairment of 36% whole person impairment.
    3. Bone injuries of the foot: She was assessed as having 32% lower extremity impairment (LEI) from the fracture of the mid tarsal region. Foot and ankle regional grid: Fracture/dislocation metatarsal-tarsal function fracture/dislocation, per criteria 'Very severe malalignment or non-union with angulations or involvement of 4<sup>th</sup> and 5<sup>th</sup>metarsal joints and assigned class 3 with mid range impairment of 30% LEI. Application of the

adjustment grid with functional history grade modifier 3, physical examination adjustment grade modifier grade 4, and a net +1 with upward adjustment of 32% LEI.

4. Equinus deformity – LEI of 30%. Ankle motion impairment of flexion contracture greater than 19 degrees equates to a severe deformity and an impairment of 30% LEI.
5. Combined whole person impairment total 51% and post-surgery her impairment rating would be reduced to 10% LEI.

**Second Addendum Medical Report of Dr. Grantel Dundas (Consultant Orthopaedic Surgeon) Orthopaedic Associates, dated the 28<sup>th</sup> July 2014.**

[11] In his Second Addendum Medical Report Dr. Dundas outlined that:

- The Claimant remains a suitable candidate for the recommended surgery outlined in his report dated July 7, 2010 and in the medical report of Dr. Arscott dated September 24, 2010.
- It was outlined that the surgery is likely to take two or three surgical procedures. To address the matter of the scarring, a flap rotation was recommended rather than a straight forward skin graft. The optimum rating anticipated is 10% lower extremity impairment or 4 percent whole person impairment. An element would be added to this for the scar formation on the skin from grafting and flap rotations.
- The prospective surgery would allow her to be able to tolerate long standing but not prolonged walking; as such, she would have to be provided with a special 'rocker sole shoes'.
- She would also require the use of special heel pads made of silicone in order to reduce the pressure on her skin after the surgery. He further outlined that the delay of eight years (now eleven) would likely render her



joint less mobile and her soft tissue less pliable hence this may affect the outcome of the surgery in a negative manner. Thus, a mobile ankle joint may not be realistic.

- Should the Claimant not proceed with the surgery she would retain the ankle deformity, which amounts to 60 percent lower extremity impairment 24 percent whole person impairment. The abnormal gait would as already stated in evidence, impose certain strains on her lumbar area and she would inevitably develop accelerated lumbar disc degenerative disease, it was however noted that some degree of the lumbar degeneration would be attributed to the process of ageing.

**Updated Medical Report of Dr. Guyan Arscott dated September 9, 2014 (As outlined in Defendant submissions)**

[12] Following a recount of the 2006 accident, examination and treatment Dr. Arscott outlined that –

- Corrective surgery from a Plastic Surgical standpoint would provide Soft Tissue Cover to replace the lost heel pad. This will involve a saphen-sural flap from her left leg. This should provide adequate padding to the left heel and should be done in conjunction with Arthrodesis of the left ankle by her orthopaedic surgeons. The sapheno-sural flap would be taken from her left leg and this will leave her with a marked and obvious scar. Anticipated improvement with heel cover should be fifty to sixty percent.

**Summary of Claimant's Witness Statement**

[13] The Claimant outlines that on the 2<sup>nd</sup> November 2006, on behalf of NWA she was doing work along the Moores Main Road in the parish of Clarendon. The road

work involved filling and patching pot holes along that stretch of road. There was a dura patcher machine that was used to do the patching.

- [14] At around 9:00 a.m. on the fateful morning the dura patcher machine stopped working. The said machine was parked on a slight gradient when it stopped working. Upon the machine ceasing to work, Ms. Brown accompanied by one Katherine Walters and the dura patcher operator went to the back of the dura patcher and tried to fix it. She eventually left from behind the dura patcher and was walking alongside the road, upon reaching the middle of the motor truck she saw a van coming down the road. It was clear hence she signalled him to continue driving.
- [15] Before the van got down to where she signalled him, she felt a hit on the back of her left foot and she fell across on the other side of the road. Whilst on the ground she noticed the motor truck slant on the other side of the road. This was not the position the motor truck was in when she walked from the back of the dura patcher to the motor truck hence the reason she knew the truck had moved off.
- [16] She maintains that it is not true that the dura patcher was working when she got hit, hence she saw no danger in standing beside the motor truck, as no work was going on, and because no work was going on the truck was not supposed to be moving.
- [17] She was taken to the May Pen Hospital and her foot was cleaned and dressed by the nurses, she was also taken to the theatre where the Doctors washed the wound. She received antibiotics and pain medication.
- [18] She was transferred to the Mandeville Hospital and taken to the theatre three times and the Doctors cut off the heel that was hanging down under her foot. She spent two weeks at the Mandeville Hospital during which time her foot did not heal. She received an appointment to go to the National Chest Hospital where a skin graft surgery was conducted. The surgery was unsuccessful and the foot

was not showing any sign of healing; it kept breaking down and the wound kept draining.

- [19]** The skin graft surgery was re-done and this time she spent a month in the hospital. After a year, she saw signs of the foot healing but she could not put any weight on it.
- [20]** At home, her husband before he left, along with her children assisted her, as she was unable to move. She was on crutches for three years and upon ceasing the use of the crutches things were very difficult with no heel and most of her foot bottom gone. She had to learn to stand and walk on her toes under the soft area of her foot. To walk in this manner she had to twist her waist and back to balance each step.
- [21]** She outlined that the injury to her foot has left her disfigured and deformed not only in the way she now walks but that the scars on her foot are very ugly. She got a pair of special shoes from Rehab Plus that cost \$98,000.00. However, her evidence is that she was unable to wear it as it caused her a lot of pain and when she walks, she felt that it was making her fall.
- [22]** She was a very active community member she played netball and football but is now unable to do so. Instead, she has to contend with the stares of people whenever she goes out. She once enjoyed dancing and going to parties; she is however now unable to do these things.
- [23]** According to her, her livelihood is now affected; she was a farmer, a domestic helper; sold at the market and even worked in a factory. However, she is no longer able to work. Her marriage has also since ended.
- [24]** She stated that she saw Dr. Grantel Dundas and Dr. Guyan Arscott and that she wants to do the surgery that they have recommended; she has also realized that as time goes by she feels more pain.

**Issue**

[25] By virtue of the aforementioned, the issue for assessment are what sum is most appropriate to compensate her for the injury sustained, given the losses suffered and the expenses incurred? It must be borne in mind that her injuries are significant, given the report of de-gloving coupled with her permanent scars; her manifest deformity as well as the losses to her livelihood and the changes to her way of life and the current and future medical expenses that she has incurred.

[26] The sums as initially claimed by the Claimant are as follows:

**General Damages**

- Pain and Suffering - \$10,000,000.00
- Handicapp in the Labour Market/Loss of Future Earnings - \$1,820,000.00
- Cost to future Medical Care - \$1,260,850.00

**Special Damages**

- Amount claimed in Particulars of Claim - \$1,170,780.19

[27] In Response to the Defendant's submissions, reverting from her claim, in her submission some two years prior to the Hearing of the matter, the Claimant now claims the following sums:

**General Damages**

- Pain and Suffering - \$14,500,000.00 to \$15,000,000.00
- Special Damages - \$623,459.12
- Loss of Earnings - \$2,256,800.00

### **Claimant's Submissions**

- [28]** It is the Claimant's contention that she suffered extensive degloving injury to her left foot, which involved extensive full thickness skin loss extending from the left heel to the mid left foot as well as loss of her heel pad. She outlined that because of her injuries she has done several surgical procedures including, wound debridement and two skin graft procedures.
- [29]** So as to provide a holistic view of the severity of the injuries suffered by the Claimant, Counsel acting on her behalf referred to the findings in the medical reports of Dr. Grantel Dundas dated the 26<sup>th</sup> March 2008 and Dr. Guyan Arscott's dated the 24<sup>th</sup> September 2010.
- [30]** Pursuant to the medical reports, Counsel outlined that against the significant orthopaedic residues and the extensive cosmetic disfigurement occasioned as a result of the degloving injury, it was the joint opinion of both Dr. Dundas and Dr. Arscott that in order to bring about a mobile ankle rather than a stiff ankle to the Claimant a multi staged surgical intervention would be best. This Counsel outlined would be followed by a second surgical procedure, the purpose being to bring the ankle to a neutral position. Of note is the fact that in providing his opinion as to future corrective surgery, to manage the loss of the Claimant's heel pad Dr. Arscott highlighted that for one of the procedures although it would result in marked and obvious scars, the Claimant would nonetheless experience a 50-60% improvement to her injured leg.
- [31]** It was counsel's submission that the medical evidence illustrates that the Claimant suffered significant injuries, to bolster this assertion she repeated the particulars of the Claimant's witness statement. These include the dilemma the Claimant must now face of having to walk with an obvious deformed leg and having to twist her waist and back to balance with each step. Counsel has also recounted the fact that as the Claimant is now forced to walk on the ball of her

foot, she has developed callouses and that the area has hardened with the passage of time. As such, the callouses at times break down and bleed.

- [32] The Claimant's ability to walk or stand for short periods is now limited; therefore, she no longer enjoys the basic amenities of ambulating without experiencing pain and suffering.
- [33] The Claimant's physical impairment has not only hampered her social activities but has also affected her status as a farmer and her relationship with her husband whom she has since ended their relationship on the premise that he did not marry her "with dis yah foot" .
- [34] It was outlined that before the accident the Claimant dressed a particular way and placed a high premium on her image. She described herself as a "pretty black woman". Counsel submitted that against this background, she would dress up and attend social functions, such as parties and dances, all of which, subsequent to the accident, came to an abrupt end. Additionally, she played community netball and football and that prior to her injuries, neither age nor gender restricted her participating in these activities.
- [35] It was Counsel's submissions that where an injured Claimant is so dislocated and rejected as in the manner described, that such a combination, results in serious mental strain; she commended to the court the comments of Lord Reid in **H. West & Sons Limited v Shepherd** (1964) AC 326, *Harrisons* page 16 where Lord Reid said "... *the real loss is not so much his physical injury as the loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition...for the multitude deprivations and even petty annoyances which he must tolerate...*"
- [36] Counsel submitted that the Claimant must now contend with the stares of the curious, the questions of the inquisitive, determined to find out what caused her obvious deformity. She must put up with the mental strain, brought on by her

physical impairment and resulting loss of amenities. Her loss is immeasurable, as the loss of good health is in and of itself something of intrinsic value.

[37] On the question of a fair estimate of damage Counsel directed the court to the case **Delmar Dixon (bnf) Olive Maxwell v Jamaica Telephone Company Limited** SCCA 15/91 taken from Harrisons page 316 , Rattray J outlined that “...*In determining a proper award for a young boy in the Jamaican jurisdiction in considering the effect of an injury which is in this case causes an obvious disfigurement which is permanent and affects the injured person in terms of mobility, a Court may in our view, properly take into account two additional factors:*

1. *The importance of athletic prowess in our culture not only in respect of games but of recreation involving the movement of the body and form e.g. dance. The recognized phenomenon in dance hall and carnival as avenues of enjoyment and expression are well established.*
2. *The inhibiting effects of an obvious deformity particularly among young people in terms of social relationships.*

*These elements may not assume such magnitudes in countries which have been subjected to wars with their aftermath of obvious scarring on numbers within the population, a feature which its populace has become conditioned and accustomed...”*

[38] Counsel readily conceded that the Claimant at bar does not fit the description of the Claimant in the cited case. However, the court was asked to be mindful of the general principle that it is the consequence of the physical impairment, which really measures the true loss for which the Claimant is to be compensated.

[39] As regards the question of how the Court is to treat with improved condition following corrective surgery, the court was directed to Sykes J comments in

**Marsha Page v Malcolm Campbell**, 2002 HCV./P-006 where he stated that “...I conclude that Ms. Page has lost something of worth. This is the objective part of the assessment. She has lost a scar free body forever...The subjective parts comprises the following: “She complains of persons seeing the scar before they see her and the remarks to which she has been subjected to. This has undoubtedly produced worry and anxiety...” Against this background Counsel directed the court to the cases of **Kennesha Harris (by next friend Beverly Harris) v Hall McIntosh and Morgan**, Khan 4, page 77 and **Sherrene Rose (by next friend Gladys Joseph) and Gladys Joseph v Irvin Satchwell**, Khan 4, page 70.

[40] In **Kennesha Harris (by next friend Beverly Harris)**, the Claimant suffered extensive degloving injuries to the left leg from the knee down to the ankle. She was hospitalized for a period of 2 months and followed up for 3 months in outpatient clinic. 9 month later, she was finally discharged. The Claimant was left with an unpleasant scar that was hypertrophied and had a green lizard appearance. Plastic surgery was recommended in the nature of scar revision. An award of \$400,000.00 was given in October 1992 when updated this sum amounts to \$5,030,903.79.

[41] The facts of **Sherrene Rose (by next friend Gladys Joseph)** are that the Claimant was struck down on an embankment and suffered the following injuries:

- i. Hypovolemic Shock
- ii. Severe crush injuries involving soft tissue and bony components of left leg and foot amputating left heel;
- iii. Degloving injuries represented 2/3 of her left leg and left heel.

Her treatment involved:



- i. Debridement and excision of the wound, and a second surgical procedure to facilitate K wire fixture of the heel;
- ii. Skin graft and reconstruction of the heel and;
- iii. Several surgical procedures in one year accompanied by several follow up visits at the Bustamante Hospital for children.

The residues included:

- i. Leg discrepancy;
- ii. Unsightly scar measuring 31 x 75 cm along the lateral anterior aspect of the left thigh (donor sight);
- iii. Large unsightly scar on the left leg measuring 28cm;
- iv. Unsightly weeping ulcers;
- v. Unstable graft over the left heel;
- vi. A deformed foot;
- vii. Loss of movement of 4 toes,
- viii. Complete fusion of ankle and subtalar joints;
- ix. Degenerative changes at talo- navicular joint and;
- x. The Claimant further suffered severe psychological damage assessed at 85%, her education was severely interrupted and disability assessed as 28% of the whole person.

- [42] An award of \$2,500,000.00 was made in May of 1997, today this amounts to \$12,468,208.10.
- [43] Upon an analysis of the aforementioned authorities, Counsel outlined that although a reasonable measure of similarity exists between the case at Bar and that of Kennesha Harris, the circumstances of the Claimant at bar exceeded those of the infant Claimant, for this reason, Counsel submitted that a significantly higher award should be made to the Claimant at bar.
- [44] Of particular note is the fact that Counsel asserted in the Claimant's initial submissions, filed some time before the Hearing on July 8, 2014, that the infant Claimant in the case of Sherrene Rose had more to contend with when compared to the Claimant at bar and as such some adjustments must be made to reflect these distinguishing features. She further asserted that an examination of the residue in both cases demonstrates that in broad terms both Claimants are similarly impacted. It was recognized as between the infant claimant and the claimant at bar, certain specific aspect of the residue, may be different but of no less magnitude. On this premise, it was submitted that any discount of the updated award of the infant Claimant, to the Claimant at Bar, should be conservative.
- [45] However, the Claimant later highlighted in the updated submissions, filed January 16, 2017, that as indicated by the medical report of Dr. Arscott of September 9, 2014, in performing the corrective surgery some improvement of the scarring would result, as the skin would be harvested from the left leg. This would leave her with additional scarring to the left leg, so although less unsightly, there would be additional scarring. The Claimant contends that these factors as well as the medical report of Dr. Dundas of July 28 2014 which indicates the development of blisters on the lateral aspect of the foot (which the Claimant explains occasionally bursts and drains and has now left her with a scar); as well as his findings of fissure which she developed over the passage of time; is sufficient when taken in the context of the Claimant's continuing back pains

associated with poor gait and the radiological findings of osteoarthritis both in the back and the feet to cause a deviation and justifies the revised figures claimed in the updated submissions.

[46] Therefore, Counsel has now submitted that in light of the aforementioned factors, the Claimant at bar ought to receive a higher award than that of the infant Claimant.

### **HANDICAP IN THE LABOUR MARKET/LOSS OF FUTURE EARNINGS**

[47] Under this head of damages, Counsel submitted that the Claimant having been thrown out of the labour market has been unable to find employment. The court was asked to be mindful that given her physical impairment she is now less able to compete on the open market with persons who have not been beset with the disabilities she is now plagued with. This they opine is a loss by itself, a loss of value.

[48] On the issue of the method that should be used to calculate the amount that should be awarded, Counsel submitted that the multiplier/multiplicand method should be used. As the Claimant is unemployed, they asserted that the multiplicand should be equal to the National Minimum Wage and as the Claimant at the time of the Assessment was 49, using Rough Guides to Multipliers a multiplier of 7 years was recommended. It was emphasized that 7 was an appropriate figure as the Claimant was not a member of the formal employment sector, her vocation included a factory worker, farmer and a domestic helper and these vocations are not restricted to the statutory years of retirement for women in Jamaica.

### **Cost to Future Medical Care**

[49] Counsel submitted that the amount to be awarded under this head of damages is \$2,949,900. In arriving at this sum, reliance was on the estimates provided by Dr.

Arscott and Dr. Dundas for the cost of the surgery Hospital fees and special shoes for the rest of her life.

### **Extra Help**

[50] Counsel directed the court to paragraph 30 of the Claimant's witness statement where she outlined that before her husband ended the relationship he along with her children provided her with assistance, she further emphasized that this assistance was needed as the terrain to her house was such that it prevented her from travelling to and from without the assistance. In support of the Claimant's claim for extra help counsel cited the cases of **Donnelly v Joyce** (1973) 3 ALL ER 463 and **Hunt v Severs** (1994) AC page 350. The dicta of both cases being that in action for damages for personal injuries, a claimant is at liberty to claim damages for those services reasonably required and which were rendered by a third party.

### **Special Damages**

The amount claimed for special damages was limited to the sums outlined in the Particulars of Claim.

### **Defendant's Submissions**

### **General Damages**

### **Pain and Suffering**

[51] Having examined the medical reports of Dr. Dundas, Dr. Arscott and Dr. Melton Douglas, in assessing the amount to be awarded for the pain and suffering experienced by the Claimant, the Defendant directed our attention to the cases of **Burnett James v Caribbean Steel Co. Ltd & J. Lorna Clarke** Suit No. C.L.1993J 340, **Errol Turner v Cigarette Company of Jamaica Limited**, **Anthony Gopie, Attorney General for Jamaica and Headley Nicholas** Suit

No. C.L. 1982 T 106 and **Sherrene Rose (by her mother and next friend Gladys Josephs)** (discussed above).

**[52]** In **Burnett James**, the Plaintiff was a loader aged 69, at trial. He was injured at work whilst directing the loading of steel onto a truck when the wheel on the truck crushed his foot. Liability was apportioned between the defendants – 25/75.

**[53]** The injuries suffered were as follows:

- i. Exquisite tenderness along plantar fascia of foot as well as mid foot.
- ii. Torn plantar fascia
- iii. Severe torso metatarsal joint strain

Treatment received:

- i. The Plaintiff was initially placed on crutches, non bearing on the right leg and started on intensive physiotherapy and given anti-inflammatory medication
- ii. A below knee plaster cast was applied and removed ten days later
- iii. He was then maintained on crutches and allowed to partially bear weight.

Impairment:

- i. The Plaintiff's Permanent Partial Disability was assessed at 25% impairment of lower extremity or 7% whole person disability .

In 1998, the court awarded the sum of \$425,000.00 for pain and suffering, when updated (at the time of the hearing) this amounted to \$2,029,323.20.

[54] The facts of **Errol Turner** are, the Plaintiff an electrician's assistant was injured in motor vehicle accident in 1981. His injuries were noted as follows:

- i. Left leg severely crushed and he was admitted and discharged several times over a seven-year period for the devastating pain and suffering he experienced. This ceased in 1989 when a troublesome sore on his leg finally healed.
- ii. On the 20<sup>th</sup> April 1988 Dr. Guyan Arscott, found the Plaintiff to be suffering from chronic ulceration of the junction of the middle and lower 1/3 of the left leg. There was an area of marked hypertrophic scarring covering the anterior surface of the lower 1/3 of the left leg. The scar was pale and adherent to the bone. Repeated breakdown of this scar was evident.
- iii. There was also a marked deformity of the leg which involved circumferential constriction of the junction of the middle and lower 1/3 of leg, an inch shortening was also noted.

[55] As a result of his injuries the Plaintiff was precluded from standing for long periods or climb, he was unable to walk for long distances, to dance, play cricket or football and felt great pain whenever pressure was placed on the leg. He also now bears an unsightly leg, extensively scarred and grossly deformed and from a cosmetic standpoint "nothing short of a disaster." In 1991, the sum of \$250,000.00 was awarded. At the time of the hearing, this updated to \$5,916,844.35.

[56] Like the Claimant, upon an analysis of the cited authorities, Counsel for the Defendant agreed that the facts of the case of **Sherrene Rose** is analogous to the circumstances highlighted in the case at Bar. They have averred that the

perceptible distinctions are those regarding the age of the respective Claimant/Plaintiff, the extent of the injuries, the surgical procedures and the psychological effect on the young Sherrene Rose.

[57] The Defendant was also keen to highlight that as per the medical report of Dr. Douglas, the debridement surgeries done coupled with the corrective surgeries to be completed illustrates that the degenerative effect of the accident on the Claimant amounted to a 51% whole person impairment with what amounts to a combined 62% LEI. However, the more recent medical report of Dr. Douglas assessed the Claimant's whole person disability at 24%.

[58] It was their submission that in balancing the scales, given the obvious differences with the injuries suffered by Sherrene Rose, these include, the unsightly weeping ulcers, the complete fusion of the ankle and subtalar joints and the fact that her whole person disability was assessed at 28%, that the updated award given to Rose must be discounted by 20%.

#### **Handicap on the Labour Market/Loss of Future Earnings**

[59] Counsel submitted that although the Claimant was not an employee of the NWA, but rather a seasonal labourer paid according to work done, which varied in sums she was nonetheless entitled to compensation.

[60] Like the Claimant, they were of the view that the multiplier/multiplicand method should be used to calculate the amount to be awarded and they agreed that the multiplicand should be the national minimum wage. However, Counsel submitted that as at the time of Assessment the Claimant was about 50 years old, the appropriate multiplier was 6.

#### **Cost of Future Medical Care**

[61] Counsel subsequently, agreed that a total of \$2,949,900 should be awarded under this sum. In arriving at this figure reliance was placed on the cost for future surgeries as outlined by Dr. Grantel Dundas, surgical cost from Orthopaedic

Associates and Estimate quotation from Rehab Plus and costs of special shoes for the rest of the Claimant's life.

### **Special Damages**

[62] In calculating the amount to be awarded as special damages, Counsel relied on the receipts submitted by the Claimant for travelling, hospital visits, medication and the medical reports.

### **Analysis**

#### **The Claim for General Damages**

#### **Pain and Suffering**

[63] There can be no doubt that the injuries suffered by the Claimant are not only severe and debilitating but they have also resulted in a paradigm shift in the quality of life she once knew and loved. In her evidence, she laments the harsh realities that she is now forced to accept as a permanent fixture of her daily existence. She recounts that the injury to her foot has left her disfigured and deformed, not only in the way she walks, but that the scars on her foot are simply grotesque. She now has to contend with the enquiring stares of persons who at times see it fit to make a spectacle of her. She is now a recluse as she is no longer able to participate in the various sporting activities to which she was an avid participant and events such as dances and parties which were amongst her favourite past time are now merely a memory of a past life that she enjoyed. Even her husband is but a memory of a past life, as he has paid no credence to the marriage vows of 'for better or for worse', or 'in sickness and in health' as her deformity has proven too much for him to contend with.

[64] The medical reports that have been placed before this court have been useful in illustrating the severity of the injuries suffered by the Claimant, and they have supported her assertions relating to the physical deformities and constant pain that she has to contend with. These deformities include a lack of heel pad forcing



her to walk on the ball of her foot which has resulted in her developing callouses which at times bleed. She is now forced to twist her waist and back to balance when she takes a step; this has resulted in her experiencing back pains all the way down to her left leg and ankle. Further to this she is unable to put her foot flat on the ground, it is the Claimant's evidence that her disabilities have left her feeling stressed and frustrated.

[65] Counsel for the Claimant has proffered two cases to assist the court in arriving at an appropriate figure. The first was **Kennesha Harris (infant by mother and next friend Beverley Harris) v Hall, McIntosh and Morgan** Suit No. C.L. 1987 h 084 Khan's Recent Personal Injury Volume 4. Here the infant Claimant was hit by a car; she suffered significant degloving injuries to the left leg from the knee down to the ankle. She was hospitalized for a period of 2 months and followed up for 3 months in outpatient clinic. She was finally discharged after nine months. She was left with gruesome scarring which was hypertrophied and had a green lizard appearance. It was recommended that plastic surgery was done in the nature of scar revision, this necessitated the importation of special prosthesis tissue from the United States of America. An award of \$400,000.00 was given in October 1992 updated using the Consumer Price Index (CPI) in 2014, this figure amounts to \$5,030,903.79.

[66] The second case as submitted by counsel for the Claimant is **Sherrene Rose (by her mother and next friend Gladys Josephs) and Gladys Josephs v Irvin Satchwell** Suit No. C.L. 1992 R 037, Khan's Recent Personal Injury Volume 4. Here the infant Claimant was struck down on an embankment and suffered the following injuries :

- i. Hypovolemic Shock
- ii. Severe crush injuries involving soft tissue and bony components of left leg and foot amputating left heel;

- iii. Degloving injuries represented 2/3 of her left leg and left heel.

Her treatment involved:

- iv. Debridement and excision of the wound, and a second surgical procedure to facilitate K wire fixture of the heel;
- v. Skin graft and reconstruction of the heel and;
- vi. Several surgical procedures in one year accompanied by several follow up visits at the Bustamante Hospital for children.

The residues included:

- xi. Leg discrepancy;
- xii. Unsightly scar measuring 31 x 75 cm along the lateral anterior aspect of the left thigh (donor sight);
- xiii. Large unsightly scar on the left leg measuring 28cm;
- xiv. Unsightly weeping ulcers;
- xv. Unstable graft over the left heel;
- xvi. A deformed foot;
- xvii. Loss of movement of 4 toes,
- xviii. Complete fusion of ankle and subtalar joints;
- xix. Degenerative changes at talo- navicular joint and;

xx. The Claimant further suffered severe psychological damage assessed at 85%, her education was severely interrupted and disability assessed as 28% of the whole person.

[67] \$2,500,000.00 was awarded. This updated using the consumer price index in 2014 (when the submission were prepared) amounts to \$12,468,208.10. Counsel for the Claimant conceded that the infant Claimant had more to contend with when compared to the Claimant at bar. This it was submitted was evidenced by the longer period of hospitalization, and the surgical procedures endured by the infant Claimant appear to be more extensive when compared with the Claimant at Bar. It was also submitted that the residues in both cases have a similar impact on both Claimants. It was however, Counsel's view that given the age discrepancy between the infant Claimant and the Claimant at bar that a discount be given to the updated sum awarded in the **Sherrene Rose** matter. In light of the evidence, Counsel submitted that an award of \$10,000,000.00 would be appropriate.

[68] This court has also taken note of the fact that counsel for the Claimant later departed from her original submissions and thereafter submitted that an award of \$14,500,000.00 to \$15,000,000.00 would be more appropriate. This change was premised on the fact that the issue of the imminent cosmetic residues were not sufficiently ventilated in the earlier submissions. Counsel submitted that (as indicated by the medical report of Dr. Arscott dated September 9, 2014), although the recommended corrective surgery would result in some improvement of the scarring, she would be left with additional scars as the procedure would require skin to be harvested from the left leg, to which Dr. Arscott has expressly stated would leave her with marked and obvious scars to the affected leg. There is much merit in these submissions.

[69] Counsel outlined that in addition to the pain and suffering associated with the surgical procedures and the period of rehabilitation that has been estimated to be

six months; the Claimant would nonetheless be left with 40 -50% scarring of the affected leg and additional scarring at the site where the skin was harvested. These factors it was submitted were not present in the **Sherrene Rose** case.

- [70] It was further highlighted that these abnormalities when taken in the context of the Claimant's continuing lower back pains associated with poor gait and the radiological findings of osteoarthritis both in the back and the affected left foot justifies the higher award.
- [71] Counsel for the Defendant also cited three cases to assist the court in arriving at an appropriate award; these are again **Sherrene Rose** and the cases of **Burnett James v Caribbean Steel Co. Ltd & J. Lorna Clarke** Suit No. C.L. 1993J 340 Khan's Personal Injury, Volume 5 at page 63 and **Errol Turner v Cigarette Company of Jamaica Limited, Anthony Gopie, Attorney General for Jamaica and Headley Nicholas** Suit No. C.L. 1982 T 106. The facts of all were detailed above.
- [72] Referring to the **Sherrene Rose** case, Counsel for the Defendant submitted that the injuries suffered by the infant claimant was more in keeping with the injuries suffered by the Claimant at Bar. They made much of the manifest distinctions regarding the age of the Claimant/ Plaintiff, the extent of the injuries, the surgical procedures and the psychological effect on the infant Claimant. This was juxtaposed against the several debridement surgeries done with the substantial corrective surgery to be done, the degenerative effect of the accident on the Claimant, a 51% whole person impairment with what appears to be a combined 62% LEI as per the report of Dr. Douglas. Of note is the fact that the more recent medical report of Dr. Dundas assessed the Claimant's whole person Disability at 24%.
- [73] In balancing the scales, Counsel for the Defendant took into consideration the unsightly weeping ulcers, the complete fusion of the ankle and subtalar joints and the injuries that were unique to the Claimant. It was also highlighted that in

**Sherrene Rose** the infant Claimant's whole person disability was assessed at 28%. On this notion, it was submitted that the updated award in the **Sherrene Rose** case should be discounted by 20%. In the circumstances, it was submitted that an appropriate award for the Claimant would be \$10,777,944.74.

[74] Having considered the nature of the injuries in the case at Bar and those in the cases cited, I find that the injuries suffered in the **Kennesha Harris** and **Errol Turner** cases are somewhat similar.

[75] However, unlike the Claimant at bar, the infant Claimant in **Kennesha Harris** had suffered no orthopaedic injury, neither did she suffer from the physical deformities that the Claimant has had to contend. As noted before, these include, the lack of heel pad, the draining callouses, the fact that she is forced to twist her waist and back to balance when she steps, thereby resulting in back pains all the way down to the left leg and her inability to put her foot flat on the ground.

[76] I have further noted that the infant Claimant also had to under-go further plastic surgery. However, this was in the form of a scar revision and the special prosthesis to be used was imported from the United States. As such, unlike the Claimant at Bar, whose surgery involved a sapheno-sural flap, which resulted in additional scarring, the infant Claimant received no additional scarring from her procedure.

[77] In the **Errol Turner** case, although the Claimant was admitted and discharged several times over a seven-year period, the pain he felt ceased when his sore healed. Therefore, all he now has to contend with is an unsightly scar and a shortened leg. The residues with which the Claimant at bar is faced are far more extreme.

[78] The **Burnett James** case reveals no real similarity in terms of the gravity of the injuries suffered or the age of the parties involved and it therefore does not assist the court.

- [79] It is my view that the case of **Sherrene Rose** best mirrors the Claimant's peculiar circumstances. The major difference being that in Sherrene Rose the Claimant was an infant and she suffered severe psychological damage. In addition, her education was severely affected by prolonged interruptions and she suffered weeping ulcers and a complete fusion of the ankle and subtalar joints. The scar at her donor sight measured 31x75cm and the scar on her left leg measured 28cm.
- [80] The medical report of Dr. Dundas dated the 26<sup>th</sup> March 2008, reveals that the Claimant at bar had two donor scars measuring 15x14cm and 20x13cm each; and the scar at the recipient sight measured 9x9cm. Of note is that Dr. Arscott's medical report of September 24, 2010 has assessed her donor scar as 25x18cm. It is unclear what accounts for this difference in measurement. What is clear is that it is a large scar. Although the infant Claimant may have had a larger donor scar than the Claimant at Bar, it must be noted that the Claimant at Bar has two donor scars as her graft had to be redone. I have also noted that the infant Claimant was assessed as 28% disability of the whole person whereas the medical report of Dr. Douglas dated September 17, 2013 has assessed the Claimant at Bar with whole person disability of 51% and Dr. Dundas' report dated July 28, 2014 assessed her whole person impairment at 24%. This indicates improvement, whether assessing it as an impairment or disability.
- [81] I am of the view that the injuries suffered by both the infant claimant and the claimant at bar are similarly debilitating. However, it is clear that the infant Claimant has suffered injuries that were not meted out to the Claimant at Bar. Likewise, the Claimant at Bar has suffered injuries that are specific only to her. In examining the injuries as a whole, it is manifest that the injuries sustained by both parties have negatively impact their quality of life. Of significance is the age of the Claimant in **Sherrene Rose**. Her age presents and makes obvious the fact that her suffering is likely to be endured for a much longer period than the Claimant at Bar; but some of the injuries suffered by the Claimant at Bar appear more serious. Having considered all the evidence, the submissions and the

cases cited, as well as the distinguishing features, I find that the appropriate award for pain and suffering in this case should be \$11,500,000.00. This takes into account the various variables between the **Rose** case and the one at Bar; including age, which is somewhat countered by some more serious injuries and residue sustained by Ms Etta Brown, and reflects a quantum proportionate to the injuries suffered, in light of historical data gleaned from similar previous awards.

### **Handicap in the Labour Market/Loss of Future Earnings**

**[82]** In relation to this head of damages, both parties have equally agreed that the Claimant is entitled to an award and that the appropriate method for calculating the sums to be awarded is the multiplier/multiplicand. They have also agreed that the national minimum wage should be applied as the multiplicand. However, there is some dispute relating to the multiplier. In this regard, Counsel for the Claimant directed the Court to the cases of **Trevor Clarke v National Water Commission** Suit No. C.L. 1993 C 371 Khan's Recent Personal Injury Award Volume 5 Page 21 and **Burnett James v Caribbean Steel Co. Ltd** Suit No. C.L. 1993 J 340. Khan's Recent Personal Injury Award Volume 5 Page 63.

**[83]** In **Trevor Clarke**, the Claimant was 63 at the time of Trial and in calculating his loss of future earnings a multiplier of 5 was used whereas in **Burnett James**, the Claimant was 69 at the age of assessment and a multiplier of 4 was used.

**[84]** Counsel for the Defendant proffered the cases of **Raymond Reid v Dalton Wilson** Claim No. 2004/HCV0889 delivered 03<sup>rd</sup> March 2004 and **Oswald Hyde v The Attorney General for Jamaica** Suit No. C.L. H 055/98 delivered 19<sup>th</sup> June 2002. In **Raymond Reid**, the multiplier used for a 49 year old Security Guard/Electrician was 7 and in **Oswald Hyde**, a 61 year old Spray man (retired) was assessed as having a multiplier of 5.

**[85]** Having considered the cited cases, it is my view that the appropriate multiplier to be used is 7. At the time of the hearing of this assessment, the Claimant would have been approximately 50 years old. I agree with the submissions made by

Counsel on her behalf, that is, that the Claimant has never been employed in the formal employment sector. She has worked as a factory worker, a farmer and a domestic helper and these vocations are not restricted to the statutory year for retirement in Jamaica. Of note, the medical report of Dr. Dundas dated March 26, 2008 outlined that the Claimant's past medical history was unremarkable. He distinctively outlined that her respiratory system, her cardiovascular system and her abdomen were all unremarkable. As the Claimant has never been formally employed and as such would not have the attendant benefits of a pension upon reaching 60 years old, it is reasonable to believe that she would likely to have been working beyond the statutory retirement age. Therefore, taking into consideration the many vicissitudes of life, 7 in my view is an appropriate multiplier. To this end, the sum to be awarded under this head of damages is \$2,256,800.00 (\$6200.00 The Current National Minimum Wage x 52 weeks x 7 years).

**[86] Before finalisation of this judgment, the parties made further submissions indicating that some aspects of some of the issues were overlooked by them and that they had agreed such amounts as will be indicated in the orders below as being awarded by consent.**

#### **Cost of Future Medical Care**

**[87]** In placing reliance on the medical report of Dr. Arscott dated the 24<sup>th</sup> September 2010 and the pre-operative estimate for the cost of the surgical procedure to be undertaken, as well as the hospital estimate from the Medical Associates Hospital, the parties have agreed a sum of \$2, 079,900.00 under this head of damages.

**[88]** They have also agreed under this head for costs of future Rehab footwear that the claimant will require for life. The claimant is now 50 years old. The claimant's life span for this purpose is 70 years of age. Therefore, 20 years would be remaining. This the parties have used as the multiplicand.



**[89]** The estimated quotation for this footwear, which includes custom ankle foot orthosis, silicone heel protector and rocker bottom ladies shoes was \$104,000. It is anticipated that the ankle foot orthosis will last between 2-3 years; the rocker bottom shoes between 1 – 2 years and the silicone heel protector 1 year. It was also anticipated that the ankle foot orthosis would be needed for 20 years and this attracts a multiplier of 6; the rocker bottom shoes would be needed for 20 years and attract a multiplier of 10 and the silicone heel protector required for 20 years with a multiplier of 20. This gave an agreed sum of \$870,000, which the parties submit ought to be included in the figure for future medical and surgery costs. This they agree as being \$2,079,900.00, plus, \$870,000.00, which amounts to \$2,949,900.00.

**. Special Damages**

**[90]** Under this head of damages, the Claimant provided this court with a myriad of receipts categorized as follows:

- a. Travel cost to the hospital through 2006 – 2007. This amounted to \$66,000.00
- b. Hospital fees, including admission for surgery, registration and Doctor's visits. This amounted to \$67,931.10
- c. The cost of medication amounting to \$5,412.66
- d. The cost of Medical Reports (Arising from consultation and Resulting reports from Doctor Arscott, Doctor Dundas, The National Chest Hospital and Rehab Plus). This amounted to \$183,007.68
- e. Cost to Rehab Plus for special shoes. This amounted to \$98,800.00
- f. Cost to Rehab Plus for Gel socks. This amounted to \$2207.68

**[91]** On the question of special damages, the aforementioned sums have been proved by the many receipts entered into evidence as such I have no reservation

in awarding the sum of \$423,359.12 for the items listed above and as agreed between the parties at the assessment Hearing.

### **Extra Help**

**[92]** The Claimant's evidence reveals that due to the debilitating nature of her injuries she was unable for a period of two and a half years, to carry out her normal functions and as such assisted by her children and husband. It is on this basis that the Claimant has claimed \$200,000.00, as part of the figure for damages. She cites the authorities of **Donnelly v Joyce** 1973 3 ALLER 463 and **Hunt v Severs** 1994 2 AC 350, in support of this position. I award the Claimant \$200,000.00

### **ORDERS**

#### **General Damages**

**(1) Pain and Suffering and Loss of Amenities:**

**\$11,500,000.00**; with interest at the rate of 3% from 29<sup>th</sup> August 2007 to 11<sup>th</sup> July 2017.

**(2) Handicap on the Labour Market/ Loss of future earnings:**

**\$2,256,800.00**

**(3) Cost of Future Medical Care:**

**By consent \$2,949,900.00**

**(4) Extra Help:**

**\$200,000.00**; with interest at the rate of 3% from 2<sup>nd</sup> November 2006 to 11<sup>th</sup> July 2017

**(5) Special Damages**

As agreed, **\$423,359.12** with interest at the rate of 3% from 2<sup>nd</sup> November 2006 to the 11<sup>th</sup> July 2017.

**Costs to the Claimant to be Agreed or Taxed**