[2019] JMSC Civ 65

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014 HCV 04711

BETWEEN	**DELSHA HYMAN**	**CLAIMANT**
AND	**JAYE-ANN O'CONNOR**	**DEFENDANT**

IN OPEN COURT

Joseph Jarrett for Claimant.

Kwame Gordon instructed by Samuda and Johnson for the Defendant.

Motor vehicle accident - Assessment of damages - Future Care - Pain and Suffering and Loss of Amenities - Four medical doctors - Four conflicting assessment of impairment.

HEARD: 19th November, 2018, 17th December, 2018 and 19th February, 2019

THOMAS, J.

INTRODUCTION

[1] The claimant Ms. Delsha Hyman originally filed claims in negligence claiming damages for personal injuries for herself and her daughter arising from a motor vehicle accident which occurred on or around the 5th of August, 2014 at Upper Waterloo Road & Short Wood Road, Kingston 8 in the parish of St. Andrew. Ms. Hyman alleges that the defendant was the driver of a grey Suzuki Swift motor car registration number 6804 FX which she negligently drove and collided into the rear

of the white Honda Fit motor vehicle bearing registration number 3686GD, driven by her thereby injuring both herself and her daughter. The defendant did not contest liability and Judgment by Admission was entered on the 8th of April, 2015 for both claimants with damages to be assessed, interest and costs. Damages in relation to the daughter was settled.

[2] In this matter the court is called upon to assess damages and award cost in relation to Ms Hyman. During these proceedings Special Damages for medical and related expenses was agreed at $234,600. However, the contest in relation to the other heads of damage remains for the court to determine.

The Claim for Damages

[3] Ms. Delsha Hyman alleges that she suffered the following injuries which are all included in her Particulars of Claim.

(a) Pain and shock.

(b) Head injuries.

(c) Dizziness.

(d) Tenderness in the right side and back of her head and neck.

(e) Tenderness over her upper chest vertebral spines with pain radiating down to the spines of her lower back.

(f) Whiplash injuries to her neck and spine especially of the upper thoracic spine with scalp contusion and brain concussion

Summary of Defence Limited to Quantum

[4] The defence limited to quantum is pleaded as follows**:**

(i) The defendant requires that the claimant prove that the alleged injury, loss and damage was caused by the collision on August 5, 2014 and not by some other cause or collision.

(ii) A CT scan was done for Delsha Hyman and it was reported as being normal.

(iii) The Defendant denied that Delsha Hyman suffered a brain concussion as there is no medical evidence to that effect.

(v) The Claimants failed to mitigates their losses as no medical treatment was sought between August 12, 2014 and the Filing of the Claim Form and Particulars of Claim on October 08, 2014.

(vi) The claim is within the jurisdiction of the Resident Magistrate Court.

PAIN AND SUFFERING AND LOSS OF AMENITIES

The Evidence

[5] Ms. Hyman gave the following testimony:

As a result of the accident she is unable to stand for more than 15 to 20 minutes at a time without rest, breaks, to sit or lie down. She has to prop herself up with pillows when she goes to bed, to keep her in the most comfortable position or the pain will keep her awake. There are times when she has difficulty getting up from lying down and difficulty walking. On one occasion she has been away from work resting her back for two weeks. She cannot properly position herself to bathe and care for her daughter who is now seven years old without discomfort. She needs injection to treat her condition. She is relying on the following medical reports.

(i) Dr. Jerome Stern who gave her a Partial Permanent Disability rating (PPD) of 15%.

(ii) Dr. Philip D. Waite Consultant Orthopaedic Surgeon. Doctor Waite's initial assessment was 12% but his final assessment is 9%.

[6] She further states that she was attended to by two other medical doctors at the request of the defence. These are Doctor Warren Blake and Doctor Konrad

Lawson. She attended the medical practice of Dr Warren Blake around the 17th of March, 2015. She had with her the medical reports from Dr Stern and the Xrays. She did not have the MRI to give him at the time. That arising from his examination he issued a report dated the 2nd of October, 2015. He gave a zero (0) for whole person impairment.

[7] She took the following issues with Doctor Blake's reports:

(i) Dr Blake's reports did not take into account the report by Dr Waite nor did he have the benefit of the MRI which was supplied by Dr Waite who saw her several months after her visit to Dr Blake. At the request of Samuda and Johnson the MRI was supplied via them to Dr Blake. Arising from Dr.

> Waite's report and the MRI. Dr Blake supplied a further report dated the 20th of June, 2016 in which he confirms his zero whole person assessment. He produces his updated report without any further examination of her since the one on the 17th March, 2015. Whereas Dr Waite's report is based on his examination of her on the 4th of September, 2015, Dr Blake has failed to represent truthfully what she said to him during her examination and her medical state during the examination.

(ii) She informed Dr Blake that she was still suffering from pain from the head and neck injuries. This information was also given to Dr Stern and Dr Waite and the investigating police officer. Dr Stern and Dr Waite have both included the injuries in their report but Dr Blake has chosen to ignore what she told him and has misrepresented that information in his report. She never informed Dr Blake that the odd sensation down her

> right lower limb had disappeared. He was told that the pains from the accident had worsened. She was unable to sit up

properly whilst being examined because of her injuries from the accident. When she visited Dr. Blake's office for the examination she was unable to walk properly and was really in terrible pain.

[8] She had the following to say about Dr Lawson's examination:

(i) She arrived at Dr Lawson's office between 4.30 pm and 5.00 pm that day. He told her to stand up and lean back, lean to the front, lean her right side, lean to her left side and that was it. At that point she asked him if he was not going to knock her knees with the thing. He replied by saying that she had done it so often that she knows what to do. At that point he told her to go into a room around the back as there was something he needed to do before he wrote the report. That was when he knocked her knees to complete his examination.

Within less than two days she received a copy of Dr Lawson's report dated the 9th of December, 2017 assessing her whole person impairment at two percent (2%). The time she spent at Dr Lawson's office was less than half hour.

[9] Her evidence in relation to her medical examination continues as follows:

On the 16th of December, 2017 she was given a further medical examination by Dr Philip D. Waite. The examination was the first since his prior examination of the 4th September, 2015. Dr Waite tested how well she could move her arms and if she could grip anything. He pushed a needle like instrument into her upper body, back and arms. As he did so he asked whether "sharp or dull". He knocked her knees with a metal instrument. He checked her back with his fingers. He examined her neck. He asked her about any sensation in her legs and arms. She never had any medical

problems before the accident as reported in Dr Waite's medical report. His examination lasted for around 1 hour. Arising from Dr Waite's further examination a further report dated the 18th of December, 2017 was produced by him in which he assessed her whole person impairment at nine percent (9%) a reduction from the 12% of his earlier report. That the pain killers that she has been taking has left her suffering from constipation. She has to wear a back-brace to support her back.

[10] She gave the following answers on cross examination:

She has no training in medical science. She cannot say what a doctor is supposed to do when assessing her and her injuries. She is not in a position to say whether any of the doctors have or have not properly assessed her injuries. She knows of no reason why Dr Blake would misrepresent or give an inaccurate statement about what she said to him. It could be because he is working for O'Connor. She does not know for a fact that Doctor Blake is working for O'Connor. Dr Phillip Waite is working for her.

THE MEDICAL EVIDENCE

[11] Four medical doctors gave evidence in this case. Each report was permitted to stand as their evidence in chief.

Doctor Enos Stern

[12] The medical evidence of Dr. Enos (Jerome) Stern according to his medical reports is as follows:

(i) He is a Medical Doctor at the Andrews Memorial Hospital. In his report dated August 28th, 2014, he states that the Claimants, Delsha Hyman presented to the outpatient

department of the hospital on August 2, 2014, with complaints of pain in the back and right side of her head as well as pain from the neck down to the lower back. She stated that she had no loss of consciousness but felt dizzy and faint for about fifteen minutes.

Examination

(a) On examination he found that she was able to move about without assistance. His main physical finding was tenderness in the right side and back of her head and neck. He also noted that there was marked tenderness over the upper chest vertebral spines with pain radiating down to the spines of the lower back.

Assessment/Treatment

(b) Delsha Hyman was assessed as having whiplash injury to the neck and spine, especially of the upper thoracic spine with scalp contusion and brain concussion viz shock effect.

Review

(c) On August 8, 2014, Delsha Hyman return to the Andrews Memorial Hospital with complaints of mild neck pain, headache, dizziness and feeling unbalanced as well as becoming forgetful. On examination, she was tender over the back of the head with bruises and sine swelling, with mild point tenderness over the neck spine. A CT scan was ordered as she was again diagnosed

with a whiplash injury to the neck and spine with a contusion of the scalp. The CT was reported as normal. She was diagnosed as having a mild head injury and cervical muscle spasm. She was discharged with medication and a referral for physiotherapy which it appears was not done.

Prognosis

(d) Ms. Hyman did not return for a follow up visit, and her status at the time of the report was therefore unknown.

Re -Examination

(ii) Ms. Hyman was re-examined by Dr. Stern on December 3, 2014. Her complaints and information were as follows:

(a) Sharp pains running down the back of the neck down into the lower back intermittently.

(b) Severe pain in the lumbar spine in the lower back with long standing**.**

(c) She had a “curvature of the spine” up to the week prior to her visit.

(d) Physiotherapist recommended that back-brace and lumbar roll be utilised.

(e) Exacerbated back pain makes showering particularly difficult.

(iii) On examination Dr Stern found:

(a) Mild scoliosis of the lumbar spine with tenderness and spasm of the Rhomboids and
Erector Spinae muscles of the lower back

(b) Straight leg raising elicits low back pain on both sides.

(c) X-ray of her thoracic and lumbar spine shows normal alignment of the vertebral column plus normal features of the bones.

(d) Dr. Stern noted that while Ms. Hyman's symptoms were hindering her ability to function at work and at home, with consistent physiotherapy they should improve.
Nonetheless, he pointed out that symptoms of muscular injury may recur over the coming months and possibly the next two years. As such he estimated her whole person disability to be fifteen percent (15%).

[13] On cross examination Doctor Stern agrees to the following suggestions: There are specialist in the field of medicine. He is not a specialist. More reliance can be placed on the opinion of the specialist when it comes to certain matters than the opinion of the general practitioner. If there is a difference in opinion between himself and the orthopaedic doctor greater reliance can be placed on the opinion of the orthopaedic doctor. Disability ratings are usually guided by the American Association guidelines (AMA guidelines). These guidelines are contained in publications. These guidelines are important as they allow a doctor to assess

disability ratings on injuries. In order to ensure that disability ratings are accurate one must use the most recent edition of the guidelines, when assessing injuries. Other than the AMA guidelines he does not know of any other guide lines. He did not use the AMA guidelines when coming up with the disability ratings of Ms. Hyman in his reports.

Doctor Phillip Waite

[14] Dr. Phillip Waite states that he is a Consultant Orthopaedic Surgeon. His evidence in accordance with his medical reports are as follows:

(i) His first assessment of Ms. Hyman was on the on 4th of September, 2015. He consulted the following documents:

(a) MRIs of the cervical, thoracic and lumbar spines done on May 4th, 2015 which were done at the request of Dr. Hunter.

(b) Medical report dated November 17th 2014, prepared by Dr. Wendy Peart, Physiotherapist.

(c) Medical report dated December 11, 2014, prepared by Dr. Jerome Stern, General Practitioner.

(ii) He noted the following complaints of Ms. Hyman:

(a) Following the accident on August 5, 2014, she developed immediate pain to the head and neck and delayed low back pain.

(b) The presence of recurrent moderate neck pain which occurred twice weekly and was aggravated by work and driving. Heat and analgesics relieved this pain.

(c) Moderate to severe shooting pain upper back pain which was aggravated by standing for 10-15 minutes and by working. This occurred daily and would last all day.

(d) Severe low back pain which occurred daily and leaving her in consistent pain for days. The pain made it difficult to work. With prolonged standing there would be a shooting pain from the right buttock to the right leg.

[15] On examination doctor Waite made the following observations:

(a) The Cervical Spine: ***mild tenderness***; no nerve irritation.

(b) The Thoracic spine: **mild tenderness**.

(c) The Lumbosacral spine: moderate bony to muscular tenderness

(d) Musculo skeletal system: no sensorimotor deficit, reflexes were within normal limits.

From the MRI done on May 4, 2015:

(i) Cervical Spine:

(a) A 2mm haemangioma [sic] was noted on the T1 vertebral body;

(b) At C3-4 there was a mild posterior disc osteophytes complex. There was mild spinal cord contact without displacement. There was mild left exit foramina stenosis. At C4-5 there was

a mild posterior disc herniation (2mm). There was mild spinal cord contact without displacement.

(c) At C5-6 there was a moderate posterior disc osteophytes complex (3mm). There was mild spinal cord contact without displacement.

(d) At C6-7 there was minimal posterior disc osteophytes complex

(e) There was mild to moderate diffuse multilevel degenerative disc disease;

(f) C3-4 and C5-6 disc osteophytes complex with mild spinal cord contact;

(g) C4-5-disc herniation with mild spinal cord contact;

(h) Minimal C6-7-disc osteophyte complex; (i) Mild left exit foraminal stenosis at C3-4.

(ii) Thoracic Spine

The thoracic spine appeared normal.

(iii) Lumbosacral spine:

(a) At L4-5, a mild diffuse disc herniation (2mm).

(b) At L5, a mild bilateral nerve root contact without displacement and mild left exit foraminal stenosis.

(c) At L5-S1, a disc desiccation, a diffuse herniation (4mm) and a posterior [sic] annular tear. There was a mild bilateral S1 nerve root canal without displacement. A mild right and minimal left exit foraminal stenosis was seen. A mild ligamentum flavum

thickening and facet joint arthropathy were noted throughout the lumbar spine.

[16] The following were his impressions based on the MRI of the Lumbosacral Spine:

(i) L5-S1 disc herniation with mild bilateral S1 nerve root contact and mild right and minimal left exit foraminal stenosis;

(ii) L4-5-disc herniation with mild bilateral S1 nerve root contact and mild left exit foraminal stenosis.

[17] His assessment was that there was:

(i) Chronic discogenic neck pain

(ii) Chronic upper back pain

(iii) Chronic multilevel discogenic low back pain with subjective lumbar radiculopathy.

(iv) Chronic neck pain was a Grade C class 1 injury or 2 % whole person impairment;

(v) Chronic upper back pain was a Grade C Class 1 injury or 2 % whole person impairment;

(vi) Chronic multilevel discogenic low back pain with subjective lumbar radiculopathy was a Grade D Class 1 injury or 8% whole person impairment.

(vii) Total whole person impairment of 12%.

[18] Based on his assessment, Dr. Waite's prognosis was that there would be periods of remission and exacerbation of the neck and back pains. The condition could also worsen, however he noted that the timing and extent of these could not be predicted. He also stated that:

These injuries were consistent with the accident as was described to him. The actual injuries sustained in the accident will have to be confirmed by the doctor who did the initial assessment at the Andrews Memorial hospital. The disc disease of the lumbar spine is consistent with a recent injury. He noted however that the disc osteophyte complex to the cervical spine suggests some chronicity and so there is a suggestion of pre-existing cervical disc disease, the timing of this cannot be established

[19] In relation to examination conducted on December 16, 2017 Doctor Waite states that**:**

> Examination of the cervical spine revealed moderate bony and muscular tenderness to the lower spine. There was swelling to the trapezius and lower paravertebral muscles. Examination of the thoracic spine showed moderate bony and muscular tenderness. Examination of the lumbosacral spine revealed moderate to severe bony and muscular tenderness. His assessed Ms. Hyman's injuries on that date as:
>
> (i) Chronic neck pain with subjective (non-verifiable) right cervical radicular complaints.
>
> (ii.) Asymptomatic chronic mid-back injury.
>
> (iii) Chronic low back pain with subjective (non-verifiable) lumbar radicular complaints.

<u>Impairment Rating</u>

(iv) Doctor Waite's impairment rating of Ms. Hyman as the 16th of December 2017 is stated as follows:

(a) Chronic neck pain with subjective (nonverifiable) right cervical radicular complaints- 2% whole person impairment

(b) Asymptomatic chronic mid-back injury-

0% whole person impairment

(c) Chronic low back pain with subjective

(non-verifiable) lumbar radicular complaints- 7% whole person impairment

(d) Total whole person impairment 9%.

[20] Doctor Waite gave the following evidence on cross examination:

> The report of 26th of March 2018 became necessary because of inflamed things he said in the 18th of December 2017 report which were directed at the report provided by Doctor Lawson. Doctor Lawson is senior practitioner to him when it comes to Orthopaedics. He has been practicing consultant orthopaedic since 2003. Doctor Lawson has been practicing in excess of 20 years. Doctor Lawson played a role in his training. Dr. Blake has been practicing longer than he has in excess of 30 years. In reference to his report dated 15th of October 2015, he agrees that prior to Ms. Hyman seeing him after the accident she was not a patient of his. He disagree that objective evidence is required to inform his conclusion. However, it plays a significant role in his conclusion. It requires careful history, clinical finding on examination, and sometimes clinical studies to make a diagnosis. In most cases the history is one of the most important things in coming to a diagnosis. That is, complaint made by patients. Save and except for the complaint of the patient there is no other way to determine whether the history is true or not. If patients were to embellish or speak untruthfully about injuries, there is no other way of determining whether the history is true or not. Objective evidence can play a significant role in those circumstances, to see whether the complaint is authentic or not.

[21] His answers on cross examination continues as follows:

> The MRI of the thoracic spine showed no abnormality. By age 30 he does not agree that persons can begin to suffer degenerative disease. There is no hard evidence to support that. There are several theories. One is that degenerative disease is as a result of injuries. The second is genetic predisposition. The third is biomechanics of positive obesity, weight, job and environmental factors. The fourth is due to medical factors such as rheumatoid arthritis The fifth is due to infections. This list is not exhaustive. The findings of the MRI of the Lumbar sacral spine can be consistent with theory one. It can also be consistent with the third theory. This was the only MRI he saw for Ms. Hyman. He cannot state conclusively whether the findings are consistent with any of these theories. They could be due to but he can't prove whether it is so or not. The MRI findings could be consistent with prolonged standing. The same findings could be consistent with genetic predisposition, not with the natural course of aging. At the time of presentation Ms Hyman was 39. The age range of over 50-60 is more likely to be considered to be as a result of a natural course of aging. Mild diffuse disherniation could be due to injury, positive obesity or age, but at age 39 it is not likely. Mild Bilateral LS nerve root contact can be due to aging. The fact that these are outlined on the MRI is not conclusive of any one of the possible causes. LSSI dis dessice diffuse hernia posterior annular tear could not be as a result of the natural aging process. Postural annular tear is highly suggestive of acute trauma. Mid bilateral root contact is not as a result of the natural aging process. It is highly unlikely that it could be as a result of bad posture. It could be as a result of genetic predisposition. There is no process to check whether it is a genetic predisposition, family history, or a medical condition.

He did not go through Ms Hyman's family history because it was not necessary. It would be relevant if she had a relative suffering from the same condition at the same age. He does not know whether this is so or not.

[22] He further indicated that:

Radiculopathy comes about when the nerve root is beginning to lose some motor function and there is some objective evidence of loss of motor strength or sensation, numbness and reflex changes. He agrees that these require objective findings of radiculopathy. None of these objective findings exist with Ms. Hyman. In order to make an accurate assessment of impairment in accordance with the AMA guidelines these objective findings would not have to exist. It is not true that his impairment rating could be deemed inaccurate in the absence of the objective evidence described. His impairment assessment is based on his opinion of the existence of the feature. It was not informed by his view of the existence of radiculopathy. In his report it says subjective. It is based on what he was told. The patient had lumbar radicular complaints which were not verified. He agrees that in the absence of objective evidence there is no radiculopathy. He admits that based on the guide, if he found no radiculopathy it would affect his impairment rating. He disagrees that the, neck pain was non-verifiable. Only the right cervical radicular complaints and the lumbar radicular complaints were non verifiable. In terms of his examination he accepts that moderate bony tenderness of the lower spine could be as a result of sleeping poorly; poor posture or sitting poorly. He further accepts that the same could have caused other findings to the thoracic spine and lumbar sacral spine. His impairment finding was informed by his opinion of subjective non verifiable, radiculopathy. Class 1 does not take into account objective radiculopathy at the time of assessment. When

there is the absence of objective evidence the patient will fall on the lower end of scale. That is 0 to 3. The higher rating that is 5- 9 is for patients with MRI evidence of disc injury that correlate with, consistent nerve complaint. In the medical field they talk about dermatomes. Ms Hyman would not be assessed at the lower end of the class between 0 and 2.

Dr. Warren Blake

[23] Dr. Blake is an Orthopaedic Surgeon. In his evidence, based on his report dated October, 2, 2016 he stated that Ms. Hyman visited him on March 17, 2015. She gave him the following information in relation to her medical history:

(a) She had no loss of consciousness after the accident but started having headaches at the time of the accident;

(b) Her backache started two or three days after the accident;

(c) The pain was initially localized in her upper back but later spread to her entire back;

(d) The afternoon of the accident she went to hospital where CT scans and x-rays were ordered;

(e) She was also placed on analgesics;

(f) She had no radiating pain in her upper of lower limbs but had odd sensations down her right lower limb which has since abated;

(g) She does physiotherapy at home on a home programme;

(h) The pain was at the time of the examination, constantly present and aggravated by long standing, sitting and bending over;

(i) At the date of assessment there was no pain of the upper or lower limbs;

(j) There was no associated weakness or sensory alteration;

(k) There were no pains down her upper or lower limbs;

(l) She complained of having intermittent headaches localised to the vertex of her skull.

[24] On Examination of Ms. Hyman he made the following observations*:*

(a) She was a healthy looking woman with no cardio-respiratory distress;

(b) Her mucus membranes were of the normal pink colour and the examination of her cranial nerves was normal;

(c) Examination of her stomach revealed that she had slight tenderness to her right iliac fossa;

(d) Examination of her back revealed that she complained of tenderness along the entire paraspinal area T1-L5;

(e) Examination of her neck was normal;

(f) Her X-Rays were provided for viewing and they showed that the films of her lumbar and thoracic spines were normal.

[25] He assessed Ms. Hyman as belonging to the impairment class 0; with a total whole person impairment of 0%. In his report dated the 20th of June 2016, having been furnished with the MRI results, he states that the results of the MRI did not seriously alter his findings. However, he made the following observations:

- Cervical Spine -Multilevel degenerative disc disease essentially described by Dr. Waite.
- Thoracic Spine- Un-remarkable.
- Lumbar spine. Multilevel degenerative disc disease affecting mainly L4/5 and L5/S1 levels.

[26] Additionally, he made the following assessment and comments:

> The findings of the MRI do not materially alter his assessment of her total permanent impairment. Her findings on the MRI essentially are age related changes and not changes brought on by the road traffic accident. According to the Guide, as it relates to chronic neck pain, there are two impairment classes, and not automatically class 1 as implied by Dr. Waite. The stated criterion has to be present for the patient to be assigned to an impairment class. He did not assign Ms. Hyman to an impairment class as she did not make any complaints of having any neck ache or injury to her neck when he saw her. His evaluation of her neck inclusive of the neurological evaluation of her upper limbs was normal. He would have no option but use a class 0 impairment assignment. The criteria for this class are "documented history of sprain/strain-type injury, now resolved, or occasional complaints of neck pain with no objective findings on examination" The criteria for class 1 is 'documented history of sprain/strain-type injury with continued complaints of axial and/or non verifiable radicular complaints; similar findings documented on multiple occasions'. None of these criteria have been met and she should be assigned to impairment class 0.

[27] He further stated that the Guide has this to say at page 567, of "non-specific chronic, or chronic recurrent thoracic spine pain"; there are two impairment classes and not automatically class 1 as implied by Dr. Waite, with stated criterion to be present for the patient to be assigned to an impairment class. The criteria for class 0 are "documented history of sprain strain-type injury, now resolved, or occasional complaints of mid-back pain with no objective findings on examination". The criteria for class 1 are documented history of sprain/strain-type injury with complaints of axial and/or non-verifiable radicular complaints; similar findings documented on multiple occasions. Since none of these criteria exist she should remain assigned to impairment class 0 with "no objective findings on examination".

[28] In relation to Dr Waite's assessment he states that he does not agree with Dr Waite for the following reasons:

> Doctor Waite divided the impairment in 3 sections. Neck pain, upper back pain and chronic multiple lower back with subjective lumbar radiculopathy. These all relate to the back. When one looks at the guide chronic neck pain has 2 impairments classes. No one should be automatic placed in class 1 with chronic neck pain. The scales are 0 to 1. When he examined the neck and upper limb they were normal. On that basis he put them in class 0. Class 0 is where the complaint is resolved with no objective findings on examination. In order to be placed in class 2 the patient should have history of continued axial complain of non-verifiable radiculopathy. This simply means that the complaint should be traced back to a specific nerve root. These finding should have existed on multiple occasions. (He refers to paragraph 567 of guide.) None of these exist on his examination. The criteria for the upper back is the same as the neck. None of these criteria were met. Subjective lumbar radiculopathy as pointed out in foot note of the guide, paragraph 571, applies to cervical, lumbar spine and invertibral disherniation. It excludes annular bulge annular tear and disherantion on image without consistent objective findings. It should exist at an apparent level when the patient is most symptomatic. It is not dealing with subjective complaints. It is dealing with real findings that can be demonstrated. If MRI is done on adults without complaint a significant percent will have imaging finding of annular bulge, annular tear and disherniation. These findings are normal and are popular in orthopaedic literature. It is part of the normal aging process. Radicular guides have specific definition relating to findings relating to a specific nerve root. If it is interfered with the patient can get pain.

[29] Further on cross examination he states the following:

He came to a neurological assessment. When one is relying on objective findings it will be there whether he was the treating physician or not. He took the previous medical reports into consideration. His first and only examination of Ms. Hyman was on the 17th of March 2015. Both the X-ray and the MRI show images of the body. Each method of generating images is different. The MRI gives a more detailed image of the body. They serve different purposes. He would not give an MRI where plain X-ray could give what he wants. For Ms. Hyman X-Ray was sufficient. With her symptom there is no reason if he was the treating physician to justify the MRI. If she complains of continued pain he agrees lots of physicians would do MRI. When he saw Ms. Hyman on the 17th of March 2015 she complained of lower and upper back pain not her neck. He did not think it required MRI. These are normal and are not symptoms of radiculopathy. There was no objective finding in relation to the nerve root involved. When he did his 2nd report he did not have the benefit of a second X –ray for Ms. Hyman. When he examined her she had reached her maximal medical impairment.

Her symptoms and signs were unlikely to be materially altered. Nothing in Doctor Waite's report suggested that things had changed. Her complaint of pain was very subjective. That is why, the Guide is premised on objective findings. A more recent examination would not necessary be more reliable. Ms Hyman's complaints were in relation to day to day activities. That does not establish impairment.

Doctor Konrad Lawson

[30] Dr. Konrad Lawson is a medical practitioner, employed to the Eastern Regional Health Authority as a Consultant Orthopaedic Surgeon. In his report dated December 9, 2017, he states that he examined Delisha Hyman on December 8, 2017. He recorded her history and complaint, as follows:

History

(i) Dr. Stern saw her at Andrews Memorial Hospital the day of the accident and treated her for “whiplash injury” to her to her neck and possible head injury. CT scan was done. No brain injury was revealed. She was treated for soft tissue neck injury and referred for physiotherapy.

(ii) She subsequently consulted Dr. Roger Hunter. Dr. Hunter ordered MRI scans of her entire spine. Dr. Hunter was unable to review her, so she sought the advice of Dr Philip Waite.

(iii) In his report dated October 15th, 2015, Doctor Waite assessed Ms. Hyman, on the 4th of September, 2015 as having “chronic neck pain, chronic upper back pain and chronic multilevel discogenic low back pain with subjective lumbar radiculopathy”. Based on these three diagnoses, he assigned 12% (twelve per cent) whole person impairment.

(iv) Dr. Blake saw Ms. Hyman on March 17, 2015. His reports, dated October 2, 2015 and June 20, 2016, presented her as having “occasional complaints of back pain with no objective findings on examination”. He assigned no permanent impairment for that diagnosis, nor was a diagnosis offered in relation to her cervical spine region.

(v) In relation to his own examination and assessment of Ms. Hyman as at December 8, 2017 Doctor Lawson’s evidence is as follows:

Complaint

(vi) She complained of experiencing low back pain for the past three years, and occasional minor neck discomfort. Prolonged sitting, standing

and stooping aggravates her lower back symptoms. While she was still able to function as a cosmetologist, this was not to the extent that she was before the injuries were sustained.

Examination

(vii) Good general health.

(a) Full and pain free motion of her cervical spine, no neck tenderness.

(b) Full muscle strength and her upper limb reflexes were equal bilaterally;

(c) Mildly restricted range of motion of her lumbar spine to lower back pains;

(d) No significant visible deformity of her entire spine;

(e) lower limb muscle strength normal and her lower limb reflexes were equal bilaterally.

Diagnosis

(viii) Documented history of sprain/strain type injury of the lumbar spine region with continued complaints of axial pain; documented history of sprain/strain type injury of the cervical spine region. However, on examination, there were no objective findings. She also had some muscle pain in her thoracic spine region, which was referred there from her lower back region. The sprain/strain type injury to the neck region, the symptoms had largely settle but for occasional discomfort, attributed to “the degenerative changes seen on MRI of her cervical spine. She continues to experience low back symptoms.

Impairment Rating

(a) Cervical spine region class 0.

(b) Lumbar spine region, Class 1.

(c) Total whole person impairment 2 %

[31] On cross examination Dr Lawson further indicates that:

> He believes the work of a cosmetologist involves standing for some time. He believes the impairment will affect her capacity to perform her work about 15%. Because of the level of symptoms there is a difference between X-ray imaging and MRI. X-ray shows bony changes and bony pathology. MRI better shows soft tissue like ligament and muscles. Based on the complaint of Ms. Hyman MRI is more useful in assessing her injuries. It is possible that the symptoms to her lumbar spine arose from the motor vehicle accident.

ISSUE

[32] The first issues I must resolve in this matter are:

(a) Whether the medical evidence can be reconciled in relation to the claimant's claim for pain and suffering, loss of amenities, future care and loss of earning capacity.

(b) Where there is conflict in the evidence of the medical doctors which evidence I should accept.

SUBMISSIONS

[33] Mr, Jarrett made the following submission:

The description of the injuries sustained by the Claimant in Dr Stern's report dated the 28th of August, 2014 was not challenged by counsel Mr Kwame Gordon in his crossexamination. From the same it can be seen that the Claimant suffered substantial injuries from which she continues to suffer in a way which has impacted her very significantly in terms of her ability to earn her living and her ability to enjoy a pain free existence which had before the accident. What Counsel Mr Gordon has challenged is the

15% whole person impairment given to the Claimant by Dr. Stern. Mr.Gordon has done this in relation to two significant areas.

(a) That skills required of an Orthopaedic Surgeon/Consultant.

(b) Lack of consultation with the American Medical Association's Guide to Evaluation of Permanent Impairment, 6th Edition. Dr Stern admitted to the same.

[33] What cannot be questioned is Dr. Stern's 40 odd years as a medical doctor and his position as the Medical Officer at Andrews Memorial Hospital one of the highly regarded medical facilities in Jamaica. The Court has accepted him as a medical expert whose reports are not to be ignored. The Court should accept Dr. Stern's evidence as corroborating the fact that the Claimant suffered significant whole person impairment arising from her injuries the extent to which has been corroborated by the medical reports of Dr. Philip Waite who is a Orthopaedic Surgeon and Consultant who was the last of the medical experts to examine the Claimant and provide a better update to the Court of her medical condition.

[34] Counsel Mr. Gordon made the following submissions:

The Claimant, for the most part, is not supported by the objective medical evidence. The Court should place very little relevance, if any, on the Claimant's complaints about her injuries and damning allegations against Dr Blake. She has provided no evidence in support. The Claimant has sought to cast doubt on the competency of Dr Blake and Lawson. She suggested that these doctors failed to examine her properly. The Claimant conceded during cross examination that she does not possess any medical expertise and in fact couldn't say which, if any of the doctors (to include her own doctors), have properly assessed her injuries.

[35] The Court can place no reliance on Dr Stern's whole person disability assessment. During cross examination Dr. Stern agreed that disability ratings are guided by the AMA Guidelines. Dr Stern also agreed that the AMA Guidelines are the only

applicable guidelines when it comes to disability ratings. He admits that he didn't use the AMA Guidelines in assessing the Claimant's disability rating. As a consequence, Dr Stern's disability assessment lacks foundation and ought to be rejected

[36] Dr Waite's medical opinions are for the most part, not based on objective evidence. Medical sciences depend largely on objective evidence. There is a possibility that Claimants could embellish and/or fabricate their injuries. Dr Waite agreed that impairment ratings are informed by radiculopathy. He also agreed that in the absence of objective evidence there is no radiculopathy. Dr Waite said on at least two occasions that there were no objective findings with respect to the Claimant. This obviously means that the Claimant's complaints were not supported by objective evidence.

[37] It would be incongruous to assess an impairment rating which is based exclusively on subjective evidence. Dr Waite, having conceded that Claimants could embellish or fabricate their injuries should have been alerted to the fact that his opinions should be based on objective findings. Dr Waite admitted that he did not treat the Claimant prior to the accident. He was also unaware of her family's medical history. He also admitted that the Claimant's complaints could have developed from poor posture, sleeping poorly or even sitting poorly.

[38] There are other issues with Dr Waite's reports. His assessment of the Claimant's injuries varied between his reports. The Court is asked to bear in mind the use of the word "non-verifiable". It essential means that Dr Waite was unable to verify lumbar radicular complaints. Yet he includes these complaints in his assessment. In essence Dr Waite's opinion is based on the Claimant's complaints. Additionally, the chronic neck pain and the chronic low back pains would have to be based on findings of radiculopathy. There is an absence of radiculopathy and Dr Waite has agreed that this is in fact so. The word "asymptomatic" clearly indicates that Dr Waite had no objective findings to support an assessment of chronic mid back injury. This renders Dr Waite's opinions and impairment ratings unreliable.

[39] Dr Waite has also included in his reports statements that clearly are outside of his remit. In his report of the 18th of December, 2017 Dr Waite details about the effect the Claimant's injuries have on her work and income. These statements would have been informed exclusively by what the Claimant told Dr Waite who treats them as facts as opposed to statements made by the Claimant. Dr Waite clearly personalised the matter and this should cause a tribunal to view with suspicion his conclusions and opinions, and attach little if any weight to his opinions.

[40] The expert evidence of Dr Blake should be accepted. His medical reports are clearly far more reliable than Doctors Stern and Waite as they are based on objective findings. Dr Blake captured in his reports what the Claimant said to him about her injuries. The Claimant has contended that Dr Blake misrepresented what she had said. However, she provided no evidence to support this contention

and neither was she able to provide any meaningful evidence which could establish a motive on the part of Dr Blake to misrepresent.

[41] Upon a careful reading of Dr Blake's reports it is beyond doubt that his opinions and conclusions are based exclusively on objective evidence. Dr Blake's experience surpasses Dr Waite's experience by at least a decade. According to Dr Blake the type of degeneration observed in the MRI results of Ms. Hyman occurs in an adult by the time they reach their 20s.This fact is well recognised in the orthopaedic circle. Dr Blake's explanation of this findings and conclusions is consistent with what would be expected of a medical practitioner. He did not personalise the matter. He placed little or no reliance on subjective evidence. He simply assessed the objective evidence and using the AMA Guidelines, rendered his opinion. Dr Blake evidence is therefore quite reliable and we should be accepted by this tribunal.

[42] If the Court rejects the evidence of Dr Blake the court is asked to consider the expert evidence of Dr Konrad Lawson. Save and except for a marginal difference in the impairment rating Dr Lawson's evidence is consistent with the evidence of

Dr Blake. Save and except for a mildly restricted range of motion of her lumbar spine, he concluded that there were no objective findings with respect to Ms. Hyman's alleged injuries. Dr Lawson in his medical report, like Dr Blake, was of the opinion that "various imaging studies indicate the usual age related degenerative changes appropriate for her age." During his examination in chief Dr. Lawson in commenting on Dr Waite's report of the 15th of October, 2015, stated that the findings regarding the changes to the Claimant's Lumbosacral Spine are in keeping with someone of the age of the Claimant. Dr Lawson said he saw nothing with respect to the Claimant's Lumbosacral Spine.

[43] The impairment assignment is based mainly on the complaints made by the Claimant. What has remained consistent between the reports and evidence of Doctors Blake and Lawson is that there is an obvious lack of objective evidence in support of the Claimant's complaints about her injuries. In relation to counsel's submission that in his cross-examination Dr Lawson admits that the Claimant work would suffer significant impairment arising from her injuries; when asked to what extent he struggled to say 15%". This was not the evidence. Dr Lawson was asked to estimate the effect the Claimant's impairment would have on her work. He gave an estimate of 15%. This was not an estimate of the Claimant's impairment. He already assessed her impairment at 2%. The 15% estimate given by Dr Lawson meant that the Claimant in the light of her impairment of 2% would operate at a level of 85% at work. This undermines the Claimant's contention about her inabilities at work as she was still 85% functional at work. Secondly, this by no means could be interpreted as a significant impairment as Dr. Lawson was not commenting on the Claimant's impairment. Thirdly, Dr. Lawson at no time struggled while giving evidence. His evidence was at all times forthright and credible. Therefore, the Court should favour the evidence of the experts Drs Blake and Lawson, and reject the evidence of the experts Drs Stern and Waite.

ANALYSIS

[44] There is clear conflict as it relates to The PPD rating of all four doctors. That is,

Doctor Stern's 15% as at the 3rd of December 2014; Doctor Waite's 9 % as at December 16, 2017; Doctor Blake's zero percent as at the 20th of June 2016 and Doctor Lawson's 2 percent as at December 8th 2017.I now have the difficult task of first of all deciding whether the conflict in the medical evidence can be resolved. Where the conflict cannot be resolved I must decide which evidence to accept.

[45] Doctor Stern has admitted that the injuries suffered by Ms. Hyman fall in the specialized area of orthopaedic medicine. He admits that he is not a specialist in the area. He accepts the proposition that more reliance can be placed on the opinion of the specialist when it comes to matters of this nature than the opinion of the general practitioner. He further agrees that if there is a difference in opinion between himself and the orthopaedic specialist greater reliance can be placed on that of the orthopaedic specialst. Additionally He agrees that disability ratings are usually guided by the American Association Guide lines, the (AMA guidelines). He

has not confirmed whether the 6th is the most current. He agrees that the guidelines are so structured, that the more severe the injury the greater the disability rating. He admits that other than the AMA guidelines he does not know of any other guide lines. However, his evidence is that he did not use the AMA guidelines when coming up with the disability ratings for Ms. Hyman in his reports.

[46] Therefore, on Doctor Stern's own evidence it is clear that the fifteen per cent (15%) disability rating was not guided by the established guideline used by the medical fraternity in Jamaica. That is The AMA guidelines. The fact that there are standard procedures and practice within the profession I would expect the doctor to provide some cogent reason as to why he deviated from this standard practice. No such reason was provided. Additionally, he has not provided any basis for his arrival at the 15% PPD. These are sufficient reasons for me to reject Doctors Stern's PPD rating. However, in addition to this he agrees that if there is any difference in opinion between his and the specialist greater reliance should be placed on the opinion of the specialist. For these reasons I reject The PPD rating of Doctor Stern

[47] In relation to Doctor Blake's examination I make specific note of the following:

(i) In his evidence he admits that on the first examination he had the benefit of Ms Hyman's Xray but not the MRI.

(ii) The X-ray showed that her back was normal.

(iii) Despite saying she had no complaint of pain of her upper and lower limb, in his first report he did indicate that on examination of her back she complained of tenderness along the entire T1-L5.

(iv) Having stated in his report of the 20th of June 2016 that Ms. Hyman also reported that the "*odd sensation down her right lower limb* "had disappeared, he nevertheless admitted on cross examination that when he saw her on 17th of March 2015 she complained of lower and upper back pain not the neck.

(v) The MRI revealed information that were absent from the X-ray. That is:

(a) multilevel degenerative disc disease of the cervical spine.

(b) Multilevel degenerative disc disease affecting mainly L4/5 and L5/S1 levels of the lumbar spine.

(vi) He indicates that assessment with regards to non-verifiable radiculopathy involves multiple complains.

[48] Therefore, in light of the fact that:

(a) Ms. Hyman had previously complained to him about pain in regard to T1-LS/5;

(b) He had been provided with new information in relation to LS/5; it is a reasonable expectation that Doctor Blake would have conducted a further

examination of Ms. Hyman in relation to his report dated the 20th of June 2016 in order to determine whether or not the pain or symptoms in the lower back persist before arriving at a final assessment. Consequent upon the fact that Doctor Blake; having been seized of additional clinical information; that is the MRI results; did not perform a recent examination on Ms Hyman with regards to recent complaints in order to arrive at an assessment in his most recent report; I will not place reliance on his report.

[49] In relation to Doctor Waite's reports the following are germane to the issue at hand:

(i) He states that the actual injuries sustained in the accident will have to be confirmed by the doctor who did the initial assessment at the Andrews Memorial Hospital.

(ii) In his assessment of the 4th of September he found that the thoracic spine appears to be normal based on the results of the MRI. Despite this finding he gave the area an impairment rating of 2% without any justification. Further he notes that the "*disc osteophyte of the cervical spine suggests some chronicity and so there is a suggestion of pre-existing cervical disc disease, **the timing of this cannot be established**".* When I compare this finding with the evidence of Doctor

> Lawson I find that it is somewhat consistent Doctor Lawson's findings in which he states that the symptoms of the sprain/strain type injury to the neck region had largely settle but for occasional discomfort. He attributed the occasional discomfort to "*the degenerative changes seen on MRI of her cervical spine done after the incident and predating the injury*."

[50] Therefore, on this medical evidence of Doctor Waite, there is insufficient basis to attribute any impairment rating to the thoracic spine. In relation to the cervical spine his evidence suggests the presence of a diseases which predates the injury.

Consequently, I find that on this evidence is no basis to attribute the impairment of the cervical spine to the negligence defendant.

[51] I will further assess Doctor Waite's evidence in light of the evidence of Doctor Lawson and with reference to the AMA guidelines. By the time Dr. Konrad Lawson examined Ms. Hyman on December 8, 2017 she was 41 years old. He detailed in his report her history as it relates to her complaints and previous examinations and treatments. He specified her complaints of:

(i) experiencing low back pain for the past three years;

(ii) occasional minor neck discomfort;

(iii) that prolonged sitting, standing and stooping aggravates her lower back symptoms.

(iv) while she was still able to function as a cosmetologist, it was not to the extent that she was before the injuries were sustained.

[52] I have carefully examined his examination and diagnosis in relation to Ms. Hyman. He noted that:

(i) On examination of her neck and upper flexes, he found free movement of her cervical spine, no tenderness, no pain on the motion of her neck.

(ii) She had a mildly restricted range of motion of her lumbar spine to lower back pains. There was no significant visible deformity of her entire spine.

Her lower limb muscle strength was normal and her lower limb reflexes were equal bilaterally.

[53] He further noted that she had a documented history of sprain/strain type injury of her lumbar spine region with **continued complaints of axial pain with** no

objective findings of a documented history of sprain/strain type injury of her cervical spine. This is in fact consistent with the MRI results. He acknowledged that she also had some muscle pain in her thoracic spine region. His findings that this was referred there from her lower back region, is also be consistent with the MRI results. The fact is, the results revealed no abnormality in the thoracic spine.

[54] I note that he further acknowledges that Ms. Hyman did suffer a sprain/strain type injury to the neck region. He found that the symptoms had largely settle but for occasional discomfort. This he attributed to “the degenerative changes seen on MRI of her cervical spine done after the incident and predating the injury.” He highlighted her continued experience of low back pain. He however found that whereas up to the time of examination her complaint was that of experiencing occasional symptoms of neck pain but continued complaints of low back pain on multiple occasions. He noted that she functions at work and around her home but with decreased capacity.

[55] In relation to Dr Waite’s assessment that Ms. Hyman had a Class 1 impairment of her thoracic spine, Dr Lawson disagrees with this assessment on the basis that there was no documented injury of her thoracic spine, and the MRI scan of the area was reported to be completely normal. His opinion is that, that pain was being referred from her lower spine area, up her back and into her neck region. He was of the opinion that the concept of referred pain perfectly explained Ms. Hyman’s symptoms. Therefore the pain in her thoracic spine, being referred there from the lumbar spine, should not be assessed as a separate diagnosis. Having assessed Ms. Hyman with a 2% impairment of her lumbar spine and a total PPD of 2%, I note that on cross examination that Dr Waite indicates that it is possible that the injury to her lumbar spine arose from the motor vehicle accident.

[56] MS. Hyman. has not denied that she was in fact examined by Doctor Lawson. What she has taken issue with is his method and duration of examination. Her evidence with regards to his examination of her is that he told her to “stand up and lean back, lean to the front, lean her right side, lean to her left side and that was

it". However, there is nothing on which I can conclude that the method and duration of Doctor Lawson's examination is inconsistent with accepted standard. This is especially in light of the fact there is no challenge to his expertise as an orthopaedic surgeon. I also view his evidence in light of Doctor Waite's admission that Doctor Lawson participated in his training. This is an acceptance that Doctor Lawson is a specialist of more seniority and experience than Doctor Waite. I also note in his report dated the 26th of March 2018 that Doctor Waite indicates that he agrees that due to a lapse of two years between his and Doctor Lawson's evaluation of

the patient their assessment differs. The inference I draw from this is that Doctor Waite is admitting that Doctor Lawson's report can be accepted as a true reflection of impairment at the time of his examination.

[57] Additionally, there is no basis on which I can find that Doctor Lawson ignored the complaint of Ms. Hyman. I find that he has provided a detailed report of a detailed examination which is not inconsistent with her complaints. What seems to be at issue is his diagnosis and assessment. However, I find that he did a careful review of her history, assessed her previous medical records, and conducted his own examination. In light of the foregoing I find that Dr Lawson considered all appropriate modifying factors, in giving a balanced and reasoned assessment of Ms Hyman's impairments rating

[58] Additionally, if Doctor Waite is accepting that there is no error in Doctor Lawson's assessment there still remains an irreconcilable difference between his assessment of the impairment rating of the Claimant and that of Doctor Lawson. The explanation, as suggested by Doctor Waite, is the 2 years lapse of time between his assessment and that of Doctor Lawson. However, if I were to accept that as the only explanation, then I would have to find that there was significant improvement in claimant's impairment within the 2 years as it would have move from 12 % to 2 %. What then, is the explanation for it worsening or the sharp decline within eight days, that is, from December 8th 2017, the date of Doctor Lawson's examination to December 16 2017, the date of Doctor Waite's final

examination. During that period the impairment rating would have moved from 2% to 9%. I also make this observation against the background that based on Doctor Waite's own assessments the PPD between September 24th 2015 and December 16th 2017 seemed to have improved instead of worsened. That is, it moved from 12% to 9%.

[59] Additionally, an authority supplied by Mr. Jarrett has provided some very useful information. **Bingham Christopher R, MD, (2011) "AMA Guides Sixth Edition Evolving Concepts Challenges and Opportunities** (***Impairment Resources, LLC***), Page 33 and 34 provide extract from the AMA guide lines Sixth Edition, and in particular, Tables 17-2-4. These tables provide examples of some spinal impairments and the associated class definitions and default impairment values. The information relevant to the issue under consideration reads as follows:

(i) "*Non-specific chronic, or chronic recurrent low back pain (also known as chronic sprain/strain, symptomatic degenerative disc disease, facet joint pain, SI joint dysfunction, etc.) – documented history of sprain/strain type injury with continued complaints of axial and/or non-verifiable radicular complaints and similar findings documented in previous examinations and present at the time of the evaluation*".

is placed in class 1 with a 1%-3% rating.

(ii) "*Lumbar Intervertebral disc herniation and or AOMSI Intervertebral disk herniation and/or AOMSI at a* ***single level with medically documented findings****; with or without surgery and with* ***documented radiculopathy*** *at the clinically appropriate level present at the time of examination" is placed in class 2 with a 10%14%.*

[60] Therefore, on an examination of the aforementioned extract from the AMA guidelines 6th edition it is clear that there is a difference in the classes of rating between verifiable and non-verifiable lumbar radiculopathy. The non-verifiable

radiculopathy falls in class I with rating ranging from 1-3% while the documented radiculopathy, (that is the verifiable) at a single level falls in class 2 with a rating of 10-14 %. I find that this is more consistent with Doctor Lawson's impairment rating of Ms. Hyman. Additionally in relation to the point raised by Mr. Jarrett that Doctor Lawson's report did not take into account the evidence of the annular tear on the MRI, at page 33, it is indicated that paragraph, 556 -592 of the **6th edition of the AMA guidelines** states that *"Common degenerative findings such as abnormalities identified on imaging studies such as annular tears, facet arthropathy, and disk degeneration, do not correlate well symptoms, clinical finding, or causation analysis and are not rateable according to the Guides".* Therefore, in this regard I find that the impairment assessment of Doctor Lawson cannot be faulted. Consequently I find that Ms. Hymans most current impairment rating as a result of the accident is 2%.

[61] However whereas there are differences in PPD as it relates to Doctor Stern, Waite and Lawson and I find some amount of consistency with regard to pain and suffering. All three found that Ms. Hyman experienced pain in the neck down to the lower back. When Doctor Stern re-examined her on December 3rd, 2014. Her complaint and information were; *sharp pains running down the back of the neck down into the lower back* occurring "intermittently"; and *mild head injury and cervical muscle spasm.* Therefore *from* the August 2nd, 2014 when examined by Dr Stern, Ms. Hyman had complaints of pain from the neck down to the lower back. His examination then showed marked tenderness over the upper chest vertebral spines with pain radiating down to the spines of the lower back. When she was *re*examined by Dr Stern on December 3, 2014, the following were identified: (i) *sharp pains running down the back of the neck down into the lower back intermittently. (ii). The pain in the lumbar spine in the lower back with long standing was described as severe*.

[62] On Dr Stern's examination of the back the source of the pain showed up in the lower back. That is "mild scoliosis of the lumbar spine with tenderness and spasm of the Rhomboids and Erector Spinae muscles of the lower back. Straight leg

raising elicits low back pain on both sides". Dr Lawson's description of **occasional** symptoms of neck pain is consistent with doctor Stern's description of the symptoms as "**intermittent**". I note also that Doctor Lawson reported that she had **continued complaints of low back pain** on multiple occasions. This is consistent with Dr. Stern's report in relation to these symptoms. Dr Waite also found the claimant to be suffering from chronic lower back pain, despite the fact that he found that she was also suffering from chronic neck and mid back pain. However, I accept the explanation of Dr Lawson that the source of the pain is the lower back injury radiating upwards. However for the purpose of my assessment under general damages and in particular pain and suffering and Loss of amenities, despite my finding that PPD rating is 2% I bear in mind the consistent evidence on all three medical reports. From the date of the accident up until the date of the last examination by Dr. Waite the claimant continues to experience pain in her lower back, which radiate upwards. I find that based on the evidence of all three doctors, that at as a result of the accident with the defendant, the claimant suffered a whiplash injury to the neck and lumbar spine with a contusion of the scalp. I accept Doctor Lawson's evidence that the neck injury from the accident has been resolve. I accept the evidence of Doctors Waite, Lawson and Stern that the claimant continues to suffer pain from the lumbar spine. I accept the evidence of Doctor Lawson, that the pain radiates from the lumbar spine upwards and not from the neck downwards. I reiterate that I find that the claimant's most current PPD is 2%.

PAIN AND SUFFERING AND LOSS OF AMENITIES

CASES SUBMITTED BY JOSEPH JARRETT FOR THE CLAIMANT

[63] (i) ***Olive Henry v Robert Evans & Greg Evans*** Suit No. CL 1998 HO19, volume 5 of Khan & Khan. In this case, the Claimant, aged 65 at the time of the accident, was found to have:

(a) Marked restriction of extension and lateral flexion of the cervical spine.

(b) Impaired rotation.

(c) Bilateral sacrospinalis spasm with tenderness and spasm in the rhomboids and trapezii.

(d) Restriction of the thoracic rotation especially towards the right.

(e) Tenderness in the extensor compartments of both forearms.

(f) Diminished grip on the right.

(g) Defused sensory blunting on the right.

(h) The claimant was diagnosed with a whiplash injury and she was assessed as having 11% whole person impairment. She suffered from pre-existing cervical spondylosis at C5/6 discs, injury to ligaments at C4/5, C6 nerve root pains and blunting signifying of C5/6 disc. She did not bear any lumbar spine ailment, disc bulging at L4/5 and L5/SI or mild chronic SI radiculopathies to the right of the lumbar spine. There was a finding of fact that the pre-existing condition accounted for 50% of the PPD. The judge, in assessing damages, attributed 50% of the PPD to the pre-existing condition, the result being that the PPD was treated as 5.5%. In February, 1999 she was awarded general damages of $1,830,000.00.

(ii) ***Yvonne Black v Oshnel Morgan & Renford Williams*** Claim 2006 HCV 00938, of volume 6 of Khan and Khan. Exhibited as DH7. In this case the claimant suffered from:

(a) muscular spasm of neck;

(b) neck pain and burning sensation across shoulder; (c) lower back pains.

(d) The prognosis of the medical doctor was that the claimant “would be plagued by intermittent neck and lower back pains aggravated by sudden movements of the neck, lifting objects, bending and

prolonged sitting as well as any injudicious activities. “She was assessed as having a PPD rating of 5% whole person in respect of the cervical spine and 5% whole person in respect of the lumbo-sacral spine. Therefore, total PPD was assessed at 10% of the whole person. In April 2007 she was awarded the following for General Damages:

Pain and Suffering and Loss of Amenities:	$2,300,000.00 (with interest)
Handicap on the Labour Market:	$ 400,000.00
Future Help:	$ 624,000.0

Mr. Gordon on behalf of the claimant

[64] Mr Gordon disagrees with the authorities relied on by the Claimant. He has given the following reasons: The case of ***Olive Henry*** is an inappropriate guide as it speaks to injuries far more severe and is not in keeping with the claimant’s assessed impairment. The Claimant Olive Henry suffered injuries mainly to her neck. Dr Lawson in his report indicated that in his opinion the occasional neck pain is not a significant problem for Ms. Hyman at this time. The current assessment of her cervical spine as Class 0 is appropriate.” He submits that an award for General Damages should be anywhere between the $1,300,000.00 to $1(sic).

[65] He relies on the following cases:

(i) ***Yanique Hunter v Conrad Clarke & Anor***. [2014] JMSC Civ. 83

In this case - the Claimant sustained a;

(a) soft tissue injury/spasm to her middle back.

(b) musculoskeletal spasm to the lumbar spine;

(c) chronic sprain or strain to the lower back with nonspecific lower back pain;

(d) soft tissue injury/spasm to the middle back.

(e) The claimant was assessed with 2% whole person impairment. In May, 2014 an award for general damages in the sum of $1 was made. This sum now updates to $1426,890.76.

(ii) ***Jhamiellah Gordon v Jevon Chevannes*** [2016] JMSC Civ. 79

In this case the Claimant sustained:

(a) mild mechanical lower back pain;

(b) a mild dorsal spine strain.

(d) Her diagnosis was consistent with sprain/strain type injury. Her pain was aggravated by standing stationary while attending to clients, performing household chores for e.g. cooking, cleaning, bending to wash clothes and sexual activities. She had permanent partial impairment rating of 2%. In May, 2016 an award for general damages in the sum of $1,400,000 was made. Using the said CPI of 254.7 this sum now updates to $1,557,117.90.

Discussion

[66] Of the two cases submitted by Mr. Jarrett I believe the case of ***Yvonne Black v Oshnel Morgan & Renford Williams*** is closer in comparison to the instant case. Apart from being diagnosed with a whiplash injury I do not find anything else comparable with the case ***Olive Henry v Robert Evans & Greg Evans*** and the instant case. However, I note that in the case of ***Yvonne Black v Oshnel Morgan & Renford Williams*** the PPD in that case was assessed as 10% whereas the accepted PPD in the instant case is 2%. Additionally, in that case the Claimant in addition to suffering from lower back pain the Claimant also had muscular spasm of the neck; neck pain and burning sensation across the shoulder. The prognosis of the lower back pains being aggravated by sudden movements of the neck, lifting objects, bending and prolonged sitting as well as any injudicious activities can be

compared to Ms. Hyman's prognosis with the limitation that the award in that case also includes the pain and injury to the neck and shoulder. I note also that 5% of the PPD in that case was assigned to the cervical spine whereas I have found in the instant case that no impairment to the cervical is attributable to the Defendant.

[67] It is my view the cases submitted by Mr. Gordon and in particular ***Jhamiellah Gordon v Jevon Chevannes*** are more comparable to the instant case. The mild mechanical lower back pain; mild dorsal spine strain and sprain/strain type injury are comparable to the injury to Ms. Hyman's lumbar spine. The aggravation of the pain brought on by standing stationary while attending to clients, performing household chores for e.g. cooking, cleaning, bending to wash clothes and sexual activities are also comparable with Ms Hyman's prognosis. The permanent partial impairment is the same as the accepted PPD rating of Ms Hyman. That is 2%. In light of all the circumstances I believe an award of 1,600,000 for pain and suffering and loss amenities is reasonable.

FUTURE CARE

[68] Future care or the cost of future help is awarded on the basis that as a result of the injuries arising from the accident the claimant will continue to need medical and or nursing assistance in the future. The factors that are taken into consideration in an assessment under this head are; the time period for when the help will be required and the cost. However, the lack of an exact time period for the duration of the extra help/future care is not a bar to recovery under this head. ***(See Wells v Wells [1999] AC 345).*** Mr. Gordon contends that *loss* of income and cost of future care are items of special damages and none of these items were pleaded. He further asserts that:

(a) The fact that these items were not pleaded is sufficient to bar recovery.

(b) In any event even if these items were pleaded the evidence in support of these items of claim the is woefully lacking.

Evidence and Analysis

[69] My Hyman testifies that; she cannot properly position herself to bathe and care for her daughter who is now seven years old without discomfort and that; the injections

she needs to treat the condition costs $45,000.00 per month. However, she has produced no documentary or supporting evidence of this cost. She does not even appear to be certain of this cost. On cross examination she said it was someone at Doctor Waite's office who gave her an estimate of the cost of $45,000 per month. She has not said who that person is. At the time of her testimony in court it is clear that she is still not certain of the cost. Inferentially, if Ms Hyman had commenced treatment she would be relying on her own certain knowledge of what she paid and not an estimate of the cost give to her by a third party. She admits on cross examination that she did not ask any of the doctors to prepare any document concerning this cost. She also states that none of the doctors referred her to a Chiropractor. However, I am mindful of the fact that on his examination conducted on the 3rd of December 2014 Dr Stern noted that while Ms. Hyman's symptoms were hindering her ability to function at work and at home, with consistent physiotherapy they should improve. Nonetheless, he pointed out that the symptoms of muscular injury may recur over the coming months and possibly the next two years. Therefore, he anticipated maximal improvement by December 2016.

[70] However, it is clear from the evidence of Doctors Waite and Lawson that Doctor Stern's prognosis was not completely accurate. However, I am mindful of the fact that he admits that he is not a specialist in the area and that the evidence of the specialist is more reliable. Therefore, I will evaluate the evidence of Doctors Waite and Lawson on this aspect of the case. Doctor Phillip Waite in his report dated the 18th of December 2017, in relation to his examination of Ms. Hyman on the 16th of December 2017, in terms of prognosis states;

(i) there will be periods of remission and exacerbation of the neck and back pains;

(ii) the condition could also worsen;

(iii) the timing and extent of these could not be predicted;

(iv) it may affect the activities of daily living and work especially activities such as reading sleeping with pillow, using computer prolonged sitting, standing walking house hold chores lifting bending, and sexual intercourse;

(v) it will also continue to affect her ability to perform her vocation as a cosmetologist;

(vi) persistent symptoms will require orthopaedic care, (vii) the cost cannot be predicted.

[71] Doctor Lawson found that her **pain persists** and does interfere with her ability to work as a cosmetologist but does not stop her completely. Therefore based the evidence of Doctors Waite and Lawson I find that the pain in Ms. Hyman's lumbar spine persists. Consequently, I have no doubt that Ms. Hyman will continue to need future medical care as it relates to the persistent pain in her lumbar spine. Her evidence is that the pain killer cost $45,000 per month. She has been challenged on this cost. She has produced no documentary or other viva voce evidence in support of this claim Additionally I have no precise evidence as to the period of time for which this treatment will be required. Counsel Mr. Jarrett suggests, 20 years without any evidential basis. Despite the fact Dr Waite has not specified a period he did not say treatment would be needed for rest of Ms. Hyman's working life. Therefore there is no basis for an actual award as part of special damages.

[72] However in the case of ***Wells v Wells*** (supra) at page 363, the court stated that:

"It is of the nature of a lump sum payment that it may, in respect of future pecuniary loss, prove to be either too little or

too much. So far as the multiplier is concerned, the plaintiff may die the next day, or he may live beyond his normal expectation of life. So far as the multiplicand is concerned, the cost of future care may exceed everyone's best estimate. Or a new cure or less expensive form of treatment may be discovered. But these uncertainties do not affect the basic principle. The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured. The sum should be calculated as accurately as possible, making just allowance, where this is appropriate, for contingencies".

[73] In the case of ***Willbye v. Gibbons*** [2003] EWCA CIV 372, the court stated that future care is not the same as care to date. Despite the fact that the court found that there was too much uncertainty to permit any claim based on the multiplier/multiplicand basis, it did go on to award damages for future help taking into consideration the claimant's need for extra care if the claimant had children or was living alone and wanted to go on holidays. It stated that:

"all that can realistically be done is o increase to some extent the fund available to satisfy her need for assistance in the future" (page l16)

[74] In the case of ***Attorney General of Jamaica v Clarke (Tanya) (Nee Tyrell)*** 2004 Court of Appeal (Jamaica) the plaintiff gave evidence that she visited her doctors approximately nine times per year, paying a sum of US$375 for each visit. These visits were unsupported by any documentary evidence. Of the nine doctors she said attended to her, not only were there no supporting evidence, but she gave the names of only two of those doctors. In that case Cooke JA did say that:

"*Plaintiffs ought not to be encouraged to throw up figures at trial judges, (and)make no effort to substantiate them and to rely on logical argument……"*

[75] However, the Court of Appeal, having found that the court below was in error in accepting the sum of US$375.00 per visit, was faced with the question as to what should have been awarded. Cooke JA further stated, "***I do not accept the appellant's contention that in the absence of strict proof there should be no award. Justice demands that there should be an award***". Therefore, adopting the dictum of Cooke JA in the afore-mentioned case, it is my view that in the instant case that 'justice demands that there should be an award" in the nature of a lump sum. In determining the sum to be awarded I take into consideration the evidence of Dr Waite, which I accept that there will be periods of remission. I also take into consideration the fact that his impairment rating for the lumbar spine between the 24th of September to the 16th of December had been reduced from 8 % to 7%. This is indicative of an improvement, though slight in the state of Ms. Hyman's injury. Were this trend to continue it is expected that there will be gradual reduction in her pain and also the need for future medical care. Consequently, it is my view that an award of 2 million for future care is reasonable.

LOSS OF EARNING CAPACITY/HANDICAP ON THE LABOUR MARKET

[76] In support of her request for general damages in relation to this item of loss of earning capacity, Ms Hyman's evidence is as follows: She was born on the 28th of March, 1976 and she is a Businesswoman. She has her own hairdressing business and beauty salon at Pavilion Plaza. The injuries left her unable to work in her business as she used to before the accident and her income has been reduced significantly. On some weeks she earns less than $15,000.00 whereas before she could earn over $100,000.00 per week from her clients and her work as a hair stylist with various musicians in Jamaica. She uses to go out on house calls doing the hair of a number of top professional women such as Yendi Phillips (Miss. Jamaica Universe 2011). She also did work for Novia McDonald-Whyte who works on the Jamaica Observer (she owns 'Under The Dryer'). As a result of her injuries she is unable to do as much house calls as before or work away from her shop on such high profile ventures as: -

(a) 'Rising Stars' which she did for 8 years.

(b) Advertising and Marketing which she did with JJ Foote.

(c) Weddings and outside commercials.

(d) That she was featured in Buzz Vol. # 5 March-April 2011 at pages 10-12.

[77] On Cross examination her evidence is as follows: Her business, Delsha Hair and Nail salon has been in operation since 2010. She had two (2) employees who did hair and nail service just like her. They were cosmetologist as well. She has none now. The business was registered as a sole trader. She need to renew the registration in January. She was paying taxes. The documents she files at the Registrar of Companies in relation to the business are filed annually. She is required in those filing to declare the income and debt of the business. These documents have not been disclosed in these proceedings as yet. There is barely any work at her business now. Her last annual filing is that the business is barely operating. She has filed for Bankruptcy.

Submissions

By Mr. Gordon for the Defendant

[78] Mr. Gordon has made to following submissions**:** The Claimant has failed to established that there is a real risk that the she will be out of work or if she is, that she will be unable to obtain fresh employment. (He relies on Robert ***Minott v South East Regional Health Authority et al*** [2017] JMSC Civ 218) Dr Blake did not indicate in his report any disability which the Claimant would face. Dr Blake's impairment rating would undermine a claim for a loss of earning capacity. It did not unearth any objective evidence which could support the complaints made by the Claimant. One can conclude therefore, utilizing Dr. Blake's reports, that on a balance of probabilities it is unlikely that the Claimant will be out of work in the future, and if she is, it is unlikely that because of the accident she will be less able to obtain fresh employment. The Claimant's contention that her income has been

reduced and she (or her business) has filed for bankruptcy is unsupported by evidence. The claimant could have easily presented this evidence if it existed, in

the light of the fact that she contends that she makes or made annual returns for her business.

[79] No documentation has been provided substantiating her earnings and she did not call any of her clients to give evidence in support of her alleged earnings. She has not provided any documentation to prove the decline in her business. The Claimant has included in her bundle a Supplemental Affidavit of Urgency filed on the 29th of March, 2017. Attached to this Affidavit are two letters which are referred to in her Witness Statement. No application was made for these letters to be admitted into evidence. These letters do not support the Claimant's case. During cross examination the Claimant stated that her business is registered and that she files documents relating to the business annually. It is fair to assume that when the Claimant says her business is registered she means registered at the Companies Office. She says the documents which she files declare the income and debts of her business. She says the last filing reflects that she has filed for bankruptcy. Yet no document has been presented to the Court substantiating these allegations. The fact that she states that she has filed these documents suggest that they could have been obtained and admitted as evidence but this was not done.

[80] It is unclear why the accident in question would have had such a drastic impact on her business. The Claimant indicated that prior to the accident two persons were employed by her to work at her business. She said these two persons provided the same services to her clients as she did. Even if the injury to the Claimant had a severe impact on her ability to work as she contends, these two employees could have continued to provide services to her clients.

[81] When one considers the medical report of Dr Lawson he speaks of a "mildly restricted range of motion" to the claimant's lumbar spine. Dr Lawson also opined that the Claimant at the time of examination had "occasional complaints" with respect to the injury to her lumbar spine. In the light of the assessments done by

Drs Blake and Lawson it, there is no substantial or real risk of the Claimant losing her job. The assertions by the Claimant that her earning capacity has been affected

by her injuries and that she effectively no longer has a job, if true, are not supported by the objective medical evidence. Put another way the objective medical evidence strongly suggests that notwithstanding the accident, the Claimant can continue working as a cosmetologist. If she has in fact experienced a reduction in her earning capacity or is no longer employed, this cannot be attributed to the accident.

[82] In the alternative if the Court finds that the claimant's earning capacity has been affected by the accident the effect is either unquantifiable or minimal. He refers to (***Moeliker v A. Reyrolle Co. Ltd.*** [1977] 1 ALL E.R. and ***The Attorney General of Jamaica v Ann Davis*** SCCA 114/2004). The Court has not been provided with any evidence which would allow it to undertake the quantification referenced in these cases. If the Court were to embark on such an exercise it would be grounded in mere speculation. Alternatively, any award for handicap on the labour market should be insignificant. Dr Lawson estimated that the Claimant's work output may experience a reduction by 15%. This is an insignificant percentage and any award for handicap on the labour market should take this into account. He recommends that a lump sum be awarded and that this sum should not exceed $200,000.

ANALYSIS

[83] Prior to making any award in relation this portion of the claim for general damages the court must first satisfy itself that certain conditions exist in relation to the Claimant Ms. Hyman.

(i) There ought to be sufficient evidence before the court, that the claimant though being employed at the time of trial is at risk of losing her employment at some time in the future and;

(ii) As a result of her injuries due to the defendant’s negligence she may be placed at a disadvantage of getting another job or another job with equal pay.

As it was stated by the court in the case of ***Moeliker v A Reyrolle & Co Ltd*** [1977] 1 All ER at page 16:

> "*what has somehow to be quantified in assessing damage under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market".* (as Per Browne LJ*)*

[84] The unchallenged evidence of Ms Hyman is that prior to the accident she was a hair stylist, operating her own business. Currently she maintains the same vocation. It is also her evidence that as result of the injuries to her back arising from the accident, she is operating at a reduced capacity. This is supported by the evidence of orthopaedic specialists, Doctor Waite and Doctor Lawson. According to Doctor Lawson the injuries could give rise to a 15% reduction in her capacity to perform her job. It is also the evidence of the Claimant, that as a result of her inability to perform at her pre accident level her business has suffer loss. She indicates that she has filed for bankruptcy. Admittedly there is no documentary evidence that she has in fact done so. It appears to me that Mr. Gordon, in his submissions is associating the state of her business with her capacity to work. In my view these are two different issues. The imminent closure of her business relates only to whether there will be a risk of her being unemployed at some time in the future. He has also taken the view that the reduction in her capacity to work could not have affected the business as she had other employees who could keep the business going. However, my opinion differs from that of counsel in this regard. Her evidence is that she has a particular skill as a hair technician. She at times utilizes her skills on a personalized level by doing house calls for "high profile women". Despite the lack of supporting evidence, she was not challenged on this aspect of her evidence. The evidence is that she is no longer capable of doing these house calls. This also has not been challenged. Therefore, I accept these statements as fact.

[85] The house calls, being in the nature of personalized individual service, do not automatically mean that anyone can be a substitute. It is an individual's choice as to who he or she allows in his or her personal space. Additionally, there is no evidence that the two employees possessed the same level of skill and competence as Ms. Hyman. Essentially there was little or no challenge in this area. Additionally, if she were to assign persons to do the task she would normally perform that may require the employment of additional staff to take over the role of her substitute resulting in an increase in her wage bill and an ultimate reduction in her profit/earning capacity. In light of the medical evidence and the evidence of the Claimant as previously outlined I find that her ability to perform her job as a cosmetologist has been reduced by 15% due to the injuries from the accident. I find that this reduction in capacity has negatively impacted her personalized house calls. Consequently I find that the most likely effects of Ms. Hyman's reduction in capacity to work are; the loss of some clients; the loss of profit and quite possibly the closure her business. Whereas a claim for loss of earnings falling under special damages must be strictly proven, in relation to loss of earning capacity which falls under general damages the strict rule does not apply. Having assessed Ms Hyman's demeanour and viva voce evidence I accept her evidence that she is no longer able to do personalized house calls. I accept her evidence that this has resulted in a loss of income in her business.

[86] Mr. Gordon has submitted that he cannot see how the accident could have caused such a drastic down turn in Ms. Hyman's business. However the principle as stated in **Moeliker v A Reyrolle & Co Ltd** (Supra)is not whether it is the injuries that will cause her to lose her job but whether there is as risk that; whether as a result of the accident or not; she will at sometime in the future be thrown on the labour market. Then if the court finds that the answer to this question is in the affirmative it is then that it goes on to consider the effect of the accident on any future employment. That is whether the risk is that the Claimant will remain unemployed or employed with reduced earnings. Despite her failure to produce the documentary evidence in support I accept Ms. Hyman's evidence that she did in

fact filed for bankruptcy. However even If I did not find that she has in fact filed for bankruptcy I assess the risk stated **Moeliker v A Reyrolle & Co Ltd** in light of the nature of her present employment. She is a sole business owner in the service industry who previously employed only two employees. Businesses survive depending on market forces. That is supply and demand for one's product, the amount of competitors and who is able to offer a product at the most competitive rate. Therefore businesses including large companies are always at the risk of failing where the required capital to include human capital is not available to keep pace with the demands of the market and other businesses that are competing for the share of the market. The risk is greater for small sole traders than for larger companies with greater resources. Therefore based on the very nature and the size of Ms. Hyman's business I find that there is a real risk that her business will fail. Consequently, I find that there is a risk she will lose her present employment sometime in the future.

[87] The other issue for me to determine is whether Ms. Hyman will not be able to obtain another job or if she does obtain another job whether it will be at a reduced pay. I find that the fact that her business will eventually be closed she will have to seek employment where she will no longer be the owner of the business. This will most likely translate into a reduction in her status and remuneration. Consequently, I find that the reduction in her capacity to perform at her pre-accident level will correspondingly affect her ability to acquire new employment with equal or higher pay. Therefore, I find that the conditions laid down in the case of ***Moeliker v A Reyrolle & Co Ltd*** (Supra) and applied in the case of ***The Attorney General of Jamaica v Ann Davis*** SCCA 114/2004) have been satisfied.

[88] In the assessment of the quantum, if any, to be awarded to the Claimant under this head there are two options open to the court. These are; (i)determining and applying the multiplier/multiplicand or;(ii) making an award of a lump sum. In order to exercise the former, the court must be able to accurately determine the multiplicand, and an appropriate multiplier. The multiplicand actually reflects the Claimant's annual loss of earnings. (see ***Leesmith v Evans*** - [2008] EWHC 134).

Therefore, the following information is of utmost importance and should be presented to the court. These are:

(i) Reliable evidence as to Ms. Hyman's annual earnings prior to the accident;

(ii) Evidence that her income has been reduced as a result of her injuries (See **O.K.** ***Francis and Ors. v Freda Claire Mc Kitty***, (Supreme Court Civil Appeal N0.16/64)

(iii) Reliable evidence of her current annual income. (See ***Icilda Osbourne v George Barnes and Others*** Claim No 2005 HCV 294, judgment delivered 17th February 2006 per Sykes J as he then was),

[89] In relation to her current income Ms. Hyman's evidence is that on some weeks she earns less than $15,000.00. However she has presented no evidence as to approximately how many weeks she earns less than $15,000.00 or when it is that she earns over $15,000.00, approximately how much she earns and for approximately for how many weeks that sum is earned. In the absence of a precise figure as to her actual earning I am unable to determine her post accident income up to the date of trial. Additionally, I do not have sufficient evidence with regards to her income at the time of the accident. She states that before she could earn over $100,000.00 per week from her clients. However I am not certain if this is what she earned on a consistent basis. I have no precise figure or even an average of her pre accident earning in order to arrive at a correct multiplicand.

[90] The claimant cannot just throw figures at the court with nothing in support, expecting the court to act on them. By stating that she could earn over $100,000 per week is not really a statement of Ms. Hyman's pre-accident income. I have no way of determining whether she consistently earned over $100,000 and If not, how often. This is especially in light of the fact that her business is locate within the formal secure of the society. Therefore, based on her own evidence that she files

annual returns she does in fact has access to this evidence. She has the burden to prove these figures that she alleges. Therefore, in spite of the fact that the evidence is accepted that she performed services as a hair stylist I have no basis on which I can conclude that her pre-trial earning was $100,00 per week. Therefore I have no basis on which I can make a determination as to the average of her current earnings per week. Essentially I have no reliable evidence on which I can arrive at her current annual income, and her annual loss of income which would allow me to make a finding as to a correct multiplicand that would be applicable in this case. Therefore the multiplicand/multiplier method of calculation is not applicable in these circumstances.

[91] However, as previously indicated even in the absence of reliable evidence as to her actual post and pre accident earnings the claimant is still entitled to award. That is once preconditions outlined in ***Moeliker v A Reyrolle & Co Ltd*** (Supra) have been satisfied. Sykes J as he then in the case of ***Archer Ebanks v. Japther McClymouth*** Claim No. 2004 HCV R172, delivered March 8, 2007 digested in Khan (5)) stated:

> "*If the claimant is working at the time of the trial and the risk of losing the job is low or remote then the lump sum method is more appropriate and the award should be low. If the claimant is working at the time of the trial and if there is a real serious risk of him losing the job and there is evidence that if the current job is lost there is a high probability that the claimant will have difficulty finding an equally paying or better paying job, then the lump sum method may be appropriate depending on when the loss is seen as likely to occur. The size of the award may be influenced by the time at which the risk may materialize"*

[92] In fact, even if the Claimant never worked she entitled to an award of loss of earning capacity. In circumstances like these the court should not take the multiplicand/ multiplier approach but should award a lump sum. In the case of

Patrick *Thompson and Anor v Dean Thompson and Ors* [2013] JMCA Civ 42, at paragraph 80, the court said that once a court decides that:

> *"an award for loss of earning capacity is appropriate in a particular case, a suitable method of calculation is a matter for the court. Among the factors to be taken into account are the actual circumstances of the claimant, including the nature of his injuries.*
>
> *Although the claimant's employment status at the time of trial is not a bar to recovery, it may have an obvious effect on the kind of information that he is able to put before the court with regard to his income and employment prospects for the future. Where there is evidence to support its use, the multiplier/multiplicand method may promote greater uniformity in approaches to the assessment of damages for loss of earning capacity. This is hardly an exhaustive list and additional or different factors will obviously be of greater or lesser relevance in particular cases. Although the decided cases can offer important and helpful guidance as to the correct approach, the individual circumstances of each claimant must be taken into account."*

[93] Therefore despite the fact that I find that Claimant has failed to provide evidence with regards to her precise earnings, I find that I have sufficient basis for making an award of a lump sum payment to the Claimant for loss of earning capacity. In making this lump sum award I take into consideration the following factors:

(a) The claimant is a hair stylist

(b) None of the doctors have indicated that the injury will be a lifelong injury.

(c) The Claimant has filed for Bankruptcy. In light of this evidence I find that the risk of her losing her present employment (her own business) is imminent. I also take into account, the fact

that Doctor Waite indicates that her symptoms can go into remission or be exacerbated. In light of these circumstances I make a Lump sum award of 2.5 million dollars.

The Issue Of Cost

[94] Mr. Jarret is claiming summary cost on behalf of the claimant to include the cost of Doctor Waite's and Doctor Stern's court attendance. Mr. Gordon objects on the basis that:

(i) The sums being claimed for the attendance of Doctors Stern and Waite are not contained in the pleadings and no amendment was made to so include this in the claim.

(ii) The usual course is that whoever relies on an expert should bear the expenses associated with that expert's attendance at court. The claimant's counsel applied to the court to call these persons as experts. The court ordered that these experts should attend the trial. Counsel for the Claimant has not made any submissions or referred to any authority which would support the claim that the Defendant pays for his experts.

(iii) ***The Civil Procedure Rules, 2002*** (the "Rules") which contains the mechanism for the appointment of experts does not empower a court to order a party that did not seek an appointment of an expert to pay the expenses associated with the expert's attendance at trial. In fact, the Rules empower a court to rule on whether both or one party pays the expenses of an expert, only where a single expert has been appointed. (He refers to ***Rule 32.10***)

(iv) Even if the court were to consider awarding the Claimant the cost of calling her experts, save and except for the statement

by the Claimant that she was being charged $150,000 per hour by Dr Stern, no evidence has been presented to ground this claim. Neither of the experts called by the Claimant gave evidence about a charge for their attendance. The experts called by the Claimant offered little or no assistance in the resolution of the issues upon which the court is expected to deliberate. Conversely the experts called on behalf of the Defendant were very helpful to the court. However, the Defendant has not made a claim for the costs of calling these experts. There is no basis for this award.

Discussion

[95] In terms of cost I am not mined to grant summary cost at this time. However, in light of the objections raised I will examine the under mentioned rules as they relate to cost.

Rule 32 (10) (1) to (5) reads:

" (1) *Where the court gives directions under rule 32.9 for a single expert witness to be used, each instructing party may give instructions to the expert witness.*

(2) When an instructing party gives instructions to the expert witness that party must, at the same time, send a copy of the instructions to the other instructing parties.

(3) The court may give directions about the arrangements for -

(a) the payment of the expert witness's fees and expenses; and

(b) any inspection, examination or experiments which the expert witness wishes to carry out.

(4) The court may, before an expert witness is instructed -

(a) limit the amount that can be paid by way of fees and expenses to the expert witness; and

(b) direct that the instructing parties pay that amount into court in such proportions as may be directed.

(5) Unless the court otherwise directs, the instructing parties are jointly and severally: liable for the payment of the expert witness's fees and expenses."

[96] However, Rule 32.10.6 is very instructive. It states:

This does not affect any decision as to the party who is ultimately to bear the costs of the single expert witness.

[97] Rule 64.3 reads:

"The court's powers to make orders about costs include power to make orders requiring any person to pay the costs of another person rising out of or related to all or any part of any proceedings".

[98] Rule 64.6 (1) reads:

"*If the court decides to make an order about the costs of any proceedings, the* ***general rule*** *is that it must order the unsuccessful party to pay the costs of the successful party".*

[99] In light of the fact that I consider the Claimant to be the successful party in the proceedings and is therefore entitled to cost.

Orders

SPECIAL DAMAGES

[100] Special Damages as agreed are awarded as follows $234,600 was agreed between Counsel.

Interest on special damages at the rate of 3 % from the date of accident to the date of Judgment.

GENERAL DAMAGES

[101] General Damages are assessed as follows:

Pain and Suffering and loss of Amenities	$ 1,600,000
Subtract	$ 850,000 (for interim payment)
	$ 970,000
Future care	$ 2,000,000
Loss of earning capacity	$2,500,000

Interest of 3 % on general damages from the date of the service of the claim form to the date of Judgment.

Cost

[102] I make the following order as it relates to cost**:**

Cost, to include the cost of Doctor Waite and Doctor Stern for their attendance at the trial awarded to the Claimant to be agreed or taxed.