



[2012] JMSC Civ 102

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

**CLAIM NO. 2003HCV0563**

**BETWEEN            ANN LUTAS            CLAIMANT**  
**A N D                LILIETH HANSON        1<sup>ST</sup> DEFENDANT**  
**AND                    ROHAN BAKER            2<sup>ND</sup> DEFENDANT**

**CONSOLIDATED WITH**

**CLAIM NO. CL OF 2001/L.107**

**BETWEEN            ANN LUTAS            CLAIMANT**  
**AND                    WARREN BLAKE           DEFENDANT**

Mr. Charles Campbell instructed by Campbell & Campbell for the Claimant in both Claims

Ms. Stacia Pinnock instructed by N.E.M. Insurance Co. (Legal Department) for the Defendants in Claim No. 2003HCV0563

Mr. Maurice Frankson instructed by Gaynair & Fraser for the Defendant in Claim No. CL OF 2001/L.107

March 31 and April 1, 2011 and July 23, 2012

**Assessment of Damages – Whiplash Injury – Apportionment of damages between defendants in separate claims, second accident having occurred when injury from first accident still subsisting – Impact of third accident on assessment of damages involving only defendants in the first and second claims**

**FRASER J**

**TRIPLE TROUBLE**

[1] Ann Lutas the claimant in these consolidated matters has suffered the misfortune of being involved in three motor vehicle accidents between

1997 and 2001. The claims being assessed are in relation to the two accidents in 1997. The court will have to determine, as far as possible, to what extent each accident has contributed to the injuries suffered by the claimant. The damages the defendants in the respective claims should pay have to be based on the deleterious effects each accident is determined to have had on the claimant. In that computation the court will seek to ensure that responsibility for any injury or exacerbation of injury occasioned by the third accident, is not attributed to the defendants.

- [2] In claim 2003HCV0563, pursuant to a court order, the claim was served by publication in the Gleaner newspaper and the time for acknowledgement of service expired on 11<sup>th</sup> October 2003. No Acknowledgment of Service having been entered and no Defence having been filed, judgment in default was entered against the defendants on January 20, 2004. That judgment is entered at binder number 733 folio 386.
- [3] In claim CL 2001/L107 the defendant entered appearance to the Writ of Summons dated the 18<sup>th</sup> December 2001 through his then Attorneys-at-law Rowe, McDonald and Co., on the 3<sup>rd</sup> January 2002. After a trial, judgment was entered for the claimant, (then referred to as the plaintiff), on 8<sup>th</sup> October 2007 with general damages to be subsequently assessed.

### ***The First Accident***

- [4] In her witness statement dated and filed April 9, 2010 received in evidence as part of her evidence in chief, the claimant stated that on the 17<sup>th</sup> April 1997 at about 7:00 p.m. she was driving her automatic Suzuki motor car registered 3767 BB on the left side of the road along the Causeway main road heading towards Portmore. Whilst so proceeding a Toyota motor car registered 2688 BK, and which she subsequently learned was being driven by Rohan Baker, the second defendant in the first listed claim, was travelling behind her. The car being driven by the second defendant was

owned by the first defendant Lilieth Hanson. The second defendant attempted to overtake the claimant but there was oncoming traffic and he swerved his vehicle back to the left which caused it to collide in the rear of the claimant's car.

- [5] The claimant's evidence is that there was a heavy impact which jolted her car causing her to be thrown forward from her driver's seat. On exiting her vehicle the claimant observed damage to the trunk, rear fender, rear bumper and rear lamp units. After exchanging particulars with the second defendant, about half an hour after the accident the claimant drove home. Approximately one hour after she arrived home she started feeling pain and stiffness in her neck and shoulders. By the following morning the stiffness intensified and affected both her neck and back which were tender with restricted movement. Later that same day, the 18th April 1997, she sought treatment from Dr. Trevor Ferguson at the Universal Care Medical Centre in Portmore. She was prescribed analgesics, painkillers and a cervical collar, which she purchased and wore as instructed.
- [6] On 29th April 1997 the claimant returned to the Universal Care Medical Centre where she was seen by Dr. Orville Morgan. He examined her neck, shoulder blades and lumbar region which were tender and painful.

### ***The Second Accident***

- [7] In her witness statement filed the 15<sup>th</sup> January 2007, also received in evidence as a part of the claimant's evidence in chief, she stated that on the 13th May 1997 at 5:00 p.m. she was in her said motor car which was stationary along the Half Way Tree Road in Saint Andrew at the intersection of Half Way Tree Road and Balmoral Avenue. The claimant's foot was on the brake. The claimant's car had not been fixed after the first accident. The claimant felt a hit in the back of her car. This occurred in slow moving late afternoon traffic. The impact caused her car to be pushed forward and she was jolted forward but was restrained by her seat

belt. She indicated that at this point she felt a snap in her neck and the onset of neck pain.

- [8] To avoid blocking traffic, the claimant drove into premises on Balmoral Avenue and the defendant in the second listed claim Dr. Warren Blake, followed her there in his new Rover motor car, a larger and heavier vehicle than the claimant's car, with a large front bumper made of shine metal. The claimant examined her car and did not notice any pronounced changes in the appearance of her vehicle save that the impact had detached the bumper from the clips and brackets which held it to the body of the car and consequently it was hanging loose.
- [9] She stated that at the time this second accident occurred the moderate pain in her neck and back caused by the first accident had been subsiding. She had been using prescribed Voltaren and other pain killers which had helped to reduce the pain.
- [10] After this second accident the claimant indicated the pre-existing pains from the first accident became more intense. She also noticed burning sensations in both upper and lower limbs which were not present prior to the second accident. She was seen again at Universal Care Medical Centre in Portmore and was referred to Dr. Christopher Rose Consultant Orthopaedic Surgeon for further care. The claimant's statement also records that she started physical therapy after the second accident and had increased dosages of pain killers, taking Cataflam three (3) times a day. This physical therapy provided by Mrs. Bernadette Frankson, registered physiotherapist, included heat and electrical stimulation to her neck, shoulders and back and continued over a two year period. The claimant's evidence is further that she started having three week appointments with Dr. Rose. The neck and back pains however continued and she had difficulty working for a full day as sitting in an upright position aggravated those pains. She received sick leave in November 1997 from

Dr. Rose and subsequently another period of thirty (30) days for bed rest. She also noticed that she started having difficulty and pain during personal chores such as washing her face, bathing and getting out of bed which were aggravated after the second incident.

- [11] The claimant maintained that she continued seeing Dr. Rose for over two years (2) after the incident and that by 1999 her condition appeared to have deteriorated. Physical activities such as bending, standing or sitting now easily caused pain and discomfort.

### ***The Third Accident***

- [12] The details of the third accident are revealed in the medical report of Dr Rose dated April 8, 2008. There it is recorded that on November 7, 2001 Ms. Lutas reported that *“on August 13, 2001 she was the driver of a vehicle which was involved in a head on collision with another vehicle. She reported transient loss of consciousness (seconds). On the day following the road traffic accident she experienced pains in both shoulders, neck, trapezius muscles and numbness in the upper limbs which lasted for approximately one week. There was exacerbation of lower back pains with radicular symptoms into the right lower limb. This was accompanied by a burning sensation in the right leg and foot. She sought medical attention from a general practitioner who prescribed Beserol, Voltaren and Voltaren Emulgel. She was given five days sick leave.”*

### ***The Challenge to the Claimant’s evidence***

- [13] The claimant was not cross-examined by Ms. Pinnock counsel for NEM in respect of the first listed claim. When cross-examined by Mr. Frankson counsel for the defendant in the second listed claim, she indicated that in the first accident the car that hit hers was speeding and the impact of the first accident was greater than that of the second. She agreed that she

made no claim against Dr. Blake concerning damage to her car as it had already been damaged and that she was not aware of any damage caused to Dr. Blake's bigger vehicle. She also testified that prior to the second accident the pain became unbearable, but that it was after the second accident that both Doctors Ferguson and Morgan recommended physiotherapy. She stated that the second accident aggravated the injury caused by the first accident and so she sought physiotherapy after the second accident. She however only started physical therapy later within the same year after she went to Dr. Rose. She admitted that she had not been consistent in going to physical therapy as she could not afford physiotherapy three times a week. She said she was directed to lie down at work and to do the McKenzie home treatment which involved hot and cold applications. She also agreed that nowhere in the reports furnished by Doctors Morgan and Ferguson did they state that they treated her for any injury sustained after the 13<sup>th</sup> May 1997, the date of the second accident.

### ***The Evidence of the Defendants***

[14] Given that a default judgment was obtained against the defendants Hanson and Blake in the first listed claim, no evidence could be called on their behalf. However based on an agreement between counsel for the claimant and counsel for the defendants Hanson and Blake, submissions on the quantum of damages were received on their behalf. In respect of the second listed claim the statement of Dr. Blake was received as his evidence in chief. In his *viva voce* evidence, commenting on paragraph 14 of the claimant's witness statement filed 15<sup>th</sup> January 2007 which detailed damage to the bumper of her car, Dr. Blake testified that at most the impact with the claimant's vehicle would have been very slight, as there was not even a scratch to his vehicle. He was not cross-examined.

## ***The Exhibits***

[15] In respect of the first listed claim (2003HCV0563) the following exhibits were received in evidence:

- (a) **Exhibit 1** (copy receipt dated 07.08.1997 for accident report); **Exhibit 2** (copy receipt dated 18.04.1997 for costs of medical treatment from Universal Care Centre); **Exhibit 3** (copy receipt dated 02.05.1997 for costs of x-ray);
- (b) **Exhibit 4** (Medical Report of Dr. Trevor Ferguson dated January 10, 2007);
- (c) **Exhibit 5** (Medical Report of Dr. Orville Morgan dated January 4, 2007).

[16] The following exhibits were received in evidence in respect of the second listed claim (CL OF 2001/L.107):

- (a) **Exhibit 1** (Receipt in the sum of \$15,000.00 dated 16.04.2008 from Dr. Rose for medical report);
- (b) **Exhibit 2** (Paid invoice in the sum of \$60,000.00 dated 17 January 2008 from Medical MRI Services Ltd);
- (c) **Exhibit 3** (Medical Report from Dr. Rose dated 3 November 1999);
- (d) **Exhibit 4** (Medical Report from Dr. Rose dated April 8, 2008).

## **THE SPECIAL DAMAGES IN CLAIM 2003HCV0563**

[17] The copy receipts for the cost of the accident report, the costs of medical treatment from Universal Health Care Centre and the costs of the X-ray together received in evidence as exhibit 1 in this claim were properly received in evidence, the court having accepted the evidence of the claimant that the originals were misplaced in the process of the claimant's

home relocation. Based on the medical report of Dr. Morgan received in evidence as exhibit 5 in this claim and the evidence of the claimant, the court accepts that a cervical collar was prescribed by Dr. Morgan and purchased by the claimant, even though the claimant was not able to produce the original or a copy of that receipt. The court will therefore award the claimant the special damages of \$3,180.00 claimed.

#### **THE SPECIAL DAMAGES IN CLAIM CL 2001/L.107**

[18] Special Damages in respect of the cost of Dr Rose's medical report, (*\$15,000.00 - exhibit 1 in this claim, date of receipt 16.04.08*), and the cost of the MRI of the claimant's lumbar spine, (*\$45,000.00 – exhibit 2 in this claim, date of invoice 17.01.08*), have been agreed by counsel with interest to run from the dates those expenses were incurred.

#### **THE GENERAL DAMAGES AND THEIR APPORTIONMENT**

[19] The submissions on general damages in each claim were necessarily interwoven, given that the claimant alleged that injuries she sustained in the first accident were exacerbated by the second. Counsel however sought to highlight the factors most relevant to each claim and counsel for the claimant at the end of his submissions in respect of both claims suggested a method by which the court should apportion general damages between the defendants. He submitted the method proposed would ensure that justice was done both between the defendants in each claim as well as between the claimant and the defendants in respect of both claims.

#### ***The Submissions of Counsel for the Claimant in Claim No. 2003HCV0563***

[20] Counsel referred to the medical reports of Doctors Ferguson (*exhibit 4 in this claim*) and Morgan (*exhibit 5 in this claim*). He highlighted paragraphs 3 and 4 of Dr. Ferguson's report which read:



Physical examination at that time elicited pain on movement of the neck (both flexion and extension) but no muscle spasm was noted. She also had tenderness in the region of the lumbar spine. No bruises or lacerations were noted.

My initial assessment was that of muscular strain and analgesics were prescribed. I also requested plain X-rays of her neck and back to rule out bony injuries.

[21] Dr. Morgan's report at paragraphs 1 and 2 on page two reads:

I then saw Ms. Lutas on April 29, 1997. She complained of burning in her neck and shoulder blades. There was also a burning sensation felt in the lower back with numbness and cramping in the legs.

On examination, there was tenderness in the neck and shoulder blades. There was also mild discomfort in the region of the lumbar spine. Miss Lutas was placed on analgesics (Cataflam) and also prescribed Voltaren cream...Xrays were ordered.

[22] Counsel pointed out that the injuries noted by Dr Morgan were whiplash, pain in lumbar spine, cramping and numbness. He submitted that both doctors diagnosed injury but not the extent of injury which was incapable of full assessment prior to the second accident. He also noted that she was not referred to orthopaedic care until after the second accident. This unhealed whiplash injury he maintained was aggravated by the second accident and the law is that the tortfeasor had to take his victim as he finds him. He submitted that while in the first accident the speed of the defendant's vehicle was greater than the speed of the defendant's vehicle in the second accident, the size of Dr. Blake's vehicle and the fact that a) the claimant was restrained by a seatbelt in the second accident and b) her evidence that on impact her neck snapped, are also factors for consideration. Speed by itself would therefore not be conclusive.

[23] Counsel cited three cases where claimants had been injured in motor vehicle accidents in support of his submissions. Firstly he cited the unreported decision of **Stacy Linton v Shama Webley** 2007HCV02866

(20<sup>th</sup> January 2010) where the claimant suffered decreased range of motion to cervical spine; tenderness to the cervical spine; whiplash injury to the neck; and nausea. She was treated with a Cataflam injection, fitted with a cervical collar and given a prescription for Cataflam and Beserol tablets. The award of \$780,000 for pain and suffering updates to \$854,115.33 (February 2011) and to \$939,475.75 (June 2012).

[24] Counsel relied next on the unreported decision of ***Novelette Hyatt v John Lee*** 2008HCV04062 (13<sup>th</sup> July 2010) where the claimant had trauma to the right lower leg resulting in severe pain and inability to walk for two weeks. She also suffered a whiplash injury resulting in severe pain and restriction of movement. She was put on sick leave for 58 days. \$820,000 was awarded for pain and suffering which updated amounts to \$849,485.43 (February 2011) and \$934,891.50 (June 2012).

[25] Counsel finally cited the unreported judgment of ***Dalton Barrett v Poincianna Brown and Leroy Bartley*** 2003HCV1358 (3<sup>rd</sup> November 2006), and a summary of which is included in Khan Vol. 6 page 104. In ***Dalton Barrett's*** case the claimant, a truck driver, suffered tenderness to the right eye and face, left hand and lumbar spine; pain in the lower back, left shoulder and wrist; mechanical lower back pains and very mild cervical strain. Additionally he experienced difficulty driving due to pain. He was assessed by Dr. Rose as having a zero percent Permanent Partial Disability but it was noted that he would quite likely experience lumbar pain upon prolonged driving. The award of \$750,000.00 for pain and suffering and loss of amenities updated is \$1,258,030.51 (February 2011) and \$1,383,758.28 (June 2012). In commenting on ***Dalton Barrett's*** case, counsel submitted that the guidance to be obtained from percentages is often overstated and sometimes insufficient weighting is given to other issues such as subjective pain and suffering. Counsel bolstered his submission by referring to an Article on ***Whole Person Disability*** by Dr. Christopher Rose Khan Vol 4. page 227 in which the judgment of

Forte J.A. in ***Pogas Distributors Ltd et al v McKitty*** S.C.C.A. 13/94 and 16/94 (July 1995) was quoted. The learned Judge of Appeal (as he then was) said, *“The learned Trial Judge misdirected himself by looking at percentages and did not properly assess the injuries and the period of total incapacity and the permanent partial incapacity...”*

- [26] Counsel submitted that the appropriate award should not be less than the highest award in the cited cases in light of the severity of the claimant’s whiplash injury and cramping in the legs and pain in shoulders. At the prevailing Consumer Price Index (CPI) rate then available (February 2011), counsel advanced that an award of \$1.25M would be reasonable and that the range should be between \$1M to 1.25 M. This would update to a range of \$1.088M to \$1.362M (June 2012).

***The Submissions of Counsel for the Defendants in Claim No. 2003HCV0563***

- [27] Ms. Pinnock on behalf of the defendants Lilieth Hanson and Rohan Baker highlighted that when Dr. Ferguson initially saw the claimant on April 18, 1997 he only diagnosed muscular strain. When he saw her again on May 25, 1997 he noted that the X-rays he had ordered showed degenerative changes in her cervical spine and he referred her to an orthopaedic surgeon for further evaluation. Counsel submitted that the examination of May 25 that spoke to degenerative changes to the cervical spine means those changes were age related and not a result of injuries.

- [28] Counsel further noted that Dr. Morgan on examination of the claimant indicated that there was tenderness of the neck when touched. She submitted that a diagnosis of numbness and cramping should be made by a neurosurgeon and the claimant was not seen by such a specialist. She also noted that in the article by Dr. Rose referred to by counsel for the claimant there was no reference to numbness being associated with whiplash. She highlighted that when Dr. Morgan saw the claimant on April 29, 1997 all he prescribed was Cataflam and Voltaren cream. He did not

refer her to physiotherapy then. Counsel submitted that the fact that the claimant was going about her business and was driving at the time of the second accident meant that her injury was not that serious at that stage.

[29] In commenting on the **Stacy Linton** case counsel pointed out that though there is similarity between the **Stacy Linton** case and the claimant's case in respect of the whiplash injury and the tenderness to the spine, in the claimant's case there is no indication of decreased range of motion to the cervical spine as in **Stacy Linton**. That she suggested should result in a slight reduction of the **Stacy Linton** award when used as a precedent for this case to one of \$750,000. Updated to June 2012, bearing in mind that the February 2011 CPI was that available at the time of hearing, that figure is \$824,955.11.

[30] In respect of the **Novelette Hyatt** case counsel submitted it was more serious than the instant case as in addition to the whiplash injury Ms. Hyatt had suffered trauma to her right lower leg resulting in an inability to walk for two weeks. She also submitted that it appeared the whiplash injury in the instant case may not have been as severe as that of Ms. Hyatt. She suggested that would require the award in **Novelette Hyatt's** case to be discounted to \$750,000.00 when applied to the instant case. As previously indicated that sum would update to \$824,955.11 (June 2012).

[31] In her comments on the **Dalton Barrett** authority, counsel pointed out that Mr. Barrett sustained other injuries such as those to the face that are not present in the instant case. Counsel further maintained that Mr. Barrett's whiplash injury was more severe resulting in him being prescribed physical therapy and lifestyle modifications. The injury affected his job as a truck driver. In the instant case the claimant was still able to be driving. Counsel therefore submitted that there would have to be a reduction in that award before it could be applied to the instant case.

- [32] Counsel for the defendants cited three cases of her own in her bid to assist the court to arrive at the appropriate award. The first was ***Peter Marshall v Carlton Cole and Alvin Thorpe*** (17<sup>th</sup> October 2006) Khan Vol. 6 at page 109. In that case the claimant suffered moderate whiplash, a sprained, swollen and tender left wrist and left hand, as well as moderate lower back pain and spasm. The claimant was given two weeks sick leave, analgesics and Cataflam injections. He received 16 weeks medical care after which there was no residual pain or suffering. The award of \$350,000 for general damages updated is \$585,845.93 (February 2011) and \$644,395.47 (June 2012). Counsel accepted that in ***Peter Marshall's*** case there was no mention of the prescription of a cervical collar but submitted there were similarities with the prescription of Cataflam and analgesics.
- [33] Counsel then cited ***Pamela Thompson et al v Devon Barrows et al*** CL2001/T143 (22<sup>nd</sup> December 2006). Pamela Thompson suffered a mild whiplash injury to the neck and complained of pains in the neck, lower back and shoulder. Counsel submitted that Ms. Thompson's injuries were very similar to those sustained by the claimant and therefore her case would be a useful guide and should be the starting point for assessing the damages to be awarded for the injuries in the instant case. The award for general damages of \$250,000.00 (December 2006) updated is \$417,750.00 (February 2011) and \$459,500.00 (June 2012).
- [34] Counsel finally cited ***Irene Byfield v Ralph Anderson et al*** CL 1996 B093 (18<sup>th</sup> September 1997) Khan Vol. 5 page 255, in which the claimant suffered injuries to her chest, back and neck; trauma to back resulting in lumbar strain; severe back pains; abrasions to lower leg and stomach and headaches. Counsel submitted that the injuries in ***Irene Byfield's*** case were more serious and numerous and that the only injuries comparable to those in the instant case were those to the back and neck causing back pains. She submitted that the impact of the injuries in the cited case was

significant as Ms. Byfield had difficulty taking care of herself. Counsel therefore advanced that the award in ***Irene Byfield's case*** would have to be reduced before it could be used as a precedent in the instant case. The award of \$300,000.00 updated is \$1,110,791.00 (February 2011) and \$1,221,803.67 (June 2012).

- [35] Having reviewed all the authorities counsel submitted that the appropriate range for the award should be \$650,000.00 to \$750,000.00. Updated from February 2011 to June 2012 that range would be approximately \$715,000.00 to approximately \$825,000.00.

***The Submissions in Response of Counsel for the Claimant in Claim No. 2003HCV0563***

- [36] In responding to the authorities cited by counsel for the defendants, counsel for the claimant submitted that using those cases does not adequately take into account all the suffering of the claimant including the numbness in her legs. He therefore maintained that in all the circumstances, the range suggested by counsel for the defendant would not amount to a reasonable award.

***The Submissions of Counsel for the Claimant in Claim CL 2001/L.107***

- [37] In respect of the second accident counsel for the claimant sought general damages in respect of pain and suffering, loss of amenities and handicap in the labour market. The main head of damages pursued was for pain and suffering.
- [38] Counsel cited ***McGregor on Damages*** (1997) 16<sup>th</sup> edition at paragraphs 202 - 206 which deal with foreseeability of damage. One of the cases referred to therein is ***Bourhill v Young*** [1943] A.C. 92. At page 109 -110 of that case there is the oft quoted sentence, "*If the wrong is established the wrongdoer must take the victim as he finds him*". Counsel relied on this principle but noted that in this case there are two tortfeasors — the

defendants who were driving in each of the claimant's accidents in 1997. Counsel relied on the Article **Whiplash Injury** by Grantel G. Dundas Consultant Orthopaedic Surgeon in Khan Vol. 6 page 269, to support his submission that even without the prior injury the claimant could have been injured by the second accident even at slow speed. In that article under the heading "Mechanism of Injury" it reads:

The classically described situation is that of a rear-end impact of a stationary vehicle by one travelling at a relatively slow speed. Most rear-end collisions occur at about 15 – 25 kilometers per hour and this is sufficient to cause neck injury. A rear end collision of 5 miles per hour produces stresses on the spine in the order of 5G. Dropping heavily on a chair produces acceleration between 6 – 9G in horizontal and vertical pains. McConnell et al 1993 found that three out of four volunteers subjected to rear-end collisions of 7 kilometers per hour reported pain the following day. Castro et al 1999 reported pain that settled after a week following collisions between between 10 and 11 kilometers per hour. Between 24 and 50 kilometers per hour there seems to be very little increase in the additional risk of injury.

- [39] Counsel cited four cases where claimants suffered injuries in motor vehicle accidents for comparison with the instant case. In **St. Helen Gordon and others v Royland Mckenzie** CL 1997 G 025 (10<sup>th</sup> July 1998) Khan Vol. 5 page 152, the plaintiff suffered whiplash and had pain centered around her neck and shoulder. The plaintiff initially had a 50% decrease in neck and right shoulder movement which had improved by 80% when she was last seen approximately 2 ½ years after the accident. She then had mild tenderness at the base of the neck and could not lift children, turn her neck to drive in reverse, nor do a number of chores. She was assessed as having a whole person disability of 3% that was expected to improve slowly with time. The award of \$400,000.00 updated is \$1,381,848.3 (February 2011) and \$1,517,469.50 (June 2012).
- [40] In **Kathleen Earle v George Graham (Defendant) Elvin Nash (Snr & Elvin Nash (Jnr) (Third Parties)** CL 1990 E 025 Khan Vol. 4 page 173,

the claimant's vehicle was hit from behind and pushed into the car in front. She suffered the sudden onset of neck pains and headaches; marked spasms and exquisite tenderness along the paracervical and rhomboid muscles; and marked restriction in range of motion of cervical spine due to pain. She was diagnosed with severe whiplash and treated with anti-inflammatory injections, placed in a soft cervical collar and put on a programme of physical therapy. When last evaluated over 5 years after her accident she was still complaining of neck pains precipitated by sudden movement of the neck and activities such as prolonged sitting dancing or lifting children. She required analgesics on alternate days to relieve her neck pains. She still had reduces motion in the cervical spine and her permanent disability was assessed as 6% of the whole person. The award of \$800,000.00 for pain and suffering updated is \$3,190,435.46 (February 2011) and \$3,509,307.87 (June 2012).

[41] ***Christopher Russell and Shirley Russell v Patrick Martin & Sheldon Ferguson*** 2006HCV03322 (February 19, 2008) Khan Vol. 6 page 118 was a case in which the male claimant suffered pain in the neck and right wrist; tenderness of the trapezius muscle on lateral flexion and rotation of the neck; and marked tenderness of the dorsal aspect of the right wrist. He was treated with topical and oral analgesics. When he was seen by Dr. Rose consultant orthopaedic surgeon two years after the accident, he complained of difficulty sleeping due to the neck pains and having to restrict his farming work to 5 hours a day. He was assessed as having chronic cervical strain that would cause intermittent neck pains that would be aggravated by manual work. His permanent partial disability was indicated to be 5% of the whole person. General damages were awarded in the amount of \$1,655,805.17 which updated is \$2,277,243.15 (February (2011) and \$2,504,831.19 (June 2012).

[42] The final case cited by counsel for the claimant for comparison was ***Yvonne Scott v Everal o/c Everal Webley/Churches and June Patricia***



**Webley** C.L.S.310 of 1991 (9<sup>th</sup> November 1995) Khan Vol. 5 page 163  
There the plaintiff after her accident suffered from headaches, whiplash injury, neck pain radiating to upper right arm, some blunting of C5 and C6 dermatomes, marked restriction of cervical movements with spasm in the muscles around the neck, and pain at the extremes of motion. She had suffered a previous injury a year and a half before, but was asymptomatic at the time of this second accident. She had a prolonged course of physiotherapy during which there were recurrent episodes of marked improvement then relapse. When last reviewed by Dr. Dundas seven months after this second accident, she had tolerable diffuse muscular pain and her disability was then less than 10%. She had difficulty using a comb and had a weak right arm. She was referred for neurological examination due to persistent headaches which were not relieved by analgesics but by rest. These headaches caused the plaintiff to leave her job as a Financial Analyst. Her neurological examination was normal. The award of general damages of \$480,000.00 updated is \$2,314,137.34 (February 2011) and \$2,545,412 (June 2012).

- [43] Counsel then reviewed the report of Dr. Rose of November 3, 1999 to show the change in diagnoses between 1997 and 1999. Dr. Rose saw the claimant on June 7, 1997 she having been referred by Dr. Ferguson. He diagnosed her with whiplash injury and mechanical lower back pain. The treatment plan she was placed on was physical therapy, continued use of a soft cervical collar, Cataflam 50 mg three times per day and Zantac 150 mg BD. The claimant did not have an adequate programme of physical therapy and subsequently when she was seen on 23<sup>rd</sup> October 1997 she was placed on sick leave from November 3 -7, 1997. She was seen at three weekly intervals and her neck and lower back symptoms which continued to fluctuate were aggravated by prolonged sitting, bending and standing.

- [44] The claimant was next examined on 6<sup>th</sup> May 1999 when she was diagnosed with chronic whiplash injury and lumbar disc prolapse and advised to continue her back care programme. The claimant was evaluated again by Dr. Rose on 17<sup>th</sup> June, 29<sup>th</sup> July, and 4<sup>th</sup> August 1999 during which period her symptoms fluctuated and she was maintained on physical therapy and analgesics. An MRI scan of her lumbo sacral spine was recommended due to the persistence of radicular symptoms into the right lower limb but this was not done due to financial constraints.
- [45] The claimant was evaluated again on the 10<sup>th</sup> September 1999. In respect of the cervical spine it was noted that there was marked tenderness along the trapezuis and rhomboid muscles with painful restriction in range of motion of the cervical spine. Concerning the lumbar spine Dr. Rose noted lumbar disc prolapse with radicular symptoms into the right lower limb with mild disc herniation. Due to her symptoms the claimant indicated that she would need to change her job to a less strenuous one and that she had difficulty performing household chores as they exacerbated her symptoms. Her social activities had also been restricted. The claimant was assessed as having a partial percentage disability in relation to the cervical spine to be five percent of the whole person and in relation to the lumbar disc prolapsed with radicular symptoms to be fifteen percent of the whole person. Counsel for the claimant submitted that in the instant case the physical injuries were more severe than in the cited cases.
- [46] Counsel submitted that in calculating damages the pain and suffering between 1997 to 2001 clearly should be taken into consideration. Counsel also advanced that the court should take into account any improvement in the claimant's symptoms reflected in Dr. Rose's report of 2008, but not any worsening after 2001 the time of the 3<sup>rd</sup> accident, as it could not be ascertained what impact on residual disability that 3<sup>rd</sup> accident would have had.

[47] Counsel maintained that in all the circumstances the injuries sustained by the claimant are more than just a whiplash. They extend to the prolapsed or herniated lumbar disc. Counsel advanced that the question for determination relative to ascertaining the respective liabilities in damages of the defendants in each claim, is the extent to which the injuries were cumulative.

[48] Counsel cited the Court of Appeal case of ***The Attorney General v Evelyn Simpson, Joseph Thorpe, Derrick Russell and Estate Ernest Clarke*** SCCA 119/04 (June 22, 2007). In this case the plaintiff suffered two accidents on March 25, 1997. There having initially been an accident between the plaintiff's motor car and a bus, the plaintiff was then being transported to the hospital in an ambulance when that ambulance met in an accident with another motor car. A major question for determination was the apportionment of liability for the plaintiff's injuries between the defendants who were the causes of the two accidents.

[49] At page 11 Harris J.A. writing for the Court of Appeal said:

In determining whether a defendant can be said to be a part and parcel of a claimant's injuries, the question is whether he can be drawn into the net of liability. Causation is a net not a chain. I would adopt the words of ***Lord Shaw of Dunfermline in Leyland Shipping Co. Ltd. V Norwich Union Fire Insurance Society Ltd.*** [1918] AC 350, at page 369 in this regard when he said:

Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but – if this metaphysical topic has to be referred to – it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as

upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

[50] At page 15 the learned Judge of Appeal continued:

In dealing with the question of apportionment, the learned trial judge was guided by the dictum of Lord Ackner in ***Fitzgerald v Lane and Another*** supra [[1988] 3 W.L.R. 356] where at pages 361 and 362 he stated:

“Apportionment of liability in a case of contributory negligence between plaintiff and defendants must be kept separate from apportionment of contribution between the defendants *inter se*. Although the defendants are each liable to the plaintiff for the whole amount for which he has obtained judgment, the proportions in which, as between themselves, the defendants must meet the plaintiff’s claim, do not have any direct relationship to the extent to which the total damages have been reduced by the contributory negligence, although the facts of any given case may justify the proportions being the same.”

[51] In the instant case there is no question of contributory negligence of the claimant in either claim. However counsel submitted that the case provided useful guidance concerning how apportionment should be approached between the defendants *inter se*. He concluded his submissions by suggesting that the way to arrive at the apportionment between the two claims is to subtract the award from the first accident from the award that should be made for the total amount of damages suffered up to 2001 to arrive at the appropriate award for the second accident. This counsel maintained would ensure that justice is done between the defendants and between the claimant and the defendants.

### ***The Submissions of Counsel for the Defendant in Claim CL 2001/L.107***

[52] Mr. Frankson counsel for the defendant Dr. Blake, submitted that the statement of claim is incorrect as there is nothing in the medical reports

that relate the herniation or the prolapse of the claimant's lumbar disc to any of the accidents. He therefore indicated that the only real injury in the pleadings is a whiplash injury. Relying on the statement of the claimant, counsel submitted that the defendant's vehicle was going quite slowly in traffic that was ebbing and flowing. The slow speed was supported by the fact that there was no damage to the defendant's car. Counsel disputed that there was additional damage to the claimant's car and that the claimant suffered excruciating pain after the accident. Counsel pointed out that there is no record of such pain or injury or of exacerbation of existing pain arising from the accident of 13<sup>th</sup> May 1997, being reported to Dr. Ferguson or Dr. Morgan. Counsel therefore suggested that the degenerative condition in her spine – a result of aging – and not any injury was the reason for referral to Dr. Rose the orthopaedic surgeon.

[53] Counsel further submitted that the credit of the claimant was impeached as in her witness statement she indicated that after the second accident she noticed a burning sensation in both upper and lower limbs which were not present before, but these were mentioned in the report of Dr. Morgan who saw her on the 29<sup>th</sup> April 1997. I should point out here however that counsel was not strictly correct. Dr. Morgan's report did mention burning in the claimant's neck and shoulder blades and burning sensation in the lower back with numbness and cramping in the legs and Dr. Rose's report of November 1999 spoke to the claimant reporting that after the first accident she had *inter alia* a burning sensation in the right upper limb. That however is not exactly the same as a burning sensation in "both upper and lower limbs".

[54] Counsel invited the court to reject the evidence of the claimant in paragraphs 28 and 29 of her witness statement where she professed to have received physiotherapy for two years from Mrs. Bernadette Frankson registered physiotherapist. Counsel submitted that there was no independent proof of such treatment and the receipts for physiotherapy

were from an establishment called “Physical Solutions” and only referred to the period June to November 1997. Further based on her own evidence and the information contained in Dr Rose’s report of November 1999, that an adequate programme of physiotherapy had not been pursued due to the claimant’s impecuniosity, it was manifest that she did not undergo two years of physiotherapy.

[55] Counsel also submitted that the claimant exaggerated the leave she was placed on as while she spoke of thirty days, Dr. Rose in his November 1999 report only mentioned placing her on leave for four days. Counsel also highlighted that the claimant in her statement of January 2007 stated that she still then experienced pain and discomfort. He invited the court to note that when giving her evidence the claimant did not appear to be in any discomfort whatsoever. Counsel submitted that what the claimant was trying to do in her evidence was to unfairly heap the blame for most of her conditions on this defendant.

[56] Counsel pointed out that some of the findings of Dr. Rose such as syndesmophytes related to the aging process rather than injuries. There was also nothing to connect the lumbar disc prolapse with either accident. The only relevant diagnoses counsel indicated were that of whiplash injury and mechanical lower back pain with the appropriate treatment plan outlined

[57] Counsel also submitted that the failure of the claimant to complete physiotherapy and to obtain an MRI scan due to impecuniosity should not be laid at the feet of the defendant.

[58] Counsel pointed out that there was no evidence that the claimant had to change her job as she indicated she needed to in the report of Dr. Rose. Also it was noted that counsel for the claimant did not pursue loss of earnings or income, and there was no proof of any difficulties in relation to

handling household chores and Dr. Rose found her neurovascular status to be intact.

[59] Counsel then referred to the second medical report of Dr. Rose of April 8, 2008. Dr. Rose saw the claimant on November 7, 2001 after she had been in a head on collision on August 13, 2001. The Claimant reported to Dr. Rose that after this accident she suffered transient loss of consciousness(seconds) and the following day pains in both shoulders, neck, trapezius muscles and numbness in the upper limbs lasting for approximately one week. There was exacerbation of lower back pains with radicular symptoms into the right lower limb, accompanied by a burning sensation in the right leg and foot. She was diagnosed with exacerbation of whiplash injury and lower back pains with radicular symptoms into the lower limbs. Treatment recommended was a continuation of Mckenzie programme of exercises and lifestyle modifications. She required analgesics one per week.

[60] The claimant did an MRI on December 13, 2007 which revealed a normal study. When she was re-evaluated by Dr. Rose on January 17, 2008 she was diagnosed with chronic whiplash injury and chronic mechanical lower back pains. Her cervical spine impairment was 3% of the whole person and the lumbar sacral spine impairment was 3% yielding a combined whole person impairment of 6%.

[61] It was pointed out by counsel that while the defendant would have had no contribution to any injury that took place in 2001 it was noteworthy that the impairment rating 12 years after the second accident and after a third accident had significantly improved.

[62] Counsel cited three cases where injuries resulted from motor vehicle accidents for comparison of injuries with the instant case. In **Anthony Gordon v Chris Meikle and Esrick Nathan** C.L. 1997 G 047 (7<sup>th</sup> July 1998) Khan Vol. 5 page 142, the plaintiff suffered pains in the lower back,

left knee and left side of chest, multiple bruises to right hand and left calf, and tenderness of left hip on movement. He was diagnosed with cervical strain, contusion to the left knee and lumbo sacral strain. His permanent partial disability was assessed at 5% of the whole person. General damages of \$220,000.00 were awarded which updated is \$760,016.53 (February 2011) and \$835,972.71 (June 2012).

[63] In ***Earl Lawrence v Dennis Warmington*** C.L.1998 L 138 (12<sup>th</sup> April 2000) Khan Vol. 5 page 144 the plaintiff suffered severe tenderness in back of neck and head, laceration on back of head, laceration on both hands with difficulties in lifting weight, laceration on both feet from upper part of leg down to ankles with difficulties in walking, marked tenderness in back of neck with movement in all directions and was diagnosed as having whiplash and he use of a collar recommended. He was seen and treated over a period of five months after which he was assessed as having moderate whiplash with a prognosis that he would continue to have severe pains for nine weeks resulting in total disability for that period after which he would have pains of diminishing severity for a further period of seven months resulting in partial disability followed by intermittent pain at least a further five months. He was awarded \$450,000.00 for general damages which updated is \$1,395,543.17 (February 2011) and \$1,536,789.29 (June 2012).

[64] Lastly in ***Stacy Ann Mitchell v Carlton Davis et al*** C.L. 1998 M 315 (10<sup>th</sup> May 2000) Khan Vol. 5 page 146, the plaintiff suffered severe tenderness in back of head and neck; laceration to back of head; marked tenderness and stiffness of lower spine; continuous pains - back of neck and across waist and swollen and painful left arm with difficulties in lifting weight. Her injuries were assessed as moderate whiplash with the prognosis that severe pains would continue for nine weeks with resultant total disability for that period, after which pains would diminish in severity with accompanying partial disability for five months, followed by intermittent



pains for at least a further four months. The award of \$550,000.00 updated is \$1,700,370.02 (February 2011) and \$1,870,305.27 (June 2012).

[65] Counsel submitted that the injuries in all three cited cases were more serious than in the instant case. He maintained that having regard to the singularity of injuries the damages awarded should be in the range of \$500,000 - \$750,000, which updated is approximately \$550,000.00 – approximately \$825,000.00 (June 2012).

[66] In respect of the method to be used for apportionment counsel referred to the ***Guides to the Evaluation of Permanent Impairment 6<sup>th</sup> Edition 2008*** published by the American Medical Association. At page 25 para. 2.5c Apportionment, the guide reads:

*Apportionment* is an allocation of causation among multiple factors that caused or significantly contributed to the injury or disease and resulting impairment. Apportionment requires a determination of percentage of impairment attributable to preexisting as compared with resulting conditions and directly contributing to the total impairment rating derived. In such cases the rating physician may estimate these contributions by first developing the following contingent ratings as based on earlier work.

1. A “total” impairment rating (A) (an all-inclusive current rating) is derived irrespective of pre-existing and resulting conditions.

2. A second “baseline” rating (B) is derived that accounts solely for pre-existing conditions without associated or aggravating reinjury.

3. The final rating (C) is derived in which pre-existing conditions are discounted by subtracting the second from the first rating (A-B).

[67] Counsel submitted that the accident on the 17<sup>th</sup> April was more severe and contributed more significantly to the claimant’s disability. Counsel

therefore submitted the appropriate apportionment was 80% for the first accident and 20% for the second accident.

***Further submission by Counsel for the Claimant in claim 2003HCV0563***

[68] Counsel submitted that the matter against Lutas and Hanson could have been dealt with a long time before the eventual hearing date had the decision not been taken to consolidate the hearing of the two claims. She therefore maintained that there should be some remission of interest in respect of the defendants Lutas and Hanson in the court's final order.

**ANALYSIS**

[69] I accept what is essentially the same method for calculating apportionment advanced by counsel for the claimant and counsel for the defendant Dr. Blake. I will therefore determine what the court finds to be the appropriate general damages recoverable by the claimant for the injuries, pain and suffering resulting from both accidents. Then I will subtract from that figure the sum the court finds represents the injury pain and suffering caused by the first accident. That will determine the sum that represents the injury pain and suffering attributable to the second accident whether that second accident caused different injuries or only exacerbated the injuries occasioned by the first accident. Given that, as the ***Leyland Shipping Co. Ltd*** case highlights, where there is more than one impacting factor causation is more appropriately likened to a net rather than a chain, I find that ultimately, the most useful way to assess the contribution of each accident to the claimant's overall injuries, is by way of percentages.

[70] The first question that has to be answered therefore is what are the verifiable medical complaints that are the result of the claimant having suffered injury in the two accidents of 1997? In 1997 the claimant was diagnosed with whiplash injury and mechanical lower back pain. There is evidence that apart from the lower back pain her symptoms included: pain

on movement of the neck, burning in her neck and shoulder blades, a burning sensation in her lower back with numbness and cramping in the legs and weakness in both lower limbs and right upper limbs.

[71] In 1999 the claimant was diagnosed with chronic whiplash injury and lumbar disc prolapse with radicular symptoms into the right lower limb and mild cervical disc herniation. Her symptoms in respect of the cervical spine were mainly neck pain that radiated into the right upper limb and along the dorsal spine into the lumbar spine, occipital headaches and occasional weakness in the right hand as well as numbness in the right upper limb. In respect of the lumbar spine she had intermittent lower back pain, numbness in the right lower limb and a feeling of weakness in the lower limbs. She was assessed as having partial percentage disability of 5% of the whole person in relation to the cervical spine and with respect to the lumbar disc prolapse with radicular symptoms, the percentage partial disability was assessed at 15%.

[72] It is important to note that the diagnosis of "lumbar disc prolapse with radicular symptoms" was not made until May 1999 two years after the second accident. This is significant especially as she had done X-rays on May 22, 1997, after the second accident, and no such condition was revealed. Therefore on the evidence, the lumbar disc prolapse is not attributable to the accidents in 1997 and the pain and suffering as a result of that condition cannot be laid at the feet of the defendants in either claim.

[73] When the claimant was last seen by Dr. Rose September 10, 1999, she was still suffering from the by then chronic whiplash injury which Dr. Rose had diagnosed on May 6, 1999. It is clear that she should be awarded damages for pain and suffering up to September 10, 1999. It is also clear that due to the intervention of a third accident, the impact of which cannot properly be assessed on the evidence, the court should not award her any

damages for pain and suffering after the date of that accident August 13, 2001. It is however less clear what the position should be between September 10, 1999 and August 13, 2001. When the claimant was seen by Dr. Rose on November 7, 2001 after the 3<sup>rd</sup> accident, he diagnosed exacerbation of whiplash injury and lower back pains with radicular symptoms into the lower limbs. That diagnosis would indicate that the whiplash injury which was diagnosed as chronic in May 1999 and for which Dr. Rose had last seen the claimant 10<sup>th</sup> September 1999 was still extant at the time of the third accident. On the basis of that evidence the court will award the claimant damages for pain and suffering attributable to the accidents of 1997 up to the time of the accident on August 13, 2001.

[74] The next question that should be answered is the apportionment of responsibility between the defendants in each claim, it having been ascertained for what global injuries and pain and suffering flowing therefrom the claimant should recover. On the evidence it is manifest that the impact of the first accident was a lot more severe. The second defendant in the first listed claim, who was driving at the time of the first accident, was speeding trying to overtake when he hit into the back of the claimant's car. This is in contrast to the second accident where the accident occurred in slow moving afternoon traffic with the impact failing to cause any damage to the defendant Dr. Blake's car. Even though the claimant's evidence is that there was some damage done to the mechanism that attached her bumper to her car, that damage was insufficient to cause her to make a claim against Dr. Blake in respect of it.

[75] On the medical evidence it is also clear that the claimant manifested most of the symptoms emanating from her injuries prior to the second accident, with the possible exception of the "burning sensation in both lower and upper limbs". Taking into account that evidence as well as the article on **Whiplash Injury** by Dr. Dundas earlier referred to, which under the heading "Mechanism of Injury" notes that whiplash injury may result even

at relatively slow speed, the court however finds that there was some exacerbation of existing injuries by the second accident. I find that the appropriate division of percentage responsibility for the claimant's total recoverable damages is 80% for the first accident and 20% in respect of the second accident.

[76] The court will not fault the claimant for not having completed all the physiotherapy recommended or for not having done an earlier MRI scan due to her impecuniosity. It cannot be said that the claimant acted unreasonably given her financial constraints and therefore the court does not find that the claimant committed a breach of her duty to mitigate her damage (See *Alcoa Minerals of Jamaica Inc v Broderick* (2000) 56 WIR 433).

[77] A number of cases have been cited to assist the court in arriving at the appropriate award. To aid in analysis in relation to the instant case, I have divided the cases into those I consider less serious on the one hand and those I consider more serious on the other hand. The details of the cases cited have been outlined earlier in the judgment. At this point I will only briefly refer to some aspects of those cases. In arriving at my conclusions, I have however, taken into account all the information they contain.

[78] Those I consider less serious are *Stacy Linton* (whiplash injury to neck, decreased range of motion to and tenderness of cervical spine); *Novelette Hyatt* (leg injury and whiplash injury causing severe pain); *Peter Marshall* (moderate whiplash, sprained swollen and tender left wrist and left hand, as well as moderate lower back pain and spasm); *Pamela Thompson* (mild whiplash injury to the neck and pains in the neck, lower back and shoulder); and *Anthony Gordon* (cervical strain, contusion to the left knee and lumbo sacral strain. Permanent partial disability was assessed at 5% of the whole person). In none of those cases did the claimant require as much medical treatment nor suffer as much pain,

discomfort and impact on lifestyle for as long as in the instant case (*up to August 13, 2001 the date of the third accident*).

[79] Those I consider more serious are:

- (a) **Dalton Barrett** (whiplash injury and injuries to right eye and face, and left hand. The claimant, a truck driver, had difficulty driving);
- (b) **Irene Byfield** (injuries to chest, back and neck; trauma to back resulting in lumbar strain; severe back pains; abrasions to lower leg and stomach and headaches. Ms. Byfield had difficulty taking care of herself);
- (c) **St. Helen Gordon** (whiplash injury causing 50% decrease in neck and right shoulder movement which had improved by 80% approximately 2 ½ years after the accident. Affected ability to lift children, turn neck to drive in reverse and do a number of chores. 3% whole person disability expected to improve slowly);
- (d) **Kathleen Earle** (severe whiplash, placed in a soft cervical collar and put on a programme of physical therapy. 5 years after accident still had neck pains precipitated by sudden movement of the neck and activities such as prolonged sitting, dancing or lifting children. 6% PPD);
- (e) **Christopher Russell** (whiplash injury, two years after the accident he had difficulty sleeping due to the neck pains and had to restrict his farming work to 5 hours a day. He had chronic cervical strain causing intermittent neck pains aggravated by manual work);
- (f) **Yvonne Scott** (headaches, whiplash injury, neck pain radiating to upper right arm, marked restriction of cervical movements with muscle spasms in the muscles. Difficulty using a comb and weak

right arm. Headaches caused the plaintiff to leave her job as a Financial Analyst);

(g) **Earl Lawrence** (severe tenderness in back of neck and head, laceration on back of head, laceration on both hands with difficulties in lifting weight, laceration on both feet from upper part of leg down to ankles with difficulties in walking, marked tenderness in back of neck with movement in all directions and was diagnosed as having whiplash and the use of a collar recommended); and

(h) **Stacy Ann Mitchell** (laceration to back of head; marked tenderness and stiffness of lower spine; continuous pains- back of neck and across waist and swollen and painful left arm with difficulties in lifting weight; moderate whiplash).

[80] In the cases that fall in the category of more serious the claimants in those cases either had more injuries and/or the whiplash injury and the pain and suffering associated therewith, was more severe and persistent than in the instant case.

## **DISPOSITION**

[81] Having reviewed and compared the authorities cited I find that the **Stacy Linton** case has provided the most assistance, though I have noted it is less serious than the instant case. Bearing in mind all the evidence, submissions and cases, as well as the date the judgment is being delivered, I find that the appropriate global award for pain and suffering is \$1,000,000.00 with the defendants in claim 2003HCV0563 being liable for 80% of that sum and the defendant in claim CL OF 2001/L.107 being liable for 20% of that sum.

[82] Counsel for the defendants Hanson and Baker in the first listed claim requested that there be some remission of interest in that matter, given that the hearing was delayed by the decision to await the outcome as to

liability in the other claim. The court is not persuaded by that submission. The circumstances of these two consolidated claims are such that the most appropriate way for justice to be done between the claimant and each defendant and between the defendants in each claim was for the assessment of damages in respect of each claim to be heard together. There was no evidence adduced nor submissions advanced that suggested the claimant or the defendant Dr. Blake were dilatory in the hearing of their claim. Further the defendants Lutas and Hanson or their insurance company N.E.M. Insurance Co. Ltd (now JN General Insurance), that will pay damages on their behalf, have had up to this point and will have until the damages are paid, the use and benefit of the sums due to the claimant, in respect of special damages from the date the expenditure occurred and in respect of general damages from the date the Claim Form was served. The defendants and their insurers would not therefore have been unduly prejudiced by the delay. On the contrary, it is the claimant who would be prejudiced if the court were to accede to counsel's submission. Accordingly, the court will apply the usual principles in the award of interest.

## **ORDER**

### **[83] In Claim 2003HCV0563:**

- (a) **Special Damages** awarded in the sum of \$3,180.00 with interest thereon at the rate of 6% from the 17<sup>th</sup> day of April 1997 to the 21<sup>st</sup> day of June 2006 and the rate of 3% from the 22<sup>nd</sup> day of June 2006 to the 23<sup>rd</sup> day of July 2012;
- (b) **General Damages** for pain and suffering awarded in the sum of \$800,000.00 with interest thereon at the rate of 6% from the 11<sup>th</sup> day of October 2003 to the 21<sup>st</sup> day of June 2006 and the rate of 3% from the 22<sup>nd</sup> day of June 2006 to the 23<sup>rd</sup> day of July 2012;



(c) **Costs** to the claimant to be agreed or taxed.

[84] **In Claim CL OF 2001/L.107:**

(a) **Special Damages** awarded in the sum of \$60,000.00 with interest thereon at the rate of 3% from the 16<sup>th</sup> day of April 2008 to the 23<sup>rd</sup> day of July 2012;

(b) **General Damages** for pain and suffering awarded in the sum of \$200,000.00 with interest thereon at the rate of 6% from the 18<sup>th</sup> day of December 2001 to the 21<sup>st</sup> day of June 2006 and the rate of 3% from the 22<sup>nd</sup> day of June 2006 to the 23<sup>rd</sup> day of July 2012;

(c) **Costs** to the claimant to be agreed or taxed.