[**2017**] **JMSC Civ.76**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. CL 2002/E-037

BETWEEN	**JANET EDWARDS**	**CLAIMANT**
AND	**JAMAICA BEVERAGES LIMITED**	**DEFENDANT**

Mr. Maurice Manning and Ms Arlene Williams instructed by Nunes, Scholefield, DeLeon and Company for the Claimant.

Mr. Alexander Williams for the Defendant.

Assessment of Damages – Whether Claimant had duty to mitigate loss – principles – general damages – pain and suffering and loss of amenities – future medical care – Special damages – Claim for extra help – principles – evidence – Civil Proceedings – Evidence Act

Heard on: January 8th, 2016, July 7th, 2016, May 10th and May 22nd, 2017

CORAM: MORRISON, J

[1] On the 27th day of April 2000 the Claimant, at bar, suffered a single gunshot injury to her neck and has, as a result, been rendered a tetraplegic. It is perhaps a testament to the human spirit for survival and, more particularly, to the tenacity and the imperious immediacy of her holistic interests, why she is alive today. For had she accepted the doleful and stolid prognostication of one of the hospitals earliest care responders and, had she remained in this jurisdiction, no medical treatment, even if forthcoming, would have availed her much, according to the care responder's judgment.

[2] I will now allow the Claimant to give the backdrop to her mental anguish and the ominous threat of physical diminishment to her person. According to paragraph 27, and onwards, of her witness statement, she says that, "I was admitted to the

hospital [Cornwall Regional], a drip was set up and a collar was put around my neck, I was lying on my back on a hospital bed and could not feel my body or move at all... All I could feel was a numbing sensation from my chest downwards and pins and needles along my hands and legs... Nobody, at the hospital explained to me what was happening to me and I had not spoken to any of my family members... I was alone and frightened. I just kept thinking that I was 31 years old and I was unable to move my body. At some time in the early hours of the next morning a man came to my bed and introduced himself as Dr. Lindo... He explained that there are two cells in my body that cannot grow back; the brain cells and the spinal cord. He told me that the bullet went through my spinal cord and cut it and I should die within two days or be in this way for the rest of my life. Dr. Lindo spoke to me in a very harsh and unfeeling tone... He gave me no hope. I know that my hope did not come from him but God and I chose to fight for my life. The next day a doctor that I had not seen before came to my bed and introduced himself as Dr Campbell. After explaining to him how I was feeling he said he was going to give to me an injection. As he was about to give me the injection Dr. Lindo approached and told him that to give me the injection was a waste of medication. After what Dr. Lindo said Dr. Campbell did not give me the injection and I know for sure that I was being left to die... I heard Dr. Lindo say repeatedly that preparations were to be made for my funeral.

The nurses tried to be sympathetic to me but no one was giving me treatment or medication. There were no members of my immediate family living in Jamaica and I felt so alone and confused as to what was going to happen to me. I was very depressed." She continued her examination-in-chief: "People from the Defendant company, came to visit me. I remember Mr. Herman Lee, Mr. Wong and another Mr. Lee from head office visited me. Mr. Herman Lee was a shareholder in the Defendant, company and he told me not to worry and assured me that the Defendant would take care of me. I told Mr. Lee that I wanted to go to the USA to be with my family. Mr. Lee told me that the company would do whatever I wanted." Significantly, the Claimant, at paragraph 46 of her witness statement, made the following statement…"I spent ten days in the neuroscience

Intensive Care Unit on west wing 8 at Jackson Memorial Hospital. On May 3, 2000 I underwent surgery to remove the bullet from my arm."

In the result the Claimant developed bed sores and the nurses and aides took care of her alongside the help she received from her mother and her sister. All this personal care, she lamented, took place through the auspices of "a revolving set of people", a feature of which was having a stranger washing her body and private areas. She felt degraded. She was subsequently transferred to the Jackson Memorial Hospital Rehabilitation Unit. From there she was again transferred to the Kessler Institute for Rehabilitation in New Jersey. There, she developed further complications and was taken to St. Barnabas Medical Center and was later re-transferred to the Kessler Institute. The expenses generated by this itinerary and the overwhelming necessity for personal care mounted and her subsequent release from Kessler to a more family-oriented setting did not abate her circumstances. She used a lot of equipment in her daily ablutions and grooming routines. The expenses are itemized at paragraph 97 of her witness statement. She also itemized her injuries and conditions, transportation expenses, medical expenses, medication expenses and medical equipment expenses. Owing to her mother's diminished circumstances, it is now projected that a private caregiver – (Care Minders Home Car) - will now have to substitute for her mother's pending withdrawal. Finally, she bemoans the loss of her significant social amenities.

THE SUBMISSIONS

[3] The parties respective counsel are antipodal in their submissions. Mr. Williams, for the Defendant, has argued that the Claimant is obliged to mitigate her loss and that she may not appropriately claim damages in respect of any loss or expense that would have been avoidable by reasonable steps. Further, in respect of actual expenses, be that is not enough for the Claimant to prove that an actual expense was incurred but that the Claimant must establish that the expense was reasonable. The Defendant, he submits, is not called upon to pay for actual expenditure, but to pay for any actual expenditure that is reasonable.

[4] For the above propositions in law the Defendant placed reliance on **Gilbert Kodilinye's Commonwealth Caribbean Tort Law,** 5th edition, p 413; **Johnson v Browne** [1972] 19 WLR 382; **Mitcham Black v The Attorney General of St. Lucia,** Claim No. HCV 2001/0728 (unreported Cari Law, LC 1004 HC 18; and, **Michael Baugh v Juliet Ostemeyer**, et al [2014] JMSC 4.

[5] The Claimant in resisting the arguments concerning mitigation of loss has recruited the authorities of **Sotiros Shipping Inc. V Sameiet Solholt**, [1983], Lloyd's Rep. 608; **Lee James Leonard Samuels v Michael Benning** [2002] EWCA Civ. 858; **Banco Portugal v Waterlow & Sons Limited** [1932] AC 452; **Geest Plc v Lansiquout** (St. Lucia) [2002] UKPC 48; and, **Gilbert Kodilinye's Commonwealth Caribbean Tort Law**, 5th edition.

THE LAW

[6] The law on the matter as to what a claimant may recover is well stated in **Sotiros Shipping Inc. v Sameiet Solholt**, supra. Stated in the negative a claimant may not recover losses which he or she should reasonably have avoided. Stated in the positive, I repeat what I said in the unreported case of **Michael Baugh v Juliet Ostemeyer** et al, supra: "The governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do, as if his rights had been observed. Its object is to put the claimant in the position he would have been in if the tort had not been committed. However, the principles of compensation, is qualified by a number of doctrines which operate to limit the amount payable."

[7] Then as now, I relied on Cockburn's, J instructions to a jury in the case of **Phillips v London and Southwestern Co.,** [1879] 4 QB] 406: "what expenses recoverable are... the expenses incidental to attempts to effect a cure, or so to lessen the amount of the injury". As noted earlier the qualification is that the claimant must establish that the expense was reasonable. In the **Sotiros Shipping Inc case** Sir John Donaldson said that, "A plaintiff is under no duty to mitigate his loss despite the habitual use by lawyers of the phrase 'duty to

mitigate' ... He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all the losses suffered by the plaintiff in consequence of him so acting."

[8] In **Lee James Samuel v Michael Benning**, supra, speaking in the English Court of Appeal, Lord Justice Laws articulated the law in this fashion: "... [T]he onus of proving that a claimant failed to mitigate his damage lies on the negligent defendant to show that the claimant ought, on the facts, reasonably to have pursued some course of action which he did not in order to mitigate his loss." In **Smith v Graham**, supra, our own Langrin, J (as he then was,) stated that a person who has been injured by the act of another party must take reasonable steps to mitigate his loss and cannot recover for losses which he could have avoided but has failed through unreasonable action or action to avoid."

[9] Let me now add the voice of Lord Macmillan from the persuasive authority of the House of Lords and Privy Council in **Banco De Portugal and Waterlow and Sons Limited** supra**:** "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

[10] In the **Lee Samuels v Michael Benning**, case supra, Laws LJ said that the question of mitigation of damage is a question of fact and not of law. Accordingly, an injured claimant does not have to take the most efficacious course in order to mitigate his loss. In Laws LJ view, the adoption of such a

posture would be artificial. If I read Laws LJ correctly, it all depends on the circumstances then facing an injured claimant. It cannot be that the facts must put the claimant into a strait-jacket or that the claimant be made to fit Procrustes' bed. The facts cannot be standardized so that "one size fits all."

[11] From that proposition, it seems to follow that the settled law throws upon a negligent defendant an onus to show that in the particular circumstances, on the facts, such a claimant ought reasonably to have pursued some course of action which he did not in order to mitigate his loss. "The defendant must put forward a concrete case to demonstrate what the claimant might reasonably have done but failed to do", pronounced Laws LJ.

[12] In **Johnson v Browne**, supra, the plaintiff suffered serious injury when a motor car vehicle in which he was a passenger was involved in a collision. On the advice of two surgeons who had seen him the plaintiff proceeded to Canada and entered a hospital there. His wife had accompanied him there. She washed and cooked for him, dressed him and accompanied him to the hospital for treatment.

[13] In the medical opinion of his doctor in Canada, had his wife not been there his admission to the hospital would have been necessary. Among other things, the question with which the High Court of Barbados had to grapple was the claimant's submission as to quantum in respect of future surgery to be performed in Canada. However, it was the opinion of Professor John Golding, Professor of Orthopaedics at the University of the West Indies, that the operation in Jamaica would cost considerably less to do than in Canada.

[14] Not unsurprisingly, the court held, inter alia, that in the absence of any reasons for holding that an operation in Jamaica would constitute inadequate treatment, any damages recovered by the plaintiff for future medical treatment must be on the basis of the cost of an operation performed in Jamaica, since he was under a duty to mitigate damages.

[15] In my view the above case is distinguishable from the case at bar. In the former, evidence was led and received about the cost of future surgery.

In the latter, there was no evidence led or received as to a studied credible informed alternative.

[16] What is required is not proof by assertion but rather, "concrete" evidence as to facts and figures having regard to the onus of proof.

[17] Let me here interpose a view of the judgment which I delivered in **Baugh v Ostemeyer et al**, supra. I am not to be taken as dissenting from the view I have expressed therein. I am to say that each case is to be determined by its own particular facts as established by the evidence.

[18] In **Geest plc v Lansiquot** (St. Lucia), supra, the issue which concerned the United Kingdom Privy Council was whether the claimant acted unreasonably in refusing surgery and had thereby failed to mitigate her loss. Reading from the head note of that case it says, "On the assessment of damages for personal injuries, the onus of proof on the issue of mitigation falls on the defendant and, if the defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff in sufficient time before the hearing to enable the plaintiff to prepare to meet it (if there are no pleadings, notice should be given by letter)."

[19] Having generalized on the purpose of pleadings which is to enable the plaintiff to direct her evidence to the real areas of dispute and avoid surprise, Lord Bingham then laid emphatic stress that, "...if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damages, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to meet it."

[20] It is luminous that where the defendant seeks to lessen the damages he is called upon to pay then an allegation of a failure by the claimant to mitigate his or her loss ought to be set out in the defence to the claim or that it be brought to the attention of the claimant by way of a notice or letter.

[21] According to the learned authors of **Bullen & Leake & Jacobs** in Precedents Of Pleadings, 14th edition, 2001, volume 2, paragraph 71 – 13, where there is no defence, notice should be given to the claimant in writing, or by letter, or otherwise. It is clear to me then that the former practice of a bare defence is no longer tenable in light of the obligation put upon a defendant to apprise the claimant and the court as to where the issues lay.

[22] As I have sought to demonstrate, the Claimant, at bar, was frightened out of her propriety while she laid supine at the Cornwall Regional Hospital. To have expected her to have put into nice scales of urgent judgment whether given the doleful prediction to fight for her life at the Cornwall Regional Hospital, or to rescue her plight by immediate flight to another jurisdiction, would be retrospective wisdom. She dared to hope and did not leave her condition in the hands of angels and ministers of grace to defend her being. She was overborne and desperate. She sought alternative medical services outside of this jurisdiction in a jurisdiction where she would also get that delicate, private and invaluable support of members of her family, all things considered. I fail to see how in the face of that compelling reality, coupled with the uncontroverted promise by her employers to support her in her medical sojourn to the United States of America that she had failed to mitigate her loss or that she had acted unreasonably in relation thereto.

[23] I find that there was failure on the part of the Defendant to point to any shortcomings on the part of the Claimant in this respect: first, that the treatment was not reasonably required by the Claimant; second, that the very treatment or its equivalent, which she eventually received overseas was being provided to her while she was at the Cornwall Regional Hospital; third, that such treatment was available locally; fourth, the costs of such treatment locally.

[24] I now turn to the case of **Mitcham Black v The Attorney General,** supra, a matter originating in the High Court of Justice, St. Lucia. It is another of the authorities cited by the Defendant for the following proposition of law. It is this: "It is trite law that the Claimant must prove his case...He has not provided any

evidence to demonstrate that the medical treatment he received in England could not be obtained locally." In the body of **Mitcham Black's** judgment there is set out the precedent for that propounded principle. Douglas, CJ in considering the case of **Johnson v Browne**, supra, in a context where a claimant sought to recover the lost earnings of his wife who had accompanied him abroad where his care was not recommended said: "In the instant case there is no evidence that the wife's trip was necessary as part of the medical care required by the plaintiff, nor that her presence hastened his recovery in any measure." From her own testimony, continues Douglas CJ, "she was in going to Canada with her husband, essentially a volunteer and although her action in so doing is understandable and indeed commendable, neither her passage money nor her loss of earnings, are recoverable by the plaintiff."

[25] Plainly, on the salient facts, Douglas CJ could not have but found that the claim for the wife's travelling expenses were irrecoverable.

There, the claimant had proceeded to Canada on the advice of two surgeons while he was a patient in Barbados. Having got married, it seems, after the unfortunate accident involving her husband, the wife said, "I went to Canada on my own decision. I thought he needed my company and he could not afford a nurse in any case up there. He was going into hospital for treatment and possibly an operation and he would have had to be admitted to hospital." In refusing the claim for the wife's travelling expenses Douglas CJ relied on the distillation of certain principles of law where a wife's ostensible presence was an incident in the plaintiff's recovery.

[26] First and by way of an adoption of the principles enunciated in **Dennis v London Passenger Transport Board** [1948] 1 ALL ER 799 the question was, whether the services were reasonably necessary as a consequence of the tort. Second, whether the expenses were reasonable in amount and would have been incurred had the friend, or wife, or other, not assisted. And third, whether the plaintiff undertook to pay the sum awarded to that other person.

[27] It is in this context that the finding of the Chief Justice was made, that is, "there is no evidence that the wife's trip was necessary as part of the medical care required by the plaintiff, nor that her presence hastened his recovery in any measure." Broadly speaking then, the question of whether or not a particular expenditure is a consequence not too remote of the injury, is, in every case, a question of fact, not of law. See: **Wilson v Mcleary & Another** (1961), 106 C.L.R 523.

[28] In the case at bar, the facts are clearly distinguishable from the **Mitcham Black's** case not only for the fact that the judgment in **Johnson's** case was evidence-based but, more particularly, there were the expert opinions and the particular circumstances surrounding the plaintiffs treatment and recovery which provided a basis or bases as to the reasonableness of the particular expenditure.

[29] I recur to my earlier observation that the proof required cannot be by way of assertion but must be guided by found facts. I cannot therefore bring to the bar of judgment the proposition of law as submitted by the Defendant that, "what those cases show is that the onus lies on the Claimant to prove that he has mitigated his loss, meaning that he must allege and prove to the court good and sufficient reasons for obtaining medical care abroad, where that is the case": See Defendant's submissions on Damages filed 5/9/2016. Rather, the principle of law is that which is contained in **Geest Plc,** supra.

GENERAL DAMAGES – QUANTUM

[30] I now turn to the question of quantum of general damages. I shall here in assessing the general damages pay particular regard to the following sub-heads of, Pain and Suffering, Loss of Future Earnings and, Future Medical Care.
I shall also be dealing with the contentious issue of the minimum wage as claimed by the Claimant's mother.

[31] I begin with the observation that the parties are in disagreement as to the applicability of certain decided cases which were cited by them as to quantum.

[32] Mr. Williams for the Defendant relied on the following:

a) **Anthony Wright v Lucient Brown,** unreported Supreme Court Judgment

b) **Lloyd Clarke v Corporal E.F. Quest, et al,** unreported Supreme Court Judgment

c) **Imogene Ananda Jackson v High View Estate et al,** unreported Supreme Court Judgment

d) **Maurice Francis v D/Cons. Owen Thomas et al,** unreported Supreme Court Judgment

e) **Jeffrey Young v Book Traders Caribbean Ltd,** unreported Supreme Court Judgment

f) **Dwight Walker v Winston South et al,** unreported Supreme Court Judgment; and

g) **Wayne Cole v Administrator General of Jamaica,** unreported Supreme Court Judgment

[33] On the part of the Claimant, the case law authorities cited are :

a) **Pogas Distributors Ltd v McKitty,** unreported Supreme Court Judgment

b) **Jeffrey Young v Book Traders Caribbean Ltd,** unreported Supreme Court Judgment

c) **Dwight Walker v Winston Smith et al,** unreported Supreme Court Judgment

d) **British Caribbean Co. Ltd v Delbert Perrier,** unreported Supreme Court Judgment

[34] It is convenient here for me to interpose the Claimant's injuries so as to give it a context. I shall here rely on the medical reports that were received into evidence. First there are four medical reports from Dr. Steven Kirshblum dated August 23, 2015, May 9, 2008, July 14, 2009 and January 19, 2011. Second, copy physician's report from the said Dr. Kirshblum dated May 18, 2000, June 9, 2000, May 2, 2001 and March 18, 2008. Third and final, a copy Discharge Summary from Kessler Institute for Rehabilitation and from West Facility dated November 8, 2000.

[35] Based on the various medical reports I now set out the nature and extent of the Claimant's injuries.

a. High level spinal cord injury;
b. Neurogenic bowel;
c. Neurogenic bladder;
d. Stage 11 pressure at the sacral area;
e. Necrotic tissue at the right heel;
f. Allergic rhinitis;
g. C5 Asia tetraplegia;
h. High fever;
i. High white blood cell count;
j. Orthostasis;
k. Neurogenic pain;
l. Potential Respiratory Insufficiency;
m. Bilateral elbow flexor;
n. Jaw pain;
o. Depression
p. Anaemia;
q. Oral thrush;
r. Vaginitis;
s. Closridum Difficile Stool Infection;
t. Treated for a number of Urinary Tract Infection;
u. C6 Motor, CS sensory ASIA tetraplegia;
v. C5 – C6 neurologically complete spinal cord injury;
w. Gait disorder;
x. Completely dependent for mobility;
y. Use of catheter;
z. Multiple surgical intervention to remove bladder stone;
aa. Gastrointestinal hemorrhage;
bb. Septicemia;
cc. Use of stool softeners and suppository with digital stimulation;

dd. Significant bilateral wrist pain and burning and shooting pain in the bilateral wrist occasionally radiating up to the forearms;

ee. Bed sores and sacral ulcers; and

ff. Impairment of Activities of Daily Living (ADL).

[36] The Claimant's medical treatment and surgical procedures include the following:

a. Foley Catheter inserted
b. Supra-pubic Catheter/Cystostomy
c. Cystoscopy and Cystolithopaxy for removal of bladder stone
d. Psychological counselling and anti-depressant therapy
e. Extensive periods of hospitalization
f. Physiotherapy; and
g. Rehabilitation.

[37] From Dr. Kirshblum's Medical Report dated May 9, 2008, he opines that:

> *"aging with a spinal cord injury does cause further complications including changing of bowel issues, increasing pain, and decreasing function secondary to overuse syndrome of the upper extremities. In addition, there are risks factors including respiratory, further skin fragility, and cardiac disorders."*

[38] The Discharge Summary, Physician Reports and Evaluation Reports from Kessler Institute for Rehabilitation set out in detail the Claimant's injuries, disabilities, treatment, medication and condition on discharge. Clearly, the Claimant requires and will continue to require assistance with eating, bathing, grooming and hygiene, dressing, toileting, tub/showers, stairs (elevation), transfers to bed, chairs and wheelchair. She will be dependent on wheelchair for mobility needs.

[39] The Claimant's testimony is that she is unable to, without assistance, either get out of bed or wiggle her fingers and toes. In April 2000 when she was shot, her body went limp. In her own words she started feeling the sensation of pins and needles immediately to her body and they were like a shooting pain. Her body started seizing up. She testified that she still gets the burning sensation or the feel of shooting pain in both her wrists which courses up and down her arms and that sensation sometimes become very intense. In April 2000 she was unable to

move her hand but she has been able to do so while she stayed in the Jackson Memorial Hospital. She did her therapy at the latter institution. She gave evidence that when she was admitted to the Cornwall Regional Hospital she had a very terrible itch to the back of her head which she was unable to scratch. After therapy at the Jackson Memorial Hospital, if she had the same itch, she would be able to self-relieve by scratching the back of her head.

[40] The Claimant is unable to control her bowel movement and she has no knowledge of being able to evacuate freely and requires the lifetime use of ducolax suppository for her bowel program every day. She is unable to urinate freely and requires the lifetime use of a catheter. Her mother has to apply use of a suppository and she has to wait for 30 to 60 minutes in order to have a bowel movement. In this, her bodily relief is not experienced all at once and, whenever this happens her mother has to come to her private emunctory aid.

[41] Further, the Claimant states in her witness statement, that she has had accidents outside of her bowel program regime. She has also been plagued with urinary tract infections with the last one occurring in or around October 2015. Whenever she gets the infection she has to go to the hospital but if she catches it before it gets severe, she would self-administer antibiotics.

[42] Furthermore, from the Claimant's evidence, she was prone to having bed sores. Her last major breakout was in the year 2000 while at the Kessler Institute. She had bed sores on her buttocks and bruises on her heels caused by her heels resting on her bed. She has to wear protective boots and when she did so for too long she had to endure the ominous prospect of developing bed sores.

[43] I am to note that the Claimant's injuries caused her significant disabilities. The injuries continue to have a lasting effect on the quality of her life. The Claimant has been unable to walk, to go anywhere, or to engage in any intimacy or sporting activities since the date of the incident and will be unable to do so for the rest of her life. In a word, the usual social amenities of which she was expectant have all been irreversibly erased. Her prospects of being married and having her

own children have been foredoomed. Her holistic integrity has been compromised.

[44] Notwithstanding, the fact that over 15 years have elapsed since that grim day of the incident, the Claimant will still need to continue to undergo procedures necessary for the preservation of her health and her condition. These include:

a. regular monthly visits to the urologist;

b. doctors' visits for the continued medical management and follow-up to minimize the known complications that come with aging with spinal cord injury;

c. cystoscopy as necessary for removal of bladder stone;

d. frequent turning of her body to prevent or minimize the risk of bed; and,

e. restraint of her wrist and feet in wrist splints and heel boots to reduce pain and/or prevent collapse of respective body parts.

PRINCIPLES OF THE LAW TO BE APPLIED

[45] **Pain and Suffering and Loss of Amenities**

In deciding what would be reasonable compensation for pain and suffering and loss of amenities, I place reliance upon the case of **Cornilliac v St. Louis (1968) 7 W.I.R 491**. In that case Wooding C.J. set out the factors which fall to be considered. They are:

a. The nature and extent of the injuries sustained;

b. The nature and gravity of the resulting disability;

c. The pain and suffering endured;

d. The loss of amenities endured; and

e. The effect on future pecuniary prospects

[46] ***In Jeffrey Young v Book Traders Caribbean Limited, Derrick Harvey and West Indies Publishing Limited***, supra, the Claimant was 25 years old at the time of the accident and was diagnosed with injury to cervical spine between the 6th and 7th cervical vertebrae. He was admitted to the Mona Rehabilitation

Centre where he was found to have complete notary and sensory loss below the 6th cervical level. He had no control of either urine or bowels – his catheter was removed and condom urinary drainage started. He also had bilateral claw hand overactive reflexes. Neurologically, he had sensory level at C5 bilaterally and motor at C5 with patches of C8. Dr. Golding F.R.C.S opined that he would remain doubly incontinent and impotent. He was diagnosed as having cervical spine injury with tetraparesis with 84% permanent disability of the whole man. In July 1997, the court awarded him $10,000,000.00 for pain and suffering which now updates to **$52,800,000.00**.

[47] **In the case of Dwight Walker v Winston Smith, Percival Francis et al** Her Ladyship N.E. McIntosh, J (as she then was) noted that **Dwight Walker** was **26 years old** at the time of the accident and that he suffered a luxation at C4/C5 of his cervical spine with a spinal cord injury and which left him tetraplegic at that point. He had an anterior dislocation of the cervical spine (C4/C5), and loss of sensation below dermatom C5 and with urinal catheter, in situ. He was diagnosed a quadriplegic, secondary to the cervical spine injury. He was assessed as having 80% permanent impairment of the whole person. In January 2003, he was awarded J$14,600,000.00 for pain and suffering and loss of amenities. Using the November 2015 CPI of 231.8, this award now updates to **J$52,122,000.00**. In the round I am prepared to award the sum of $53,000,000.00 for this head of damages.

[48] It is submitted on behalf of the Claimant that she sustained severe spinal cord injury, akin to those of **Young** and **Walker**. Both **Young and Walker** suffered cervical spine injury with tetraparesis, bladder infections and ulcers. The Claimant at bar also suffered from the self-same injuries along with urinary tract infections and ulcers. Here the current Claimant is diagnosed with tetraplegia and quadriplegia and had to undergo rehabilitation and will have to receive future care in this regard.

[49] It cannot escape notice however, that the Claimant at bar was not assessed as having a percentage whole person impairment. Be that as it may, the medical

evidence and nature of the injuries reveal with sufficient clarity and certainty the extent and severity of her injuries. Ms. Edwards is functionally in no better position than the claimants in the cited cases. She has been physically confined to the same place for years as she does not have the necessary equipment to help her to move about. She leaves the house only for medical visits.

Loss of Earnings

[50] In **Carlton Brown v Manchester Beverage Ltd**, supra, the Court of Appeal upheld an award where a multiplier of 8 was used for loss of future earnings for a 45 years old man. In **Wayne Cole v Administrator General of Jamaica**, supra, a multiplier of 6 was applied to a 48 year old man when calculating a claim for loss of future earnings.

[51] Be it recalled that in the year 2000, the Claimant being born on April 8, 1959, would have been about 31 years old.

In **TABLE B** of **KHAN'S RECENT PERSONAL INJURIES AWARDS** which deals with COMPLETE EXPECTATION OF LIFE BY SEX, 1996 – 2004 which itself is derived from **LIFE TABLES OF JAMAICA** 1879 – 2004, Statistical Institute of Jamaica (2006), a female aged 30 between 2002 through to 2004 could be expected to live to an additional 49.66 years.

[52] Our current Claimant is now 46 years old and, arithmetically speaking, she would have approximately 54.3 years minus 46 years of expectation of life. That works out to be about 8 years. Accordingly, I am prepared to accept the **BROWN** case to that of the **Cole** case in adjudging that a multiplier of 8 is more appropriate. This, I should all that more accept, as it is based on the fact that the life expectation of females versus that of males of the same age of (30) years is greater by approximately (5) years, which for a male aged 45 in 2002 through to 2004 it would be 32.58 plus years, but for a woman it would be 35.91 additional years.

[53] Accordingly, the multiplicand of $45,000 per month when computed yearly and multiplied by the multiplier of 8 years yields a grand total of $4,320,000.00

FUTURE MEDICAL CARE

[54] It is obvious that the current Claimant will require medical equipment for the rest of her expected life. According to Dr. Kirshblum, she on his recommendation will need –

a. Two wheelchairs:

   i. one powered and manual backup wheel at a cost of US$25,000.00 and this chair may need to be replaced every 5 – 7 years;

   ii. Ultra-Light weight manual back up wheelchair at a cost of $6,000.00 and this chair need to be replace every 5 – 7 years;

b. Seating for the wheelchair to include the wheel chair cushions and back supports. This will cost in the region of US$1000.00 – US$1,200.00 and would need to be replaced approximately every 2 years.

c. Portable wheel chair ramp. This items ranges in the price of US$300.00 up depending on the size needed. The item may require replacement every 10 years or as needed due to wear;

d. Special mattress with electric pump to prevent pressure ulcers. The cost of this item is estimated at US$2,000.00 and requires replacement every 3 – 5 years.

e. Advance Hoyer Portable Patient Lift Hydraulic – the price of this item starts at US$1,700.00 and requires replacement every 3 years.

f. Transfer sling – this item costs US$700.00 and requires replacement every 2 years depending.

[55] From Dr. Kirshblum's report of July 14, 2009 and January 19, 2011, the items of equipment are a medical necessity. The Doctor also stated in his reports dated May 9, 2008 and August 23, 2015 that the hospital mattress that the Claimant currently uses is ill-fitting.

[56] In **Kenroy Biggs,** supra, and **Omar Wilson**, supra both Sykes, J and D. Fraser, J agreed that in calculating the cost of future medical care, including prosthetic limbs, that the multiplier/multiplicand approach should be adopted. Both my brothers agreed that the multiplier to be adopted should be significantly higher than that used to determine future loss of earnings. In both cases the

learned judges added a factor of 8 to the multiplier used to calculate the future loss of earnings. This is because the life expectancy and medical care generally exceeds retirement age.

[57] The Claimant as noted before is 46 years old. Adopting my learned brothers' approach, an added multiplier of **8 years** is, I think, appropriate. Applying the approach adopted in those cases, the equipment, number of replacements and total cost would be calculated in the manner as has been presented by the Claimants attorneys-at-law, which I accept and reproduce:

[58] For the Power Wheel Chair, at an average usage of 6 years, the cost would be US $25,000.00. It will have to be replaced two (2) times thus yielding a total of US $50,000.00

[59] As to the Manual Wheel Chair, at an average usage of six (6) years, the cost would be US $6,000.00. It will have to be replaced two (2) times thus yielding a total of US $12,000.00.

[60] For the Seat and Back Cushion, at an average usage of two years, the cost would be US $1,200.00. It will have to be replaced six (6) times thus yielding a total of US $7,200.00.

[61] As for the Portable Ramp, the average usage is for ten (10) years at a unit cost of US $300.00 which will have to be replaced once yielding a sum of US $300.00.

[62] As for the Mattress, the average usage is four (4) years at a unit cost of US $2,000.00 and will have to be replaced every three (3) years thus yielding a total of US $6,000.00.

[63] As for the Lift, the average usage is for three (3) years at a unit cost of US $1,700.00 and will have to be replaced every four (4) years yielding a total of US $6,000.00.

[64] Lastly, for a Sling whose average use is for two (2) years at a unit cost of US $700.00 and which will have to be replaced every six (6) years thereby giving a total of US $4,200.00.

[65] All told, the grand total expressed in US $ is **86,500.00**.

Modification of Accommodation

[66] In his medical Report dated August 23, 2015, Dr. Kirshblum opined that where the Claimant now resides needs to be modified in order for her to utilize the equipment required for her daily needs and independence. In her Witness Statement at paragraphs 113 and 34, the Claimant stated that her family members sought and obtained a quotation for the said modification which was obtained from Mobility Consulting & Contracting Co. This document was tendered and received into evidence as an exhibit.

[67] Here, it is to be observed that Mobility Consulting & Contracting Co. in its quotation has provided two options for the modification. Option one involves a rear addition to the existing house at which the Claimant resides and will cost US$90,000.00

Option two (2) involves modification for egress from the house. The total estimated cost for option is US$35,200.00.

The purpose of this modification is to enable the Claimant to gain independent egress and ingress to the house which would dramatically improve the quality of her life and to allow her the relief of being less reliant on her family members in this respect.

[68] In light of Dr. Kirshblum's opinion and recommendations, the estimated cost of **US$35,200.00** is, I think, a reasonable sum for the said modification.

Cost of future Nursing Care & Home Health Aide

[69] The Claimant is paralyzed from the chest down. She is unable to care for herself. Her evidence and that of Mrs. Gloria Edwards, her primary carer, is to the effect that her mother, who is now 78 years old, is suffering from severe back

pain. The Claimant contends that her mother's attention has to be divided between her and the Claimant's father who is now physically challenged.

[70] It is the considered medical opinion of her physician, Dr. Steven Kirshblum that the Claimant requires 4-8 hours of nursing care per day along with home health aide assistance for 16 hours a day for the rest of her life. In this regard, the Claimant has received a quotation from Care Minders Home Care which was tendered into evidence as an Exhibit.

[71] The Claimant will require nursing care for an average of 6 hours per day, as well as a home health aide for 16 hours per day. Using a multiplier of (12), the estimated cost of the nursing care would be as follows:

a) For the Cost of Nursing Care it is calculated thus: 6 hours x 365 days =2190 hours per year x 12 = 26,280 hours.
The numbers of hours are to be multiplied by US $50.00 per hour thus yielding a total of $1,314,000.00.

b) For the Cost of Home Health Aide it is calculated thus: 365 days x 12 years = 4,380 days which when multiplied by US$165 per day yields a total of = US$722,700.00

Thus, the total cost for the Claimant's future Nursing Care & Home Health Aide care is **US$2,036,700.00**.

Future Medical Care: Doctors' Visits and Procedures

[72] The Claimant will require future follow up visits with her doctors. Dr. Kirshblum in his medical report dated August, 23, 2015 opined that: "She is to continue with her supra pubic catheter with routine changes, which need for bladder supplies throughout her lifetime. Given her complex history as related to her bladder, she ought to have the continued care from her urologist who is familiar with spinal cord injury, as well as yearly monitoring and surveillance due to risk of further complications as she ages." It is Dr. Kirschblum's view that, "Ms. Edwards would

benefit from continued medical management and follow-up to minimize the known complications that come with ageing with spinal cord injury."

[73] Here, I am to remark that, Mr. Williams makes the point that the cited cases of **Jeffrey Young**, **Anthony Wright, Lloyd Clarke** and **Imogene Jackson** all show injuries similar to those suffered by the Claimant and that the said injuries can be treated in Jamaica. Further, that there is no evidence that there was any medical reason for the Claimant to have sought treatment abroad.

[74] The Claimant counters that in both **Jeffrey Young** and **Dwight Walker**, motorised wheel chairs cost **US$**10,000.00 and **US$7,000.00**, respectively, though each claimant was treated locally. What the Claimant at bar has urged by way of emphasis is that the purpose of the award, following the Judgment of N. McIntosh, J (as she then was) in **Walker v Smith** and others, is to enable the Claimant to cope with her injuries.

[75] It is to be recalled that the equipment is the current case was recommended by Dr. Kirshblum whereas in **BAUGH's** case there was no such recommendation from his doctor that he should acquire the equipment to aid in his recovery and comfort. In that respect, the Claimant in the **BAUGH** case acted unilaterally.

[76] The Claimant in claiming future medical care submitted on the basis of her visits to the Doctor and Urologists. The number of occurrences per year being three (3) and 12 respectively, at US $175.00 per visit, would therefore yield a total yearly cost of US $2,625.00.

[77] This I also accept. Thus, the total estimated cost of future medical care calculated by multiplying the annual cost of future care by the appropriate multiplier of sixteen (16) comes out at **US$31, 500.00**.

Future Monthly Expenses for daily living

[78] The Claimant's evidence is that the nature of her injuries requires her to incur monthly expenses totalling US$1,835.81. These expenses are pleaded in her Amended Particulars of Claim and under the heading, Particulars of Special

Damages. Her oral evidence in respective of each item is set out in her witness statement at paragraph 57. These expenses are related to the use of her catheters and suppositories. The estimated cost for her future monthly expenses would amount to **US$264,356.64** using a multiplier of 12 for future care and a multiplicand of US$1,835.81 per month.

[79] I am prepared to allow this expense as the Claimant has provided this Court with the proper evidentiary basis in order to do so. This is, I think, a quite reasonable and necessary expense.

SPECIAL DAMAGES

[80] The Claimant has claimed special damages which are pleaded in her Amended Particulars of Claim and under the heading, Particulars of Damages. She has submitted receipts for payments made and invoices for medical services rendered to her in proof of her special damages. She has given evidence that she has not paid all her medical bills and has received many notices and letters from debt collectors regarding the outstanding sums. It is also her evidence that she is still expected to pay the outstanding debts and she still wants to honour that obligation given that without the help she received she sincerely believes she would not be alive today.

[81] The receipts and invoices in respect of expenses incurred under this head total **US$504,358.93** have been set out separately.

[82] As for her hospital expenses incurred by the Claimant then total US$446,951.61. The Claimant has provided receipts and invoices in support of same. The particular sums are arrived at as follows:

[83] First, in respect of **Jackson Memorial Hospital, Florida,** the Claimant has provided proof of payment of US$80,000.00. These documents were entered into evidence as Exhibit #3.

[84] Second, as for the **Kessler Institute for Rehabilitation** (Kessler), the Claimant has provided receipts and invoices for services rendered to her totalling US$202,579.99. These documents were entered into evidence as Exhibit #4.

[85] Third, as concerns **St. Barnabas Hospital,** the Claimant's evidence is that she spent "sometime in this institution having developed complications". The total of the receipts and/or invoices tendered into evidence as Exhibit #5 is US$132,156.80.

[86] Fourth, in respect of the **Infectious Disease Center of New Jersey,** the Claimant incurred expenses for services rendered by this institution in the sum of US$975.00. She has provided an invoice regarding same. This document was tendered into evidence as Exhibit #6.

[87] Fifth, for the **Newark Beth Israel Memorial Hospital,** the Claimant received treatment thereat on numerous occasions and she received invoices totalling US$31,239.82 but the amount pleaded in the amended Particulars of Claim is US$29,791.82. This court was asked to allow the amended Particulars of Claim to reflect the correct amount of US$31,239.82. There being no objection to this application I so allowed it. These invoices were tendered and received into evidence as Exhibit #7.

Transportation expenses

[88] The Claimant has provided receipts and invoices for transportation expenses incurred and has pleaded these items in the Amended Particulars of Claim. They total **US$12,666.50**. These documents have been tendered into evidence as follows:

a. Cost to Marlo Travel & Spirit Airline Stubs: See Exhibit 8
b. Cost of airfare to Delta Airlines: See Exhibit 9
c. Cost to National Air Ambulance: See Exhibit 10
d. Cost to Lifestar Response: See Exhibit 11
e. Cost to Emtac Corporation: See Exhibit 12

f. Cost to Essex Valley Medical Transportation Services: See Exhibit 13

g. Cost to Acute Care Medical Transports: See Exhibit 14

h. Cost to Hillside Fire Department: See Exhibit 15

Medical Expenses

[89] The Claimant pleaded the sum of US$35,127.64 for medical expenses incurred in the Amended Particulars of Claim under Particulars of Special Damages. The receipts and invoices tendered into evidence support a total of US$34,937.13. However, the sum proved by the exhibits are as follows -

a. Cost to Emergency Medical Associates: See Exhibit #16

b. Cost to Cardiovascular Care Group: See Exhibit #17

c. Cost to Monmouth Ocean Medical Services: See Exhibit #18

d. Cost to Reliable Medical Inc. : See Exhibit #19

e. Cost to Diagnostic and Clinical Cardiology: See Exhibit #20

f. Cost to Hospital Medicine Associates PC: See Exhibit #21

Cost to Non-Invasive Lab is US$650.00 and not US$1,514 as pleaded: See - Exhibit #22

g. Cost to Imaging Consultants of Essex: See Exhibit #23

h. Cost to Foot Health Center: See Exhibit #24

i. Cost to Woodland Radiology Associates: See Exhibit #25

j. Cost to EKG Interpretation Group: See Exhibit #26

k. Cost to Northfield Surgical Associates: See Exhibit #27

Cost to Northfield Imaging Center sum proved is US$650.00 and not US$1,514 as pleaded: See Exhibit #28

l. Cost to Internal Medicine Faculty PR: See Exhibit #29

m. Cost to Patricia A. Berran, DPM: See Exhibit #30

n. Cost to Millennum Anesthesia Consultants: See Exhibit #31

o. Cost to Douglas S. Green, MD: See Exhibit #32

p. Cost to Stephen Feldman, MD: See Exhibit #33

q. Cost to Trinitas Medical Center: See Exhibit #34

r. Cost to New Jersey Anaesthesia: See Exhibit #35

Proved cost to Martin Greenberg MD US$200.00: See Exhibit #36

s. Proved cost to Urology Group of New Jersey US$1637.00: See Exhibit #37

t. Apogee Medical Group: See Exhibit #38

u. Cost to North Jersey Gastro Associates: See Exhibit #39

v. Cost to Inn Civic Medical Center: See Exhibit #40

Medication Expenses

[90] The Claimant has provided receipts and invoices for expenses incurred under this head totalling US$1,592.20. These document were tendered into evidence as follows:-

i. Cost to Walgreens Pharmacy - Exhibit #41

ii. Cost to Shop Rite Pharmacy - Exhibit #42

iii. Cost to Carolina Suburban Drugs - Exhibit #43

Medical Equipment Expenses

[91] The Claimant has provided receipts and/or invoices for expenses incurred under this category totalling US$8,211.49 and has abandoned the cost relating to disposables. These documents were tendered into evidence as follows:-

i. Life Medical Supply: See Exhibit #44

ii. Cost to Purely Comfort LLC: See Exhibit # 45

iii. Cost to Wilpage Medical Equipment: See Exhibit #46

Monthly Expenses (Nov 2000 – Dec 2015)

[92] The Claimant's evidence is that as a result of the nature of her injuries she is required to incur monthly expenses totalling US$1,835.81. Most of these expenses are not supported by any evidentiary documents such as receipts and

bills but are pleaded in her Amended Particulars of Claim and under the heading Particulars of Special Damages.

[93] However, there are invoices from Kessler Institute for Rehabilitation during the period 2000 – 2003. It shows entries for legs bags @US$14.50 each, drainage bags @ US$19.30 each, catheter foley extension @US45.50/6.00 each, catheter holder @ US$0.60 each. The cost of a Foley catheter range @ US$28.00 – US$29.00 each. The Claimant submits that these invoices can assist the Court in determining a reasonable price for some of the items pleaded in this category of expenses.

[94] Here, I adopt the itemised details from the Claimant's submissions which are as follows:

a) monthly expenses for a consultation with the urologists is US$175.00;
b) suppositories per month @ US$43.30;
c) Reusable suppositories 2 per month @ US$10.46;
d) wash cloths 240 per month @ US$0.04;
e) Surgilube Gel 60 per mouth @ US$0.07;
f) Gloves 180 per month @ US$0.10;
g) Catheter Kit 1 per month @ US$11.00;
h) Catheter cord 24Fr 1 per month @ US$1.26;
i) Overnight drainage bag 30 per month @ US$5.46;
j) Leg Bag 30 per month @ US$5.00;
k) bag extension tube 1 per month @ US$1.61;
l) Foley Cathether holder 1 per month @ US$5.51;
m) Sterile Gauze sponges pad, 60 per month @ US$0.21;
n) Drain and IV sponge gauze 30 per month @ US$0.27;
o) Saline solution 1 bottle per month @ US$4.40;
p) Irrigation syringe tray 1 per month @ US$1.89;
q) Oral B toothbrush power head 1 per month @ US$8.23;
r) Oral B toothbrush US$200.00;
s) Special Food US$200.00;

t) cosmetics US$20.00;
u) Cetaphil moisturizer cream 1 per month @ US$18.92;
v) Telephone US$50.00;
w) Senna, 60 per month @ US$0.08;
x) Oxybutynin, 90 per month @ US$0.30;
y) Diazepam, 15 per month @ US$0.60;
z) Suppositories, 30 per month US$1.00;
a1) Hema-plex, 90 per month @ US$0.18;
b1) Primal defence, 30 per month @ US$0.29;
c1) Raw one, 80 per month @ US$0.50;
c2) Vitamins A & D ointment 1 per @ US$9.99;
c3) Elbow pads US$11.23;
c4) Writing splint, US$130.00;
c5) Feeding splint US$70.00;
c6) Heel pads US$113.00;
c7) Boots US$140.00; and,
c8) Wrist splint US$131.00.

[95] It is well settled law that a claimant is entitled to recover losses and expenses incurred arising directly from the negligent conduct of the tortfeasor. It is equally a well established principle of law that a claim for special damages must be pleaded and proved strictly. In **Walters v Mitchell**, supra, the Court of Appeal of Jamaica adjusted the principle to take account of the fact that in Jamaica, some claimants, by virtue of their station in life, do not keep records at all. In these instances, the trial court uses its best judgment and makes an award. However the court has to be satisfied that the claimant incurred or suffered the loss or incurred the expense.

[96] In the case of **Myrtle Daley & Anor. v The Attorney General & Anor**, the trial judge, Mangatal, J considered previous decisions on the issue of proof of special damages including **Hepburn Harris v Carlton Walker and Murphy v. Mills.** In doing so Her Ladyship noted that *"special damages must be specifically proved",*

and that "there must be some reasonable evidentiary basis on which the court can act."

[97] In **Attorney General of Jamaica v. Tanya Clarke (nee Tyrell)**, the Court of Appeal relaxed the principle that special damages must be specifically proved and accepted that in certain circumstances where there is the absence of strict proof, justice demands that an award should be made.

[98] Having regard to the Claimant's injury and evidence, I find that these expenses can be quantified. I accept the Claimant as a credible witness and award the amounts as set out in her witness statement which I find is supported by her oral testimony.

[99] It is accepted, and at the risk of repetition, I say again, it is trite law that special damages must be strictly pleaded and proved. As noted above, there is a proper evidentiary basis on which an award for the monthly expenses is to be made. The amounts reflect current prices in December 2015 through to January 2016. Accordingly, I accept that an award in respect of daily living expenses for the period November 8, to December 2015, or, 182 months at one half the monthly daily living expenses would represent the loss incurred by the Claimant under this head. That sum is calculated to be **US$167,058.71**. This approach takes into account inflation and the increase in prices over the last 15 years.

Loss of Earnings

[100] The Claimant has also suffered loss of earnings for the last 15 years from April 2000 to December 2015 and continuing. The Claimant has given evidence that prior to the accident she earned a monthly salary of $45,000.00 which comprised of a monthly payment of JA$35000.00 plus a monthly rent cheque of JA$10,000.00. The Claimant payslip from the Defendant was tendered into evidence.

[101] The Claimant has not worked since April 27, 2000. Since I have already accepted evidence that she also earned $10,000.00 additionally as a "rent

cheque", it follows that the loss under this head of damages would be J$8,460,000.00, that is to say: Loss of earnings from May 2000 through to December 2015, or, 188 months @JA$45,000 per month and continuing.

Extra-Help

[102] The Claimant claimed the cost of extra help in the sum of US$944,625.00 from April 2000 through to December 2015 and continuing. However, taking into account that she was at the Jackson Memorial Hospital and then Kessler institute until November 8, 2000 I have reduced the number of weeks by the duration of that stay. The number of days from November 8, 2000 to December 31, 2015 is actually 5,531 days which amount to **US$912,615.00**. In seeking to do justice I am to amend the Amended Particulars of Claim in order for it to reflect the actual lesser amount of US$912,615.00. This sum is calculated as follows:

i. Cost of Extra-Help using Home Health Aide rate from CareMinders Home Care is calculated as follows:

For the period November 8, 2000 through to December 31, 2015 totals. The weekly costs for 5,531 days multiplied by 7 days 790 weeks and 1 day. Therefore the cost of 5,531 days multiplied by US$165 per day equals **US$912,615.00**.

[103] The Claimant gave detailed evidence of the nature of the work or help provided to her by her mother, Gloria Edwards and her sister, Patricia Edwards. These include the changing of her catheter and cleaning of the area; cleaning and bathing her; removal of exreta whenever she is unable to do so at once; doing her laundry; bathing, feeding and, grooming, and, administering her medication whenever necessary. The Claimant requires 24 hour care and her mother, Gloria Edwards has given up her whole life to care for her.

[104] The evidence in support of this claim is that for the last 15 years Ms. Gloria Edwards has been the Claimant's primary carer and she attends to most if not all of her needs although she is assisted by her other siblings. The Medical Reports from Kessler also reported that the family was trained to care for the Claimant.

[105] In **Ray McCalla v Atlas Protection Limited, Unreported Judgment, Claim No. HCV04117/2006**, delivered May 6, 2011, McDonald-Bishop J (as she then was) relied on this excerpt from **Kemp & Kemp, Quantum of Damages** Volume 1, page 114, where it is stated that:

> "If services which are reasonably required by a disabled plaintiff are rendered for him gratuitously by a wife, relative or friend, the person rendering such services is entitled to be compensated: the plaintiff can recover damages for the value of the services and must hold such damages in trust for the person who rendered the services for him...It is not necessary that the plaintiff should have entered into a binding legal agreement to pay for the services."

[106] Given the nature and extent of the injury, the medical evidence confirming our current Claimant's incapacity and impairment for the last 15 years and the medical evidence, I, on principle, accept the submission that the Claimant would have required these services and that this expense should ordinarily be allowed.

[107] I shall here bear in mind that there is evidence before me that Gloria Edwards received formal training as a Home Health Aide. However, the services rendered to the Claimant are not only of a domestic nature but it is similar somewhat to that provided by a Home Health Aide individual.

[108] Here, I have a difficulty in accepting the proffered figure of US$912,615.00 as I agree that representing a claim for extra-help some nursing aid or assistance to the Claimant is in the order of a necessity.

[109] It has been urged that the evidence is that Ms. Gloria Edwards has not been able to do anything with her life but to care for the Claimant. Ms. Gloria Edwards, it is again urged, is a citizen of the United States of America and would have been able to obtain employment had she not been taking care of the Claimant.

[110] The Claimant's Attorneys-at-Law have asked that, at the very least, Ms. Gloria Edwards be granted a sum of money for the period from November 8, 2000 through to December 31, 2015, for extra help. This sum, it is submitted is arrived at by using the minimum wage from the state of New Jersey. On average, they

submit, Mrs. Gloria Edwards worked a minimum of 12 hours per day for 5531 days. In doing so they throw reliance upon the state minimum wage rate for 1983 through to 2014 from the Bureau of Labour statistics which is contained in the January issue of the Department of Labour, Employee Standards Administration, taken from that State's website.

[111] Let me now engage the issue of the voluntary carer's entitlement to recover the value of her services.

[112] In **Hunt v Severs** (1994) LAC, 350 Lord Bridge said "...The voluntary carer has no cause of action of his own against the tortfeasor. The justice of allowing the injured plaintiff to recover the value of services so that he may recompense the voluntary carer has been generally recognised but there has been difficulty in articulating a consistent judicial principle to justify the result." (Emphasis mine)

[113] In the instant case it is recognised on both sides that the Claimant's mother Ms. Gloria Edwards, though not a professional carer, is nonetheless entitled to a sum of money, in principle, which represents the value of her labour. In this regard, submits the claimant, the minimum wage payable in that statue of the United States of America would be the appropriate basis for payment.

[114] What now separates the parties is not only the method and mode of ascertaining the relevant minimum wage but the means by which the document containing this information is being sought to be made use of as evidence.

[115] The law is clear that as to the production of documents at trial that certain procedural steps must precede its reception into evidence.

[116] Mr. Alexander Williams' objection to the mere production of such a document is that there is no proper proof of the hourly rate which is stated in the State Minimum Wage Rate from the Department of Labour for New Jersey. He relies on Section 31 E of the Evidence Act. Let me now set out this section.

[117] Section 31 E of the Evidence Act reads:

> "Subject to section 31G, in any civil proceedings, a statement made, wither orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible."
>
> Subsection 2, however, is made subject to subsection 6 in that the party intending to tender such a statement in evidence... "shall at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement."

[118] It is to be noted, according to subsection 3, that every party so notified shall have the right to require that person who made the statement be called as a witness.

[119] What Section 31 is aiming at, according to the side note, to this section, is the admissibility of first-hand hearsay statements in civil proceedings and, in that regard, the court may, as subsection 6 says, "where it thinks appropriate, having regard to the circumstances of any particular case, dispense with the requirements for notification as specified in subsection 2."

[120] Let me now turn in Section 31F. It reads, Subject to section 31G, a statement in a document shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible if in relation to-

> (a) ...
>
> (b) civil proceedings, the conditions specified in subsection (2); and subsection (3) are satisfied."

[121] Now, what are the conditions referred to in (1)(b)? The answer is supplied by subsections (2)(a) and (2)(b), namely: the document was created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid; the information contained in the document was supplied (whether or directly or indirectly) by a person, whether or not the matter of the statement, who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement.

Clearly, the Claimant has not satisfied the requirements of the Act.

[122] Further, learned counsel for the Defendant makes the point that this document was not served on the Defendant and that no attempt was made to introduce it into evidence.

[123] On the other hand, the Claimant's counsel submitted that the document represents statistics produced by a United States reputable agency and that it was furnished to assist the Court in ascertaining and assessing the appropriate minimum wage rate in the state of New Jersey for the period 2000 through to 2016, and, that by applying the common law principle enunciated in **British Caribbean Company Limited V Delbert Perrier**, SCCA 114/94, justice will be served.

[124] Regrettably, I can find no proper basis for yielding to the Claimant's submission on this point.

[125] For the Claimant's counsel to describe the source of the document as being "reputable" is to assume that fact without proof of it. Further, it is not in evidence. I do not see how I can place reliance on it. In any event, I find that the Claimant is hoisted by her own petard in placing her reliance on the **Delbert Perrier** case. There, Carey, JA said "... I see no objection to documentary material being properly placed before a judge. Statistics produced by reputable agencies could be referred to enable him to ascertain and assess an appropriate rate it is to be noted that His Lordship was dealing with submissions on an award for interests at a commercial rate.

In making that pronouncement, so His Lordship's focus was on the documentary proof which was needed to enable the Judge to do so. However, such a document, had to be "properly placed" before the trial judge. It is my view, that not only was it not placed before me, but that, the submission that I can properly use it, flies in the face of the law of evidence as to how documents are received into evidence.

[126] Unfortunately, I am to say that I have to reject this aspect of the Claimant's claim.

On the face of it, Mrs. Gloria Edwards would be entitled to have her carers input valued. However, in principle, I cannot award it for the lack of proof.

[127] In the upshot then, I award damages as follows. For special damages denominated in United States dollars.

a) Hospital, transportation, Medical, Medication, Medical equipment expenses	$504,358.93
b) Monthly expenses for daily living	$167,058.71

Special Damages denominated in Jamaican Dollars for loss of earnings $8,460,000.00.

a) Future Nursing and Home Health Aide Care	$2,036,700.00
b) Equipment and Future Replacement Costs	$86,500.00
c) Future Medical Care	$31,500.00
d) Future monthly expenses	$264,356.64
e) Modification expenses	$35,200.00

For General Damages denominated in Jamaican dollars

a) For Pain and Suffering and Loss of Amenities	$53,000,000.00
b) Future Loss of Earnings	$4,320,000.00

INTEREST

[128] It is trite law that the Claimant is entitled to interest pursuant to the Law Reform (Miscellaneous Provisions) Act. Accordingly, I award interest as follows –

a. Interest on Special Damages at 6% from April 27, 2000 to June 21, 2006 and 3% from June 22, 2006 to the date of judgment;

b. Interest on General Damages at 6% from the date of service October 8, 2002 to June 21, 2006 and 3% from June 22, 2006 to the date of judgment.

[129] The sum of US$470,000.00 being the total interim payments to date is to be deducted from the final award.

[130] This Court grants its consideration to the rate of interest before judgment in respect of the sums denominated in United States Dollars, having regard to the fact that the rate on foreign currency judgments is fixed at 3% per annum pursuant to the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) order 2006. This interest is to be computed in the same manner as is set out in paragraph 129 (a) above.

[131] On the issue of costs, such costs are to go to the Claimant and are to be taxed if not agreed.

[132] A stay of execution of the Judgment herein is granted to June 5, 2017 on condition that the Defendant pays the sum of US$500,000.00 to the Claimant on or before May 29, 2017.