[2023] JMSC Civ 53

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV00951

BETWEEN	**JANICE GORDON**	**CLAIMANT**
AND	**STATISTICAL INSTITUTE OF JAMAICA**	**DEFENDANT**

IN OPEN COURT

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the Claimant

Mr. Kwame O. Gordon and Mr. Joerio Scott instructed by Samuda & Johnson for the Defendant

Heard: October 18th,19th and 20th 2022, March 22nd, 2023

ASSESSMENT OF DAMAGES – Negligence – Personal injury – Employer's liability - Whether Employer provided a safe system of work – Novus actus interveniens – Should a Defendant be liable for adverse outcome of a surgery – Handicap on the Labour market

T. HUTCHINSON SHELLY, J

BACKGROUND

[1] This matter involves an action brought by the Claimant, Janice Gordon, against the Statistical Institute of Jamaica to recover damages for personal injuries she sustained following two accidents which occurred during the course of her employment as a Statistical Officer. The Claimant's action also includes a claim for all subsequent losses and expenses incurred because of the said accidents.

[2] The particular facts giving rise to the Claimant's injuries are that on the 29th November 2005, the Claimant pursuant to her duties as a Statistical Officer, was at work when the chair she was seated on broke and she fell and suffered injuries. On March 2, 2007, the Claimant was at work, she was seated on a different chair when that chair also broke causing her to fall to the ground. The Claimant also suffered injuries as a result of this fall. She subsequently initiated proceedings against the Defendant for damages for Negligence in respect of both incidents.

[3] The Claim Form and Particulars of Claim were initially filed on February 27th, 2008. The Particulars of Claim was thereafter amended and re-filed on November 30, 2022 pursuant to orders made in respect of the medical evidence.

[4] The Defendant filed a Defence admitting liability and consequently Judgment on admission was entered on March 25, 2008.

[5] The matter came on for assessment of damages and evidence was heard on the following days: October 18th, 19th and 20th, 2022. The Claimant gave evidence and was cross-examined. The Expert Reports prepared by her attending physicians were placed into evidence as Exhibits A to D and F. These included the reports prepared by Dr Dwight Webster, a Consultant Neurosurgeon. Dr Webster had been required to attend for cross examination but the Court was informed by Counsel for the Claimant that he would not be in attendance. The Defendant also called two witnesses, the first being Dr Randolph Cheeks, a Consultant Neurologist, his reports were exhibited as Exhibit E1 - 3 and the 2nd Ms. Carol Coy, the Director General of the Defendant.

ISSUES

[6] This Court will have to determine the following issues:

i. the nature, cause and extent of the claimant's injuries;
ii. the quantum of damages, to be awarded against the defendant in respect of pain and suffering and loss of amenities; and

iii. Whether the Claimant is entitled to an award for special damages, handicap on the labour and future medical care.

EVIDENCE

[7] At the hearing on October 18, 2022, the Claimant was sworn and her witness statement filed March 1, 2012 was allowed to stand as her evidence-in-chief. In this statement, she outlined the two incidents which resulted in her filing this suit. In respect of the incident of the 29th of November 2005, she recounted that she was engaged in a task while seated on a chair that she had previously made complaints about. She said while so engaged the chair fell beneath her causing her to fall and hit her back. She stated that she had to throw her head up to avoid hitting it on the floor but she hit the top of her left foot. After rising from the floor, she began experiencing pain in her lower back as well as in her left foot.

[8] She was taken to the Oxford Medical Centre where she received an injection and five days sick leave. She was subsequently referred to physiotherapy and given a prescription for more painkillers. She was initially being treated by a Dr Isaacs but subsequently began receiving treatment from Dr Clark in Portmore. She was later referred to Dr Philip Waite and she was treated by him for severe pain in her neck and back. An MRI was requested, following which she was referred to Dr Stuart Murray, a pain management specialist. Ms Gordon was also seen and treated by Doctors Dawson and Webster when her symptoms did not resolve.

[9] In terms of her financial situation, she outlined that the defendant had been assisting with her medical expenses but there came a point when they stopped covering them and she had to stop her physiotherapy sessions.

[10] In respect of the second incident, she outlined that on the 2nd of March 2007, she was sitting beside a supervisor, assisting with a matter, when that chair gave way causing her to fall on her bottom. She immediately experienced pain in her neck, lower back and legs. She attended a Medical Centre in Portmore where she received an injection as well as a prescription for pain medication. She followed up with Dr Dawson as she continued to have severe pain in her

right leg and the treatment received consisted of a number of injections for recurring pain.

[11] She stated that after the second fall, she was unable to work for a period of three years and three months and when she tried to return to work, she experienced pain every day. On some occasions, the pain was so severe that she was not able to stand. She was subsequently referred to undergo another MRI and surgery was recommended. The medical reports showed that she subsequently had surgery and this was dealt with by Counsel in cross-examination.

[12] In terms of her loss of amenities, she stated that her life had been disrupted due to the unexpected financial expenses as well as her inability to do household chores. She stated that her personal life had been impacted as the injury had caused a strain on her 17-year relationship bringing same to an end. In explaining the effect of the pain on her movement, she stated that this occurs if she remains stationary for an extended period and she was unable to bend as a result of the pain. She also outlined that the pain was exacerbated by certain medical procedures and she experienced adverse reactions to medication which caused her to have a seizure for which she had to be hospitalized.

[13] Her mental health was also affected as she suffered depression and had to be treated by Dr Wendell Abel who diagnosed her with PTSD and major depression. She relied on a number of medical reports and outlined that the summary of her injuries were as follows:

- cervical whiplash,
- chronic neck pain,
- severe, chronic, discogenic low back pain with right lumbar radiculopathy at L5 consistent with MRI and in CS,
- thoracic spine contusion,
- feathery oedema in posterior subcutaneous fat extending from T12 and L4 consistent with soft tissue contusion.

- 22% whole person impairment.

[14] In respect of her financial losses, she outlined that a total of $173,800 was paid for medical reports and $419,572.39 was spent for medical treatment. She also claimed the sum of $192,000 which was described as expenses associated with 32 trips on private transport from her home to doctors' appointments and 96 trips to physiotherapy. Miss Gordon also stated that she is still on anti-depressant or at least she was at the time of her statement.

[15] In her viva voce account, Ms Gordon was asked about her examination by Dr Cheeks. She indicated that the examination conducted by him was to the bare minimum as all that occurred was a visual examination of her back followed by the comment 'what a hell of an unnecessary scar they gave you.'

[16] In cross-examination, she was asked about her statement that her relationship had ended given her indication to her doctor of traveling abroad with her spouse and she explained that she had gotten married shortly after. She was questioned about her numerous trips to the United States between 2015 and 2019 for 6 month periods while still an employee of the defendant. She acknowledged that she had made these trips but insisted that they were for vacation purposes and her children were living in the United States.

[17] She denied that she had been engaged in employment while she was abroad and when asked if she had ever informed her workplace that she was travelling out of the jurisdiction and obtained permission to do so, she indicated that she did not as she was not aware of that requirement even though she had been a civil servant and employed to the defendant for 15 years.

[18] On the issue of her employment, she was asked if she had informed the defendant that she had begun working with another entity in 2021 and she indicated that she had not. Ms Gordon then sought to explain that she did not know that she was still employed to the Defendant as she had stopped being paid by them. She was shown a letter indicating that they had indicated they would no longer be paying her sick leave and she acknowledged this but

insisted that they eventually stopped paying her a salary as well. She agreed that she had never resigned neither had she been terminated. Ms Gordon eventually conceded that she still received her full salary up to 2019 and partial salary up to January 2020.

[19] It was suggested to Ms Gordon that the defendant had stopped paying her when her sick leave had ended and she acknowledged that her sick leave had in fact ended by the time the payment stopped. Ms Gordon initially agreed that the defendant would have had an expectation that she would return to work but asserted later that to the best of her knowledge they were not awaiting her return and that they had never enquired from her when she would return.

[20] She was questioned about the requirements of her current employment given the challenges she had expressed in working with the Defendant and she indicated that it was not as demanding even though she had to work eight hours a day, whereas the defendant company had allowed her the opportunity to work four hours a day. She acknowledged that the nature of her duties required her to be seated for certain periods as well as to stand for others. She also agreed that she would be required to walk from station to station to perform certain tasks and that her work schedule was Mondays to Fridays.

[21] In respect of her injury, she told the court that her condition had improved after her first surgery until one morning when she was not able to walk. She clarified this response to explain that she could barely walk and that this occurred after she had returned to work. Ms Gordon also indicated that this situation improved to an extent after the second surgery. She acknowledged that in the second surgery, rods and screws had to be placed on her back and she was told that it was because of the instability of the spine. She denied however that she had ever been told that this had occurred as a result of the first surgery. She complained of ongoing issues and indicated she still suffered pain to the back of the neck and the pain is actually worse now, whereas the pain in her back is as bad as before she had surgery.

[22] The contents of the medical reports exhibited are set in detail below:

Medical Report of Dr Isaacs - Newport Medical Group dated September 11, 2008

[23] The Claimant was first seen by Dr Isaacs after her fall on the 29th of November 2005, the findings are as follows:

a. Tenderness of the lower lumbo-sacral spine and right sacro-iliac joint
b. Pain on straight leg raising – more marked on the right
c. Tenderness on the dorsum of her left foot, especially over the first, second and third metatarsals bones
d. Slight pain on passive rotation of left ankle, although there was no swelling/tenderness
e. Tenderness over both supra-scapular regions (muscular) – more marked on the right
f. Tenderness at the base of the cervical spine, with pain on movement, especially rotation and flexion.

Assessment of injuries after a course of treatment and subsequent review is that they were not considered serious and there should be no resulting disability/complications.

Physiotherapy Report from Maureen Spence Campbell of Emkay Physiotherapy Services dated October 10, 2008

[24] The Claimant was treated between December 2005 and August 2006 after the first fall. She had a total of 53 sessions, the cost of which were covered by her employers. The diagnosis of her injuries was as follows:

a. Cervical Whiplash

b. Thoracic Contusion

c. Lower back pain – mechanical and discogenic

d. Right lumbar radiculopathy secondary to PIVD L4-L5

e. Right cervical radiculopathy

Medical Report of Dr. Christopher Rose (Consultant Orthopaedic Surgeon) Orthopaedic Associates, dated December 11, 2007

[25] The findings of Dr. Rose are as follows:

1. Mild cervical strain
2. Lumbar nerve root irritation

His recommendations were as follows:

- Continuation of physical therapy
- Continuation of treatment with Pain Specialist
- Lifestyle modifications – avoidance of sitting for greater that 15-20 minutes, avoidance of bending, prolonged standing, lifting and prolonged walking.

His prognosis:

1. Injury to both cervical and lumbo-sacral spines with most of her symptoms related to the lumbo-sacral spine injury.
2. It is unlikely that her lower back symptoms will resolve completely.
3. At best, she will obtain approximately 50% of pain reduction from continued treatment.

The disability rating assigned is a PPD of 10%.

Medical Reports of Dr Delroy Dawson – Consultant in Anaethesia and Pain Management

[26] In his 2008 report, Dr Dawson noted that at the point when he saw and treated Ms Gordon she had already been seen by a neurosurgeon, an orthopaedic surgeon and a pain specialist but was still suffering from severe pain in her neck and back. He also noted that she had rheumatoid arthritis for which she was being treated by a rheumatologist. He outlined the course of treatment applied after the first and second falls as:

a. Oral medication and trigger point injections
b. Caudal epidural steroids

Dr Dawson also stated that Ms Gordon would continue to require pain therapy for an indefinite period.

[27] In a report prepared September 28th, 2010, Dr Dawson recounted that the Claimant had a series of 3 caudal epidurals in late 2007 to 2008. She subsequently had bilateral sacroiliac joint injections which caused a reduction in the pain on the low left back but she still had significant pain on the right side. Continued use of this treatment resulted in fluctuation of the pain.

[28] He noted that the Claimant indicated that the pain impacted her every day activity to include sitting for hours at work. He referred her for assessment for surgical intervention or an implantable device such as a spinal cord stimulator. He described her as having moderately severe impairment and using the AMA Guidelines assessed her as being at 22% WPI due to pain.

Medical Report of Dr. Philip Waite (Consultant Orthopaedic Surgeon) Orthopaedic Associates, dated December 28, 2008

[29] The Claimant was seen on the 6th February 2006, her complaints were:

1. Neck pain
2. Pain and numbness from the right arm to little finger
3. Back pain
4. Pain and numbness to the right leg.

[30] In this report Dr Waite outlined a number of headings. Under the heading history of impairment, he made a number of observations, including the following;

> '*She (the Claimant) also had pre-injury neck pains and right cervical radiculopathy (managed by me) which were aggravated by the fall.*

[31] Under the heading past orthopaedic history, he stated that he had been seeing the patient, her initial visit being in 2004 for '*management of poly arthritis to her hands, knees polyneuritis to her upper limbs and poly tenosynovitis to the upper limbs'.*

[32] His assessment of her revealed:

1. Acute chronic neck pain with subjective right cervical radiculopathy. This existed prior to the injury but had been aggravated by the injury.
2. Thoracic spine contusion
3. Mechanical and discogenic low back with right lumbar radiculopathy at L5 possibly secondary to MRI confirmed prolapsed intervertebral disc at L4-L5.
4. Worsening lumbar radiculopathy
5. Resolving neck pain but persistent cervical radiculopathy.

[33] Dr Waite recorded that Ms Gordon underwent nerve conduction studies which were done by Dr Ali, a consultant neurologist on the 14th of June 2006, impression was of normal right upper and lower back studies. He also outlined the other course of treatment that the Claimant was receiving from Doctors Webster, Murray, Dawson and DeCular, a consultant rheumatologist. In respect of the latter, Dr Waite noted that Ms Gordon had previously been diagnosed as having rheumatoid arthritis with associated fibromyalgia and also underwent a right carpal tunnel release in 2004.

[34] He noted that an MRI performed on Ms Gordon in January 2006 showed:

a. An annular tear at L4/L5 with diffuse posterior disc bulge mildly indenting vertical thecal sac but central canal is patent, minimising the compressive effect.
b. Feathery oedema is posterior subcutaneous fat extending from the level of T12 to L4 consistent with soft tissue contusion.

<u>Second Addendum Medical Report of Dr. Phillip Waite Consultant Orthopaedic Surgeon) Orthopaedic Associates, dated November 17, 2011</u>

[35] Dr Waite commenced his 2011 report with the heading 'correction to 2008 report', under which he stated that the Claimant <u>did not</u> have any neck or low back pains prior to the accident. He noted that she had polyarthralgia and poly tenosynovitis to the limbs as well as nerve symptoms to the right upper limb with normal nerve conduction studies and MRI of the neck.

[36] The Claimant was recorded as presenting with the following complaints:

1. Constant, severe neck pain which is aggravated by posture and relieved by one (1) oral analgesics and two (2) trigger point injections by the pain specialist (Dr. Dawson)
2. The upper back pain is resolved
3. A constant severe lower back pain
4. A burning sensation with numbness which radiates from the buttocks to the great toes. There was occasional weakness to the right lower limb. There was urinary frequency urgency, and occasional incontinence when the back pain is severe. There was no faecal incontinence.

[37] The doctor also noted that a follow up MRI conducted on the 31st of January 2011 showed:

a. No significant bulge at L3/4. Mild hypertrophic changes of the facet joints. No change since the previous report.
b. L4/5 – Disc degeneration, mild diffuse disc bulge with a superimposed small annular tear and bilateral facet arthrosis with resultant minimal narrowing of the central canal. Mild bilateral neural foramina stenosis. No change since previous study.

c. L5/S1 – Small left paracentral annular tear and a small central disc herniation mildly indenting ventral thecal sac which was not present before. There is bilateral facet arthrosis.

[38] Dr Waite also recorded that neurodiagnostic studies were done by Dr Ali on the 16th of October 2011 who noted:

a. Mild chronic L5 radiculopathy on the right. No evidence of axonal loss in this myotome.
b. No electrophysiological evidence for L1-S1 radiculopathy on the left.
c. No electrophysiological evidence for sciatic nerve neuropathy bilaterally arguing against piriformis syndrome.

He also stated that he conducted a Spurling test on her which was negative.

[39] **Final assessment** – chronic neck pain, severe, chronic, discogenic, low back pains with right lumbar radiculopathy consistent with MRI and NCS.

Examination – Impairment rating assigned – Chronic neck pain – 3% WPI, chronic multilevel discogenic low back pain – 19% WPI – Total combined impairment 21% whole person.

Prognosis:

1. Her condition is considered chronic and permanent.
2. She will continue to have acute exacerbations of the neck, back and radicular pains and the timing and extent of these pains cannot be predicted.
3. Her condition may affect or continue to affect activities of daily living and work especially with activities that involve flexion and loading of the neck and back.

Recommendations: further management by a neurosurgeon and further pain management.

Third Report of Dr Phillip Waite dated 13th October 2016

[40] This report was produced in response to reports prepared by Dr Randolph Cheeks, a Consultant Orthopaedic Surgeon instructed by the Defendant who had examined Ms Gordon. In that report, Dr Waite disagreed with Dr Cheeks' comparison of Ms Gordon's impairment pre-surgery to her post-surgery condition. He also disagreed with Dr. Cheeks' consideration of Ms Gordon's pre-existing medical condition in determining the level of impairment that could be attributed to the Defendant's negligence. He specifically disagreed with any finding that Ms Gordon had pre-existing lumbar disc disease in the absence of a prior history of low back pain and radiological features of spondylosis of the spine, particularly facet joint disease.

[41] Dr Waite opined that the MRI finding of bulging disc disease at L3/4, L4/5 and L5/S1 has to be attributed to the accident. Dr Waite stated that the progression to facet joint disease in the subsequent MRI is consistent with degeneration of the motion segments that were injured due to the fall. He strongly disagreed with the finding of Dr Cheeks that Ms Gordon only has age related lumbar and spinal disc disease as the patient had trauma which accelerated or caused the degenerative disc disease.

Medical Report of Dr. Wendel Abel (Consultant Psychiatrist) dated October 5, 2011

[42] His findings on examination:

- Review on June 20, 2011 - Dr Abel noted that Miss Gordon was feeling depressed, still experienced pain, low energy level but improvement in concentration.
- Review on October 6, 2011 – it was observed that she was not doing well and that she was feeling even more depressed than usual.
- Her medical challenges were all centred around issues with sleeping well at nights.

Diagnosis:

1. **Post-traumatic Stress Disorder (PTSD)**
2. **Major Depression**

Prognosis:

- Miss Gordon's physical injuries have impacted on her ability to function physically, occupationally, psychologically, interpersonally and recreationally.
- Severe pain curtails her activities, limits her function and has negatively impacted her mental health.

The doctor opined that based on her level of physical and psychological impairment, Miss Gordon is unlikely to be able to function in a similar job at this time.

Medical Report of Dr Dwight Webster (Consultant Neurosurgeon), dated April 10th, 2013

[43] In this report, Dr Webster outlined the following:

1. The Claimant was seen on April 10th, 2013. She complained about lower back pain and neck pain.
2. He examined her and found the following:
    1. Moderately tender along lumbar spine
    2. Radicular pain on straight leg raising bilaterally, at 45 degrees on both sides
    3. Muscle bulk and tone are normal
    4. Subtle weakness of the flexors at the hip joint

Diagnosis

- The Claimant was diagnosed as having Lumbar Radiculopathy – Post Trauma

MRI of lumbo-sacral spine done July 19th, 2012;

- Degenerative disc disease at L4/5 with mild to moderate disc herniation, bilateral foraminal stenosis left>right
- Mild disc herniation L5/S1 with mild bilateral foraminal stenosis

[44] Dr Webster noted that because of persistent symptoms despite pain management, it was decided that Ms Gordon would have to undergo surgery. This occurred on July 20th, 2012 and it was a L4/5 laminectomy with L4/5 and L5/S1 bilateral forminosities.

[45] In terms of post-surgery, Ms Gordon experienced symptomatic improvement of the lower back pain and radicular pain to lower limbs. She was placed on pain

medication and approved to return to work on a limited basis in November 2012. A review conducted in December 2012 revealed neck pain radiating to the left upper limb as well as lower back pain and stiffness. It was recommended that the Claimant be assessed by an occupational therapist.

[46] On a follow up visit, there was a significant increase in her neck pain and back pain. X-ray in January 2013 showed;

- Grade 1 spondylolisthesis at L5/S1

Cervical MRI done April 4th, 2013 showed:

- Mild degenerative disc disease, disc bulges at C4-C5 and C5-C6 with foraminal stenosis at C4-C5 and bilateral foraminal stenosis at C5-C6.

Lumbar spinal stabilization was recommended because of the persistent and progressive back pain and spinal instability.

<u>Second Addendum Medical Report of Dr Dwight Webster (Consultant Neurosurgeon), dated September 30, 2014</u>

[47] The findings detailed by Dr. Webster following surgery are as follows:

- There was pedicle screw fusion of the lumbar spine. This operation was done on July 4th, 2013.
- There was improvement in the lower back and radicular pain after this surgery.
- There was a continuation of significant symptoms as manifested by muscle spasms, lower back pain and radicular pain.
- There was the persistence of the neck pain radiating to the upper limb, despite the intervention of physiotherapy and pain management.

Claimant made the following complaints:

1. Feeling sore in the lower back with radicular burning pain involving the right lower limb.

2. Radicular numbness
3. Pain in the right upper limb.

On Examination

- There was mild to moderate mid cervical spinal tenderness.
- There was also lumbosacral spinal tenderness.
- Straight-leg raising was limited to 60 degrees bilaterally.

Diagnosis

1. Persistent lumbar radiculopathy
2. Cervical radiculopathy

Disability Assessment

- Using the American Medical Association Guides, the Claimant has a combined disability rating of 26% impairment of the whole person. Disability impairment related to lumbar spine pathology is a class 3 impairment due to invertebral disc herniations at multiple levels with associated radiculopathy which persisted after surgery which amounted to 20% of the WPI.
- Cervical spine – this was assessed as having invertebral disc herniation at multiple levels with radicular complaints a class 1 impairment on the cervical regional grade. This disability is associated with 8% impairment of the whole person.

Third Addendum Medical Report of Dr. Dwight Webster (Consultant Neurosurgeon), dated November 3, 2016

[48] Dr Webster opined that after surgery in 2012, there was marked improvement in her symptoms supporting the efficacy of the intervention. He indicated that undoubtedly surgery was indicated. He also stated that he stood by the disability assessment of September 30th, 2014.

Medical Reports of Dr. Randolph Cheeks – Consultant Neurosurgeon

[49] Dr. Cheeks prepared 3 reports in respect of this Claimant. The Claimant was first seen by him on the 11th of June 2015. He also reviewed reports prepared by Doctors Rose, Isaacs, Waite, Isaacs, Dawson, Webster, DeCuelar between 2007 and 2011, MRI results, ultra-sound results, nerve conduction studies and EMG of the upper and lower limbs conducted by Dr Ali in 2006. He noted that the Claimant presented with the following complaints:

a. Persisting pains in the right buttock and thigh extending to the L5 dermatone of the right leg.
b. Pains at the back of her neck and shoulder

Diagnosis arrived at:

a. Acute cervical muscular sprain secondary to falls from chair, status – recovered
b. Injury to the L4-L5 intervertebral disk with nerve root irritation secondary to falls from chair
c. Lumbar spinal instability caused by prior spinal surgery – status post second surgery for spinal fusion – dynamic lumbar x-rays conducted one day before first spinal surgery established that the lumbar spine was not unstable.
d. Age-related degenerative cervical and lumbar disc disease

[50] Dr Cheeks opined that in respect of her neck, Ms Gordon suffered sprain type injuries from both falls. This was confirmed by the fact that the plain x-rays showed no sign of bony injuries and the MRI of the cervical spine in 2006 was normal. When he saw her in 2015, he recorded that her neck had recovered and was entirely normal and the upper extremities were neurologically normal. He also noted that she had previously suffered from neck pains for which she had been treated by Dr Waite.

[51] In respect of her lumbar area, he noted that the facet arthrosis and hypertrophic changes of the facet joints noted on the MRI do not signify injury and are age-related spondylotic changes which were present prior to the fall. Her first MRI

done within 2 months of the fall showed bulging of the L4/5 disc and an annular tear as well as bruising in the subcutaneous tissues. This convergence of events suggests that she injured the L4/5 disc in the fall by excessive axial loading at the moment of impact and developed L5 nerve root irritation. In respect of the degenerative disc disease, he observed that this is not regarded as diagnostic of injury and usually reflects age-related wear and tear. Reference was made to an extract from page 579 of the AMA Guidelines in support of this.

[52] In respect of Ms Gordon's complaint of radiating pains in her right leg, it was found that the neurological examination conducted was normal as such this pain was denoted as 'non-verifiable radicular pain' as it was not accompanied by any objective neurological changes and signifies mild nerve root irritation.

[53] In commenting on the surgery which occurred in 2012, Dr Cheeks observed that there was no nerve entrapment and malfunction (the indicator for surgery) noted on any of the MRIs or nerve conduction studies. Reference was made to the report of Dr Rose which confirmed a normal neurological examination pre-surgery. In light of the foregoing, he questioned the justification for the surgery and indicated that it had the effect of creating a new problem which did not exist, namely, spinal instability which caused persisting post-op back pain during the early months after the first surgery. This spinal instability necessitated a second surgery in July 2013, ie, spinal fusion.

Prognosis

[54] Ms Gordon is not likely to experience any new problems in the future arising from injuries sustained in the fall. Chronic lumbar pain is likely to be exacerbated if she engages in frequent or excessive heavy lifting, bending, pushing or pulling and in those circumstances she would have to resort to over the counter analgesics. For a severe flare up of muscular pain, she may need physiotherapy but further surgery of the neck or back is not required.

Follow up reports

[55] The second report took the form of a letter addressed to Counsel for the Defendants in which the Doctor indicated that in his opinion, the Claimant would have been fit to resume work within 6 months of each fall.

[56] The third report of Dr Cheeks took the form of a commentary on the final report prepared by Dr Philip Waite. In his critique of that report, Dr Cheeks observed that it was an erroneous statement on the part of Dr Waite that there should be no comparison between an impairment which existed prior to surgery and an impairment assigned post-surgery. In support of this assertion, Dr Cheeks made reference to Section 2.5 D of the AMA guidelines which addresses the subject of 'changes in impairment from prior ratings'.

[57] On the issue of apportionment, Dr Cheeks' report made reference to section 2.5 C of the guidelines. He highlighted that in approaching the question of impairment the literature examined three areas, the total impairment rating, a baseline impairment rating and the final rating. The latter is arrived at when pre-existing conditions are discounted. This occurs by subtracting the baseline rating from the total rating. He opined that in these circumstances it is self-evident that any pre-existing conditions which by definition pre-dates the injury must not be added to the injury sustained in the accident in arriving at the overall impairment rating.

[58] Dr Cheeks also took issue with the position advanced by Dr Waite that there is no literature which supports the argument that degenerative disease of the spine correlates to pain. He recounted that there are in fact several such medical articles including one by Dr Peter S Ullrich Junior wherein it was stated "most patients with lumbar degenerative disc disease will experience only low grade continuous tolerable pain that will occasionally intensify."

[59] Dr Cheeks also refuted the assertion by Dr Waite that there is no literature which states that a 32-year-old should have degenerative disc disease of the spine and described it as contrary to medical articles on the subject. Specific

reference was made to the results of a study conducted in Vancouver Canada and published in the 2004 edition of The Spine Journal, where it was stated that 'degeneration of the spine is a prevalent problem that generally advances with age although its occurrence is not restricted to the elderly'.

[60] Dr Cheeks also stated that Dr. Waite's approach to degenerative disc disease as diagnostic of injury is contrary to the AMA guidelines specifically page 563 where it is linked to age-related wear and tear. He also highlighted that the guidelines make it clear that degenerative disc disease is not diagnostic of trauma. Dr Cheeks also pointed out that in respect of the MRI results, common conditions related to degenerative changes in the spine, including abnormalities identified in imaging studies such as annular tears, facet arthropathy and disc degeneration do not correlate well with symptoms, clinical findings or causation analysis and are not ratable according to the AMA guidelines.

[61] In terms of the impairment assigned, Dr Cheeks noted that although his clinical examination of Ms Gordon did not reveal a radiculopathy, which is a purely objective neurological feature, the AMA guidelines acknowledge that there is a category of persons who may present with non-verifiable radicular pain and the current methodology allows this patient to be rated in class one with a range of impairment rating from 1 to 3% whole person impairment.

[62] He also indicated that the guidelines make it clear that bulging disc in the absence of any radiculopathy are not ratable. It was also observed by the doctor that the MRI results from 2006 showed evidence of bruising of the subcutaneous tissue which shows that the individual had sustained injury to the underlying soft tissue thus confirming the presence of an acute lumbar muscular strain which evolved into a chronic lumbar strain and only permanent impairment may be rated.

[63] In respect of Ms Gordon's neck pains, Dr Cheeks observed that page 561 of the AMA guidelines provided that "subjective complaints without physical findings or significant clinical abnormalities are generally assigned a class zero rating and have no ratable impairment."

[64] Dr Cheeks' reports were placed into evidence and allowed to stand as his evidence in chief. There was some amplification of his evidence by Mr Gordon. He explained the term radiculopathy, outlining that there are three functions of the nerve the first relates to the muscle, the second is the sensation under the skin which is controlled by a nerve and the third being the tendon reflexes which are also controlled by a nerve. He asserted that in his examination of Miss Gordon, all were normal which means that the nerve was not sick and there was no radiculopathy. As such, the claimant should be able to run, walk, jump bend and hop with no restrictions on her carrying out her physical activities or daily living.

[65] He was asked about the Claimant's ability to work while seated and responded that she should be able to sit at a desk but, as with any healthy person, conventional medicine dictates that she should not sit for longer than an hour irrespective of how she is feeling as this places greater strain on the shock absorbers in the spine than standing does. Dr Cheeks also indicated that the best course was to sit for an hour before taking a 15-minute break to walk or stand.

[66] He was invited to comment on the report prepared by Dr Rose and indicated that the findings of the doctor and the 10% PPD assigned were not justified as the findings show that Ms Gordon suffered a soft tissue injury which is a class one motion segment lesion which has a disability rating in the range of 5 to 9% and a default rating of 7% according to the sixth edition of the AMA guidelines.

[67] Dr Cheeks was also shown the reports prepared by Dr Waite. He disagreed with the whole person impairment of 21% which was said to be based on an objective lumbar radiculopathy. Dr Cheeks insisted that this did not exist and pointed out that Ms Gordon did not have any motor sensory or reflex changes which means that the nerve was working well.

[68] He informed the Court that the spinal cord stimulator machine which had been recommended by Dr Dawson often created issues for patients as the body

either rejects it or the battery runs out with the result that the patient has to have an operation to replace it. He suggested that a better alternative would be for Ms Gordon to invest in a TENS machine in which she could operate to control the pain. Dr Cheeks also disagreed with the impairment level rating of 22% which was assigned by Dr Dawson and commented that Dr Dawson had relied on the guidance offered in the 5th edition of the AMA guidelines which had been discarded and discontinued from 2006 as being inaccurate and leading to a high degree of abnormally high error rating for PPD because of the methodology used.

[69] In respect of the reports of Dr Webster and the two surgeries he performed, Dr Cheeks indicated that whereas the second surgery was required to correct the spinal instability which had been occasioned, the first surgery was wholly unnecessary as there was no radiculopathy or trapped nerve.

[70] He was cross-examined extensively and reiterated his disagreement with the position that the surgery did not affect Ms Gordon's PPD. He maintained that the first surgery had worsened her condition as it produced additional scarring in addition to the scar tissue from the fall and caused her spine to become unstable. He said that this would have had the effect of increasing her PPD rating and whatever her disability would have been before the surgery, it certainly got worse.

[71] He explained that by disability, he meant the level of impairment of function. He also noted that a PPD is assigned to a person with a disability who has gotten as good as they are going to get. He told the court that he did not agree with most of the conclusions and recommendations made by Dr Dawson and he accepted that this was not stated in any of the reports that he had prepared. He contended further that Dr Dawson is not an expert in pain management but a trained anaesthetist who treats symptoms of pain in person. He also advised the Court that there is no specialty called anaesthesia and pain management as the specialty is called Anaesthesia. Dr Cheeks acknowledged that this information had not been stated in his reports and explained that he had

prepared his reports to assist the court in terms of his own expertise and findings and not to criticize his colleague.

[72] He was shown the report of Dr Waite which made reference to the results of the neurodiagnostic study done by Dr Ali on the 16th of October 2011, as outlined in the report of Dr Philip Waite. He told the court that he was seeing this information for the first time and he would certainly have responded to it if he had seen it before. He then accepted that he must have seen it as that report from Dr Waite had been provided to him previously but he insisted that what was stated there and underlined in bold was not accurate. Dr Cheeks again asserted that the study by Dr Ali did not show neural diagnostic evidence of mild right L5 radiculopathy.

[73] In respect of his examination of Ms Gordon, he was questioned about the Spurling test and indicated that this is a clinical test of the function of the intervertebral function of the disc in the neck. He explained that the examination is conducted by placing pressure on the neck which involves pushing down on the top of the patient's head to see if it creates or reproduces nerve symptom in the neck or extremities. Dr Cheeks informed the Court that this test was performed by him on Ms Gordon with a negative response. He denied that his examination consisted of telling her to take off her shirt, looking at her back and commenting that this was a hell of an unnecessary scar that they gave you. He maintained that he never spoke like that, especially to a patient. He stated that the examination of Miss Gordon lasted a total of about 40 minutes.

[74] When asked whether Ms Gordon's PPD could have changed since he examined her, he commented that this could only occur if she had since had another accident or developed some disease in the intervening period. He told the court that Ms Gordon had chronic lower back pain as a result of the two falls which produced soft tissue injury with scarring on which further scarring was superimposed by two surgeries. Dr Cheeks explained that it was the scars which were causing her to experience the lower back pains. In terms of recovery, he indicated that patients follow a relapsing, unremitting pattern based on their genes and lifestyle, especially if an individual does a lot of sitting,

bending or lifting all of which would annoy that area. He described the pain which may be felt as often mild but intrusive as well and its severity and level of annoyance would depend on one's pain threshold.

[75] In concluding remarks on the assessment ratings assigned by the various doctors, Dr Cheeks indicated that Dr Dawson is not qualified to give an impairment rating, neither are Doctors Rose and Dr Waite. He clarified further that a rating could only be assigned by him or Dr Webster as they are the only medical specialists who actually treat the condition that Ms Gordon suffered from and are qualified to state a PPD. He asserted that only neurosurgeons are trained to treat the entire spine and to assign a PPD rating.

[76] When questioned on what would have been Ms Gordon's likely rating before surgery, Dr Cheeks responded that had she not undergone surgery, her PPD would have been less than 5% perhaps as low as 2%. He said that the connection between the scarring and a disability is that the scarring ties down the tissues immediately adjacent to it and in Ms Gordon's case, the scarring was tethering the lumber muscles causing her to experience lumber muscle pain which is a pain in her lower back area and the two surgeries generated additional scarring. He also told the court that the AMA guidelines stated several years ago that only doctors who treat the disability are qualified to rate it, hence his comments in respect of his fellow physicians.

Claimant's Submissions

[77] It is the Claimant's contention that she suffered severe physical injuries to her lower back as a consequence of her fall from a broken chair at work on two separate occasions. Mr Kinghorn outlined that because of these injuries, she had undergone a number of procedures including surgery, physiotherapy and psychiatric intervention.

[78] Mr Kinghorn observed that while the Claimant was examined by Dr Cheeks, it was important to note that this examination was on one occasion for a period of 40 minutes. Counsel also laid out a summary of the findings of each

physician. This summary was largely reflective of the evidence outlined above and I do not intend to re-state it here.

[79] In his analysis of these reports, Mr Kinghorn asserted that careful note should be taken of the fact that in providing his opinion as to the injuries sustained by the Claimant, Dr Cheeks makes no mention of ever having reviewed the Neuro-diagnostic study done on October 16, 2011 by Dr. Ali, despite the fact that Dr. Philip Waite's Reports dated November 17, 2011 and October 13, 2016 make reference to same. Counsel also highlighted that these specific findings were neither expressly or specifically challenged.

[80] In addressing what he believed to be the relevant considerations for the Court at this stage, Mr Kinghorn highlighted the duty of a claimant to mitigate his/her losses and the duty of an expert to the Court. On the point of the duty to mitigate, Counsel acknowledged that the relevant legal principles had been outlined in the decision of ***Janet Edwards v Jamaica Beverage Limited*** *[2017] JMSC Civ 76* with emphasis placed on the following extract;

> *[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."*

[81] In respect of an expert's duty, Mr. Kinghorn recounted the provisions at rule 32.3 of the Civil Procedure Rules relating to the overriding duty of an Expert Witness. He asserted that the evidence of Dr. Randolph Cheek was at its best unimpressive, unhelpful and unconvincing. Learned Counsel also submitted that the quality of the doctor's evidence fell far below the standard required of an expert and should either not be accepted or given little or no weight at all.

Mr Kinghorn asked the Court to reject the evidence of Dr Cheeks on the basis that it was prepared without making reference to the neuro-diagnostic report of Dr. Ali which states that there was mild chronic L5 radiculopathy on the right, it is internally inconsistent and several vital details were excluded.

[82] Mr Kinghorn submitted that it is clear that the clinical findings of radiculopathy is of utmost importance to Dr. Cheeks as it forms the basis of whether the Permanent Partial Disability (PPD) assigned by the other experts is correct and forms the basis of his own assessment of PPD. Accordingly, a clinical finding of radiculopathy will undoubtedly determine the PPD rating assigned to a patient. Counsel also noted that in examination-in-chief, when asked to comment on the reports of Doctors Rose and Waite, Dr. Cheeks stated that there is no radiculopathy and therefore, a rating that assumes that there is, is wrong.

[83] Mr Kinghorn contrasted these responses with those provided in cross-examination, where Dr. Cheeks stated that he was seeing the notation by Dr. Waite about the neuro-diagnostic evidence of L5 radiculopathy for the first time. He stated, "*I can't imagine that I saw this document and can't remember. Certainly what is stated in paragraph 7 is new to me. Had I seen this before, I would most certainly have made a pointed comment about it."* Counsel noted that when pressed on this point, Dr. Cheeks stated that he "*must have seen those words (the words in bold) but what is stated and underlined in bold is not accurate*." Mr Kinghorn also made reference to the fact that the neurological study itself was not listed by Dr Cheeks as among the items received which was a clear indication that he had not seen or reviewed it. This omission was described as material to the findings of Dr Cheeks and rendered his conclusions unreliable.

[84] Learned Counsel also expressed the view that the evidence of Dr. Cheeks should not be accepted based on the numerous inconsistencies in the presentation of same. He noted that in examination-in-chief when asked by Counsel for the Defendant, if the Claimant had not undergone the first surgery, what is the probability that her PPD would have been less than 5%. He responded by saying that her PPD would have been less than the 5% that he

had assigned her after her second surgery. Under cross-examination, Counsel asked if the effect of the first surgery contributed to the 5% PPD that he assessed. He responded by stating that "*I can only answer that if I examined her now and compared her PPD now to the PPD at the time of examination*."

[85] Again, in evidence-in-chief, he was asked by Counsel for the Defendant if he was in a position to indicate how much less the disability would have been if she had not undergone the first surgery. In his response, Dr. Cheeks uttered "*I believe that I am in a position to guide the Court with an answer to that. It would have been 2% percent points less, that would have been 3% PPD."*

[86] Mr. Kinghorn submitted that these inconsistencies remain unresolved and the evidence of Dr. Cheeks is "*unreliable and unbelievable*" and the doctor's credibility has been severely impacted by theses inconsistencies. Counsel also made reference to what he characterised as to the cause of the disability and whether these were impacted by scarring.

[87] Learned Counsel asserted that it was curious that Dr. Cheeks omitted germane materials from his report. These omissions were stated as follows:

- There is no reference to the presence of any scarring resulting from the surgeries performed by Dr. Webster on the Claimant. In fact, the word scarring has never been used by Dr. Cheeks in his Expert Report.
- There is no reference in his Expert Report to the impact of the surgeries on the Claimant's permanent partial disability. His report seems to indicate that the surgeries had no impact on his final assessment. Yet in cross-examination, he indicated that the final surgery increased the Claimant's permanent partial disability by 2%.
- There is no reference in Dr. Cheeks' Report of the clinical findings of the neuro-diagnostic study done on October 16, 2011 by Dr. Ali, Consultant.
- The absence from the report of his critique of the doctors in viva voce as not being qualified to give a disability rating. This was

noted as being the same in respect of his assertion that there was no specialty known as anaesthesia and pain management.

[88] Learned Counsel for the Claimant submitted that it is unimaginable that an Expert who understands his duty to the Court did not think it important to draw the Court's attention to the above-mentioned and this ought to call into question the reliability of Dr. Cheeks' evidence. Mr Kinghorn asked the Court to carefully scrutinise this attack on the expertise of these doctors in circumstances where the Defendant had consented that their reports could be accepted as expert's reports without the need for them to attend for trial. In support of this assertion, Mr Kinghorn made reference to the decision of ***Phillip Granston v The Attorney General CL 1680/2003 delivered on 10th August 2009*** in which Sykes J (as he then was) outlined the importance of the frontal attack on the evidence of a witness being undertaken while he is in the witness box. The observations made in that decision also included the fact that the tribunal would have to take into account the absence of cross-examination in determining the weight to give to contradictory testimony.[1]

[89] Mr. Kinghorn asked the Court to accept the reports presented by the Claimant. He highlighted the fact that the majority of them had follow up visits with the Claimant in contrast to Dr Cheeks. In respect of the surgeries performed on Ms Gordon, Counsel asserted that Dr. Dwight Webster is a specialist trained in neurosurgery and it was his medical opinion that the Claimant's condition would benefit from surgery. He therefore recommended it and conducted same. Mr Kinghorn submitted that it was noteworthy that of all the doctors whose expertise had been questioned by Dr Cheeks, this was not the case with Dr Webster. Counsel also asked the Court to note the evidence of the Claimant who experienced relief post-surgery and also the justification for same noted in Dr Webster's report.

[90] Learned Counsel further submitted that the fact that the Defendant's expert is of the view that the surgery was "*unnecessary*" and expressed the view that the Claimant's PPD was increased by 2% does not absolve the Defendant from

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[1] Allied Pastor Holding Pty v Commissioner of Taxation [1983] 1 NSWLR 1 462 -463

compensating the Claimant fully. Mr Kinghorn argued that in any event, Dr Cheeks had been of the view that surgery would only have been justified if there had been radiculopathy but the evidence showed that he had overlooked same. Counsel also asserted that the unsupported view of the Defendant's expert that this worsened the Claimant's position does not absolve them from compensating the Claimant fully and without any deductions for her present condition.

[91] The case of **Janet Edwards v Jamaica Beverages Limited (supra)** was again cited by Counsel in respect of this issue with reference made to the pronouncements by the Learned Judge as follows;

> *"….. it depends on the circumstances when 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.'*
>
> *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."*

[92] Learned Counsel proffered that there has been no suggestion by Counsel for the Defendant, whether to the Claimant, or anyone else, that the Claimant's obedience to the advice and recommendations of Dr. Webster, Consultant Neurosurgeon was unreasonable or that her actions were not in keeping with her duty to mitigate her loss.

Award of Damages

Post-Traumatic Stress Disorder and Depression (PTSD)

[93] On the question of an appropriate award for Post-Traumatic Stress Disorder and Depression, Counsel directed the Court's attention to the case, **Angeleta Brown v Petroleum Corporation of Jamaica,** where Justice McDonald Bishop made an award of **$340,000.00** for PTSD where the Claimant sustained burns to the body. Using the CPI for January 2023, I note that this sum updates to $1,102,842.63. Reference was also made to the decision of ***Celma Pinnock***

v The Attorney General Khan Vol 5, p 239 and ***Neil Colman v Air Jamaica Limited Khan Vol 6 p.224*** where awards had been made in 1998 and 2007 of $2.5 million.

[94] Counsel submitted that a separate award can and should be made where it is clearly shown that the claimant has suffered a distinct and separate psychological injury. He outlined that the Medical Report of Dr. Wendel Abel illustrates a diagnosis of Post-Traumatic Stress Disorder and Major Depression Axis 1 which indicates the level of suffering that the Claimant experienced. Mr Kinghorn also asserted that an appropriate award would be **$5,000,000.00** as the Claimant continues to be traumatized in the years since this incident.

Pain and suffering

[95] In his submissions under this head of damages, Counsel submitted that the Claimant would be entitled to an award under this head as in spite of undertaking extensive orthopaedic care and pain treatment, she continues to experience pains to her back and will continue to do so for the rest of her life. He recommended an award of **$15,000,000.00** and relies on the following cases in support of this submission:

i. **Marie Jackson v Glenroy Charlton and George Stewart** – Khan Vol. 5, pg. 167. The Claimant sustained pain in the neck, back, rib cage and left elbow, sustained severe pains to the neck and lower back and was left with a PPD of 8%. The award at the time was **$1,800,000.00** which updates to **$14,495,652.17** based on the present CPI of 166.7 (October 2022).

ii. **Sascha Grant v JUTC** – Khan Vol. 6, pg. 200. The Claimant sustained serious pains in the back and was left with a PPD of 10%. The award at the time was **$3,000,000.00** which updates to **$10,022,044.08** based on the present CPI of 166.7 (October 2022).

iii. **Marcia McIntosh v Elite Wholesale and anor**. – Claim No. HCV 1973/2005, delivered on the 31st March 2009. The Claimant

sustained serious pains in the back among other injuries and was left with a PPD of 15%. The award at the time was **$4,500,000.00** which amounts to **$14,180,529.30** based on the present CPI of 166.7 (October 2022).

iv. **Brenda Gordon v Juici Beef Limited** – Claim No 2007 HCV 04212 delivered on the 14th April 2010. The Claimant sustained serious pains in the back in addition to other injuries and was left with a PPD of 13%. The award at the time was **$4,600,000.00** which amounts to **$12,612, 171.05** based on the present CPI of 166.7 (October 2022).

v. **Stephanie Burnett v The Metropolitan Management Transport Holding and JUTC** – Khan Volume 6, page 195. The Claimant sustained serious pains in the back in addition to other injuries and was left with a PPD of 13%. The award at the time was **$4,600,000.00** which amounts **to $13,057, 441.25** based on the present CPI of 166.7 (October 2022).

[96] Mr. Kinghorn also highlighted that the Claimant sustained numerous injuries which were not evident in the cited authorities and she was left with a disability of 26% which undoubtedly is higher than any of the disabilities in the cited authorities. Learned Counsel also stated that it is fair and reasonable that there be an augmenting of the award and **$15,000,000. 00** is appropriate in the circumstances.

Handicap on the Labour Market

[97] Under this Head of Damages, Learned Counsel submitted that all of the doctors speak to the serious level of disability suffered by the Claimant. He also argued that the Claimant's injuries are such that she has a distinct disadvantage on the labour market. In her witness statement, the Claimant indicated that the injuries have affected her future and expressed the difficulties she experienced in functioning as a result of the injuries she sustained from the two falls. Counsel

outlined that this is corroborated by the reports of the Doctors in respect of her permanent impairment and the effect upon her ability to work.

[98] Counsel made reference to the authority of **Icilda Osbourne v George Barnes and others Claim No. 2005 HCV 294** where the Court awarded a global sum of **$500,000.00** to a Claimant who had 5% of the whole person permanent disability.

[99] Mr Kinghorn also placed reliance on the authority of **Carline Daley v Management Control Systems, Claim No. 2008 HCV 00291 delivered on the 4th May 2012**. The Learned Judge made an award of **$1,200,000.00** for Handicap on the Labour Market. He also commended the authority of **Robert Minott v South East Regional Authorities** [2017] JMSC Civ 218 delivered on the 20th October 2017 in which the Court awarded **$2,000,000.00** to the Claimant for Handicap on the Labour Market.

[100] Learned Counsel postulated that in light of the circumstances of the case at bar and the trend of the authorities, the sum of **$5,000, 000.00** is a reasonable sum under this head.

Future Medical Expenses

[101] Counsel submitted that based on the expenses identified by Dr Abel in association with future psychiatric intervention, the appropriate award for Future Medical Expenses is **$680,000.00**. This sum being sufficient to cover the cost of initial assessment and preparation of reports, psychotherapy, medical review and treatment and the cost of medication.

Special Damages

[102] The amount claimed for special damages was limited to the Claimant's Witness Statement which highlights her Special Damages which are specifically proven by the receipts admitted into evidence.

Defendant's Submissions

[103] The Defendant adumbrated its submission by challenging the credibility of the Claimant. Mr. Gordon indicated that the Claimant's evidence cannot be trusted not only because of the discrepancies in her case but also because of the manner in which she treated her employment with the Defendant. Counsel stated that the Claimant had no qualms about collecting her full salary from the Defendant even though she had started working for other employers, with her current job being more physically demanding and requiring longer hours than her employment with STATIN. Mr Gordon argued that in these circumstances, the Claimant's behaviour can best be described as untrustworthy and dishonest.

[104] Learned Counsel submitted that although the Claimant has sought to paint a picture in which she was financially challenged as a result of medical expenses and had to be assisted by her elderly mother, between 2016 and 2022, she left the jurisdiction on at least 4 occasions to vacation overseas for periods between 3 and 6 months. Counsel highlighted that she also left the island in May 2019 and did not return until December 2021. Mr Gordon asserted that during this period, the Claimant had still been employed to the Defendant but in the report prepared by Dr Abel in 2011, Ms Gordon had reported that she had lost her usual employment since the incident. Counsel asked the Court to note that the Claimant had never informed the Defendant that she was leaving the jurisdiction, neither did she inform them that she was working overseas. He also emphasised the acknowledgment by her that she has never resigned and collected a full salary up to 2019 and partial salary up to January 2020.

[105] Mr Gordon described the Claimant's lifestyle as being inconsistent with someone who has been disabled or who is suffering from injuries and insisted that she was in fact embellishing the effects of her injuries. He noted that despite all the treatment the Claimant has received, to include the two surgeries, and the extended periods of rest, it is quite odd that she contends that her condition had worsened or remained the same. Learned Counsel stated that that allegation is "*simply remarkable and improbable especially given the fact that her lifestyle does not reflect a condition that has worsened or* improved*.*"

[106] Learned Counsel submitted that there is no objective evidence which supports her allegation of a condition caused by both falls worsening year after year. He commended to the Court the evidence of Dr. Cheeks that this injury would have been resolved within six months. Mr Gordon argued that any misalignment of her spine from the first surgery which resulted in ongoing pain is not a matter for which the Defendant should be liable.

[107] In relation to the medical evidence, Learned Counsel for the Defendant proffered that the most critical part of the medical evidence is to be found in the medical opinion expressed by Dr. Cheeks that there was no objective evidence of radiculopathy which would have justified the first surgery. Counsel highlighted that Dr. Cheeks was of the opinion that the numerous tests performed on the Claimant did not exhibit that she was suffering from a condition which required surgery. Counsel argued that in those circumstances it is evident that the first surgery was wholly unnecessary.

[108] Mr Gordon highlighted that Dr. Webster who performed both surgeries chose not to attend the hearing although he was required to do so. Counsel asserted that Dr. Webster had not indicated in any of his medical reports, the objective medical findings which would have justified the first surgery. He further contended that the three tests to which he made reference to in his April 2013 report failed to reveal any justification for surgery. It was also submitted that the second surgery only became essential because of the spinal instability which was occasioned by the first surgery. Mr Gordon further expressed the view that Dr. Webster's absence from the trial meant that Dr. Cheeks' opinion that the first surgery was unnecessary and the second surgery was performed to remedy the problem created by the first surgery is unchallenged and ought to be accepted.

[109] In addressing the neuro-diagnostic study prepared by Dr. Ali dated October 16, 2012, Mr Gordon asserted as follows:

1. This report does not form part of the evidence before the Court and Counsel did not seek to put it into evidence. If this study was essential to the Claimant's case, then it should have been entered

into evidence. Therefore, in the circumstances, there is really no basis for the Court to deliberate on the purported contents of a report which is not in evidence.

2. Dr. Webster who performed the surgeries on the Claimant makes no reference to this report. Dr. Webster only refers to a report done by Dr. Ali dated June 14, 2006 and in this report he indicates that the nerve conduction studies were inconclusive.
3. Dr. Waite is the only doctor who refers to this study of October 16, 2011 and if the contents of this study are as has been represented, then it is inconsistent with all of the other studies which showed no evidence of radiculopathy justifying surgery.

[110] Mr. Gordon asked the Court to note that in his evidence-in-chief, Dr Cheeks advised that surgery would have been justified on two bases:

1. Where the nerve tissue is entrapped, compressed or malfunctioning and there are objective signs of abnormal function indicating radiculopathy.
2. There is spinal instability.

Learned Counsel submitted that the numerous tests performed on the Claimant prior to her first surgery do not indicate (i) or (ii). Mr Gordon reiterated that the second surgery only became necessary because of the instability to the Claimant's spine which was caused by the first surgery.

[111] Learned Counsel highlighted that the medical evidence also brings into question the Claimant's credibility as it did not support some of her assertions. Mr Gordon submitted that between paragraphs 9 to 21 of her Witness Statement, the Claimant contends that the first fall of November 2005 caused severe injuries which caused her to see several doctors and receive different treatments but the pain she was experiencing did not subside until about 8 months after this first incident. Counsel posited that this assertion conflicts with the report prepared by Dr. B.E. Isaacs (Exhibit D) and dated September 11, 2008 in which it was noted that:

i. all of the Claimant's x-rays were reportedly all normal;

ii. the severity of the Claimant's pain had reduced significantly when she was examined on December 15, 2005;

iii. the Claimant was unable to work for only 18 days; and

iv. Dr. Isaacs presumed that the Claimant had recovered fully since "*her injuries were not considered serious and there should be no resulting disability/complications."*

[112] Mr Gordon also examined the Claimant's assertion that she had suffered from two seizures[2] for which she was hospitalized for 8 days and 2 weeks. Counsel submitted that when this was compared with the report of Dr Abel, page 7 of the report October 5, 2011 (tab 7 of the Agreed Bundle) what was actually recorded is that the Claimant was told that she had a stroke for which she was receiving treatment. Mr Gordon contended that in spite of these assertions, there was no medical evidence presented in support of either incident.

[113] Learned Counsel submitted that the stark difference between the reports of the various experts and Dr. Cheeks is a matter for the Tribunal to either accept or reject regardless of whether the expert gives oral evidence at a hearing. Mr Gordon took issue with the assertion of Mr Kinghorn that the fact that it had been agreed that a number of the doctors would not be called for trial meant that the contents of their reports were accepted. He asserted that the reports and letter produced by Dr. Cheeks are diametrically opposed to the findings and conclusions contained in these medical reports and as such there is no change in the Defendant's position.

[114] Counsel questioned the findings of Dr. Abel and asserted that in making his diagnosis, Dr. Abel assumed that what was said by Ms Gordon about her impairment and lifestyle changes were in fact true and that these arose exclusively from the two incidents. Learned Counsel submitted that there is no indication in Dr. Abel's report about the Claimant's psychiatric state prior to the incidents in question which raises questions as to his certainty that the symptoms noted began after the incident.

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[2] Paragraph 38 witness statement

[115] Mr Gordon urged the Court to reject the findings of Dr. Abel on the basis that they rely on assumptions which have been disproved by Dr. Cheeks and in the circumstances, no award for post-traumatic stress disorder should be made or it should not exceed **$300,000.00.**

[116] Mr Gordon highlighted the evidence of Ms Carol Coy, the Director of the Defendant Institute who he submitted made efforts to follow up with the Claimant to ascertain when she would return to work and her medical status. Mr Gordon also asked the Court to take special note of the witness's evidence that the Defendant was never informed by the Claimant that she was travelling overseas or had gained employment. It was also emphasised that the salary paid to the Claimant was never repaid in spite of her receiving a salary elsewhere. Counsel submitted that on comparing this account with that of the Claimant, it is clear that the Claimant was not truthful about her decision to reside and work overseas and this decision was not influenced in any way by the Defendant.

[117] On the issue of what he described as 'the intervening acts of Dr. Webster', Mr Gordon contended that the surgeries performed by Dr. Webster whether individually or together constituted a "novus actus interveniens" which broke the chain of causation between the Defendant's negligence and the Claimant's alleged injuries. Counsel made reference to the legal principle concerning intervening acts by third parties which was stated in Charlesworth & Percy on Negligence as follows:

> *"Where a claimant's damage has resulted from the act of another person independent of the defendant, the mere fact that the defendant's breach of duty has given, as it were, the third party the opportunity to intervene does not suffice to make the defendant responsible for the consequence of the intervention. Rather, those consequences must be within the scope of the risk."*

[118] Mr Gordon submitted that if the intervening conduct is of such a nature that it breaks the chain of causation then any harm which flows from this intervening act is not for the defendant to bear. Learned Counsel asserted that if the intervening act suggest negligent conduct, then it is likely that it breaks the chain of causation. The authority of ***Knightley v Johns*** *[1982] 1 W.L.R. 349* was cited in support of this submission. Mr Gordon submitted that the

appropriate test to determine whether there is negligence among skilled persons is the Bolam test which focuses on the standard of the ordinary skilled man exercising and professing to have that skill. Counsel asserted that a medical practitioner is not guilty of negligence if he has acted in accordance with practice accepted as proper by a responsible body of medical men skilled in that particular art.

[119] In examining the actions of Dr Webster, Mr Gordon made reference to the reports submitted by Dr Cheeks where he outlined that the two (2) reasons for which surgery would be warranted, neither of which he found were present in this case. Counsel contended that there is no evidence which contradicts Dr. Cheeks' pronouncement about this practice. Mr Gordon emphasised the finding of Dr Cheeks that the first surgical procedure exposed the Claimant to a dangerous condition known as spondylolisthesis. Counsel also submitted that even the Claimant acknowledged that her overall condition worsened notwithstanding these surgeries.

[120] Mr Gordon insisted that on a balance of probabilities, Dr. Webster's decision to proceed to surgery despite the absence of objective material was negligent and constituted intervening acts which broke the chain of causation. Therefore, any pain, discomfort or disability which the Claimant suffered as a consequence of these surgeries are matters for which the Defendant ought not to be held liable.

Divisible Harm

[121] Mr Gordon submitted that the case law recognizes that where the extent of a defendant's liability can be determined, then that defendant should not be asked to bear any additional liability. The authority of ***Rahman v Arearose Ltd*** *[2001] QB 351* was cited in support of this submission. The Court had to consider the issues of intervening acts and the apportionment of liability between the defendants.

[122] Counsel commended the Court's approach in the ***Rahman*** decision on apportioning liability as instructive, specifically where it was stated that:

> *…the real question is, what is the damage for which the defendant under consideration should be held responsible. The nature of his duty*

> *(here, the common law duty of care) is relevant: causation, certainly, will be relevant – but it will fall to be viewed, and in truth can only be understood, in light of the answer to the question: from what kind of harm was it the defendant's duty to guard the claimant?"*

[123] Mr Gordon asserted that even if the argument in respect of novus actus interveniens were to fail, then consideration should still be given to whether the Defendant should be responsible for the Claimant's total loss and damage. Counsel argued this was particularly significant where Dr. Isaacs had recorded that the injuries which were caused by the first fall were not serious and Dr. Cheeks had opined that the Claimant would have recovered within six months.

[124] Mr Gordon also contended that it was clear from the report of Dr. Cheeks that the Claimant suffered from age-related degenerative changes and would have experienced scarring from both surgeries. Counsel submitted that these would have caused pain and on a balance of probabilities would account for the Claimant's prolonged discomfort after the six months' recovery period from the second fall. Mr Gordon also addressed the evidence of Dr. Cheeks where he indicated that if the surgeries had not occurred, the Claimant's PPD would have been approximately 3% and posited that this meant that the Defendant should only bear responsibility for proven injuries and consequential loss up to six months after the second fall.

General Damages

[125] Counsel submitted that in spite of the varying views outlined in the myriad of reports presented on behalf of the Claimant, it was reported by Dr Cheeks that the only injuries directly/causally connected to the fall from the chair were the cervical muscular strain (from which Ms Gordon had recovered), injury to the L4/5 invertebral disk with nerve root irritation and a small annular tear. It was in these circumstances that the 5% impairment was assigned. In respect of the comparable cases on quantum, Mr Gordon relied on a number of decisions. The first was ***Melvin McCurdy v George Campbell and Jin Hee Kim*** *[2014] JMSC Civ 5*. In that matter, the Claimant suffered injuries to the neck and back and was diagnosed with a herniated disc C3/C4. The prognosis was that the pain might recur and a 5% impairment rating was assigned. An award of

$1,400,000.00 was awarded which Counsel noted updates to **$2,080,147.96** using the March 2022 CPI.

[126] The decision of ***Racquel Bailey v Peter Shaw*** *[2014] JMCA Civ 2* was also commended to the Court. The Claimant/Appellant suffered whiplash injuries when the vehicle in which she was a passenger was struck by another. She also experienced tenderness in the lower lumbar region, mild spasm in the muscles, pain in forward flexion, persistent back pain and was assigned a 5% impairment. On appeal, the sum of **$1,000,000.00** was awarded which updates to **$1,485,819.97**. In light of these authorities, Counsel recommended that if the Court accepts a PPD of 3%, a reasonable award for General Damages should not exceed the sum of **$1,500,000.00.**

[127] Mr. Gordon took issue with the head of damage, Handicap on the Labour Market. He submitted that no award should be made as the evidence does not support an award under this head as based on the evidence of Dr. Cheeks, the Claimant was fit to resume her work six months after the second fall. He also stated that there was no evidence that the Claimant's job with the Defendant was in jeopardy and that the Claimant was or is unable to compete on the labour market. Counsel asserted that the evidence revealed that the Claimant was able to secure two other jobs while still employed to the defendant and as such was still able to secure employment. The case of **Attorney General of Jamaica v Davis** Civil Appeal No. 114/2004 was cited in which the Court examined the relevant considerations for such an award to be made.

[128] Mr Gordon highlighted paragraph 15 of the judgment, where the Court of Appeal made reference to the "Moeliker" principle and stated the two (2) stages for consideration are as follows:

1. Whether there is a "*substantial*" or "real" risk that the plaintiff will lose her present job at some time before the estimated end of her working life.
2. The Court "*must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the*

time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chance of getting a job at all, or an equally well paid job."

[129] Learned Counsel postulated that the Claimant's employment was never in jeopardy and no evidence had ever been presented to show that she had been at risk of losing same. He submitted that her current employment is physically far more demanding than the one she had with the Defendant. Mr Gordon argued that in the circumstances, the Claimant's status in the labour market has actually improved as her current job requires her to travel to another state where she is accommodated in a hotel for approximately one year. Counsel posited that her current employment circumstances are far more prestigious than before.

[130] Mr Gordon contended that the Defendant should not be responsible for a claim under this head as the complaints which the Claimant continue to make about the effect of her injuries are related to her degenerative condition and/ or the surgeries which were performed by Dr. Webster. Counsel submitted that if this position does not find favour with the Court, an award under this head should not exceed the sum of **Two Hundred Thousand Dollars ($200,000.00).**

Special Damages

[131] Mr Gordon submitted that no award should be made for any item claimed subsequent to September 2007 (i.e. six months after the second fall) as by this time, the Claimant would have been fit enough to resume her work. The Defendant further submitted that any costs incurred by the Claimant subsequent to this date would have been unnecessary and should not be the responsibility of the Defendant.

[132] Learned Counsel for the Defendant submitted that in any event, no award should be made for the following items:

a. In relation to the head of damage, Depression, the claims relating to Dr. Abel's assessment and future care ought to be disallowed.

b. No police report was put into evidence as such it is unclear what this item has to do with this matter as the claim does not involve a motor vehicle accident.

c. In relation to transportation, this claim is unsupported by documentary evidence. The amount stated does not specify for what period or where the Claimant was travelling to and from.

d. The Claimant has not led any evidence about being treated by a Dr. Masters, Dr. Bromfield, and/or Dr. Anderson. The receipt from Newport Medical Group (Dr. Anderson) dated September 24, 2008 refers to a medical report which is not a part of the Claimant's trial documents. The exact involvement of these doctors with this matter is unclear.

e. In relation to Dr. Waite, Learned Counsel for the Defendant expressed that there is a claim in the claimant's submissions for a sum of **$250,000.00** for which there is no basis as there is no documentary evidence to support same.

An award of special damages, if given and taking into account the exclusion of the documents stated above was outlined by Counsel as amounting to **$240,754.96**.

LAW AND ANALYSIS

[133] In arriving at my decision on the appropriate quantum and heads of damages that should be awarded in this claim, I have carefully considered the evidence of the witnesses and the relevant legal principles. It is trite law that a Claimant has a duty to prove on a balance of probabilities that the Defendant owed a duty of care to her and that her injuries were caused by a breach of this duty. This principle of law was helpfully illustrated by Harris, JA in ***Glenford Anderson v. George Welch*** *[2012] JMSC Civ. 43* where she stated at paragraph 26:

> *"It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach 7of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a*

claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities."

[134] In addition to this general duty of care, the employer owes a special duty to his employees, at common law, to provide a competent staff, adequate equipment, a safe system of working with effective supervision and a safe place to work. Employers also have an overriding managerial responsibility to safeguard the employees from unreasonable risk of personal injury in regards to the primary conditions of employment such as the safety of the premises and the method of work.

[135] It is not in dispute that the Claimant was an employee of the Defendant. Neither has any issue been taken with the Claimant's assertion that the Defendants breached their duty of care to her when the chairs provided by them for her use gave way with the end result of her being injured when she fell to the ground. The seminal point with which the Defendants have taken issue is that they should not be called upon to shoulder the full extent of the injuries suffered by the Claimant as the first surgery broke the chain of causation.

[136] The question of whether an intervening event will break the chain of causation is one for the courts to decide in all the circumstances. In the Court of Appeal decision of ***Knightley v Johns*** *[1982] 1 W.L.R. 349*, the defendant's negligent driving caused the blocking of a busy road tunnel. A police constable was sent by his inspector to drive against the traffic flow in order to close the tunnel entrance. While complying with these instructions, the constable was struck by a car being driven in the opposite direction. It was held by the Court that the defendant was not liable as while it might be natural, probable and foreseeable that the police would attend on the location in response to the accident and that there were risks involved, the multiplicity of errors on the part of the police meant that the inspector's negligent behaviour was the real cause of the plaintiff's injuries and not that of the defendant.

[137] The decision of ***Jobling v Associated Diaries Ltd*** *[1982] AC 794 (HL)* also provides useful guidance on this point. In that case, the claimant was injured at work due to his employer's negligence. He slipped and injured his back and lost

50% of his earning capacity as a result. Three years later, he developed spondylotic myelopathy, a spinal disease. This was not connected to the accident. He was consequently unable to work. The House of Lords held that the disease of the spine was a novus actus interveniens which broke the chain of causation. Lord Keith of Kinkel's statement at page 814 paragraphs E-H of the judgment is instructive and applicable to the case at bar;

> *"The assessment of damages for personal injuries involves a process of restitution in integrum. The object is to place the injured plaintiff in as good a position as he would have been in but for the accident. He is not to be placed in a better position. The process involves a comparison between the plaintiff's circumstances as regards capacity to enjoy the amenities of life and to earn a living as they would have been if the accident had not occurred and his actual circumstances in those respects following the accident.* ***In considering how matters might have been expected to turn out if there had been no accident, the "vicissitudes" principle says that it is right to take into account events such as illness, which not uncommonly occur in the ordinary course of human life. If such events are not taken into account, the damages may be greater than are required to compensate the plaintiff for the effects of the accident, and that result would be unfair to the defendant. "***

[138] It is the position of the Claimant that the principle of novus actus interveniens does not arise as the evidence shows that the surgeries, with special emphasis on the first surgery, were necessary and the need for same was wholly as a result of the injuries sustained on the two occasions when the Claimant fell. In support of this proposal, Mr Kinghorn made reference to the fact it had been greatly emphasised by Dr Cheeks that there was no justification for the surgery as the nerve conduction study did not disclose any radiculopathy of the nerve. Counsel argued that the report of Dr Waite disclosed that a study conducted in 2011 revealed that there was in fact radiculopathy. On this basis, the surgery was necessary and no consideration needs to be had to the issue raised by the Defendants.

[139] The issue of causation being greatly disputed by the respective parties, it is evident that any decision on quantum would turn on whether there was a break in the chain of causation and if yes, what would constitute an appropriate award in damages. In order to properly address this issue, it is evident that the reports which have been exhibited in this matter have to be carefully reviewed. Before

moving to an analysis of the contents of these reports, it is important to note that although the reports have been placed into evidence by consent, it is still a matter for the Court to determine the reliability of same. The Court also has a discretion on whether all the evidence contained in the reports can be accepted as a fact and what weight if any should be ascribed to these reports[3].

[140] Having carefully reviewed the various reports, I noted that prior to the report of Dr Waite dated November 2011, there had been no reference to the Claimant experiencing radiculopathy as confirmed by nerve conduction studies. In fact, the references to radiculopathy in the previous reports appeared to have been based on reports of the Claimant when subjected to various examinations and it was noteworthy that in his 2008 report, Dr Waite made reference to this radiculopathy as subjective. In other words, this complaint was non-verifiable as the study conducted in 2006 showed no sign of nerve root irritation and was categorised as normal.

[141] It was also noted that this nerve conduction study was requested by Dr Webster as a part of the diagnostic and treatment procedure adopted by him in his treatment of the Claimant. On a detailed analysis of his reports leading up to and after surgery, it is noted that no reference was made by him to any further studies being requested or reviewed. To be specific, there is no reference in these reports of any such study being done in 2011, the contents of which formed the basis for his decision to proceed to surgery. In fact, the rationale offered by the doctor states that '*because of her persistent symptoms despite extensive pain management and her radiological findings, a decision was made to offer Ms Gordon surgery.'*

[142] It is important to note at this stage that these radiological findings had been stated in his report as:

MRI of lumbo-sacral spine done July 19th, 2012

[3] Stockwell (1993) 97 Cr App R 260

- Degenerative disc disease at L4/5 with mild to moderate disc herniation, bilateral foraminal stenosis left>right
- Mild disc herniation L5/S1 with mild bilateral foraminal stenosis

X-ray of area

- Good alignment and no movement on flexion extension

Nerve conduction studies done June 14, 2006

- inconclusive

[143] In his submissions on this issue, Mr Kinghorn has asked the Court to find that these results were overlooked by Dr Cheeks and this omission clearly undermined his evidence as a whole but specifically on the point of the surgery being required as a part of the Claimant's treatment. In considering this submission, I have taken careful note of the reports which were provided to the Doctor for review. This record is significant as it was also noted by Counsel that this document is not listed and may not have been seen or reviewed by the doctor.

[144] The segment of Dr. Cheek's report dated July 7th, 2015 is captioned 'documents provided' and sets out a lists of all the documents received. It is noted that the list includes all the other reports which pre-date the date of submission, the majority of which have been put into evidence by agreement. The documents outlined include not only doctors' reports but also MRIs, X-rays, Ultra-sounds and the results of a nerve conduction study conducted in 2006.The report also contains a history of events as gleaned from the documents provided with specific reference again being made to the 2006 nerve conduction study and the observations made by Dr Webster of same. It was evident on a review of these segments of the report that there is in fact no reference to the 2011 results and in that regard this would tend to lend support to the submission of Mr Kinghorn that the contents could not have been reviewed by Dr Cheeks.

[145] When shown the 2011 and 2016 reports of Dr Waite where reference was made to the results of this later study, Dr Cheeks was visibly flummoxed and his words indicated as much as he initially responded that he had not seen that information before and on further review of the document handed to him, he stated that he must have seen the notation made by Dr Waite but in any event it was not accurate and neither were the conclusions of the doctor which was based on same. In my analysis of this situation and the impact of these utterances on the reliability of the evidence provided by Dr Cheeks, I found that while it has been suggested that the doctor had not been straightforward or entirely forthcoming in his evidence on this issue, my assessment of his demeanour and responses were to the contrary. I found no deceit in the witness and it was clear that the information noted in the reports previously mentioned had 'taken him by surprise'.

[146] While it is correct that this information would have previously been mentioned in Dr Waite's report of November 2011, a review of the exhibits provided revealed that the actual report was never exhibited in this matter and the Court is left to assess this important detail based on the notation in the 2011 and 2016 reports of Dr Waite. It is the Defendant's submissions that the second hand account of Dr Waite on this point ought not to be accepted by the Court as the Claimant has asserted that there was this finding and it was incumbent on her to prove this through the submission of the actual report. They argued that this was of particular importance given the significance of these findings to her claim.

[147] In determining if the second hand account of Dr Waite on this issue was sufficient to move the Court to accept that there was in fact such a result, I carefully considered the reliability of his reports on a whole. In the course of this review, I noted that in his initial report, Dr Waite had indicated that on assessment, the Claimant had been noted as suffering from injuries which included:

1. Acute chronic neck pain with subjective right cervical radiculopathy. <u>This existed prior to the injury but had been aggravated by the injury</u>.
2. Thoracic spine contusion.
3. Mechanical and discogenic low back with right lumbar radiculopathy at L5 possibly secondary to MRI confirmed prolapsed intervertebral disc at L4-L5.

(emphasis added)

[148] Dr Waite stated that the Claimant's pre-existing injury had been managed by him. His report also outlined that he treated her for poly arthritis of the hands and poly tenosynosvitis of the upper limbs for which he subsequently referred her to a specialist. This record of the pre-existing injury was repeated in other reports to include that of Dr Abel. In his follow up report however, Dr Waite resiled entirely from this assertion and stated that it was not accurate that she had ever had this injury. His report is silent in respect of his previous comment that she had been under his treatment/management for this condition. It is evident from the evidence of Ms Gordon, her pleadings and the medical reports on which she relies, that her case is predicated on her having suffered injuries to her neck and lower back as a result of having fallen on these two occasions. Given the importance of this injury to the collective consideration of damages, I found it curious that an error of this magnitude could have been made by Dr Waite.

[149] The end report of this startling occurrence is the Court had to consider the fact that the reports presented by Dr Waite were not infallible in terms of their content. My concerns in this regard were compounded by the fact that no other physician makes reference to ever seeing the 2011 study and only speak of the 2006. It was also interesting to note that while Ms Gordon asserted in her account that it was Dr Waite who requested this additional nerve conduction study and later recommended that she have the herniated disc removed, Dr Waite does not record that anything of this sort occurred.

[150] It was also significant that although given the opportunity to comment on Dr. Cheeks report in which he asserted the bases on which surgery would be justified and asserted that there was no evidence of verified radiculopathy, Dr Webster chose not to meet this head on with a declaration that there was in fact this later study. The very fact that he had requested same initially shows the significance of it in his decision making process and it is logical that if it had been requested and received by Dr Waite that he would have provided it to the neurosurgeon. In light of the foregoing discussion, it is my opinion that given the absence of this information from the reports of Dr Webster, these results as recorded in Dr. Waite's report, cannot now be argued as providing justification for the surgery and undermining the evidence of Dr Cheeks.

[151] In respect of this argument, I note that it had been open to the Claimant to have Dr Webster attend and provide clear evidence as to what was considered by him in the course of arriving at his decision to conduct surgery. It was also open to them to ask him to comment on the report of Dr Waite if he had not previously had sight of its contents. None of this was done in spite of the clear indication before the assessment hearing that both he and Dr Cheeks were to attend for cross-examination.

[152] The surgery having been completed, the Claimant initially reported some improvement but based on her own account and that of Dr Webster, she began experiencing excruciating pain in the neck and lower back and an X-Ray and MRI performed in January and April 2013 respectively revealed:

- Grade 1 spondylolisthesis at L5/S1
- Mild degenerative disc disease, disc bulges at C4-C5 and C5-C6 with foraminal stenosis at C4-C5 and bilateral foraminal stenosis at C5-C6.

[153] I also noted that as a result of these findings, Dr Webster recommended lumbar spinal stabilization and a 2nd surgery was conducted on the Claimant in respect of same. Although the Claimant had the benefit of same, it was clear from the report of Dr Webster in 2014 that she continued to experience pain and

incapacity and in his assessment of impairment, he observed that the lumbar spinal pathology was a class 3 as a result of invertebral disc herniations at multiple levels with associated radiculopathy which persisted after surgery.

[154] In assessing the significance of this finding, I noted that in the MRI which had been conducted immediately prior to surgery, the results had indicated mild to moderate disc herniations at the L4/L5 and mild disc hernations at L5/S1. These findings were clearly different from those which appeared in the April 2013 MRI and the observation of Dr Webster in his 2014 report (following the 2nd surgery) seems to acknowledge that there were now invertebral disc herniations at multiple levels with foraminal stenosis and radicular complaints as opposed to mild/moderate herniations. In light of the foregoing differences, it is evident that post-surgery, the condition of the Claimant had been significantly changed.

[155] It was also of some significance that the report of Dr Rose who had seen the Claimant after both falls and had the benefit of viewing an MRI which showed the same findings as the 2012 report stated that there were no indications for surgical intervention and she was appropriately being treated for pain. While the Claimant may have undergone the surgery in an effort to mitigate her situation, it appears that the procedure occasioned additional problems which worsened her pain and physical condition and increased her disability. In these circumstances, I find that there is merit in the argument of the Defendant that the principle of novus actus interveniens has arisen and this must now be considered.

APPORTIONMENT/DIVISIBLE HARM

[156] On a review of the evidence presented by the Claimant's experts, it is clear that with the exception of Dr Isaacs, their view on the appropriate level of impairment suffered by Ms Gordon ranges between 10% to 26%. Dr Cheeks, on the other hand, found that based on the original injuries and the full recovery of Ms Gordon from what he described as 'neck sprain,' the appropriate level of impairment is 5% and possibly 3% setting aside the impact of the surgeries which created new issues and the scar tissue from which would have caused pain and disability in movement.

[157] In respect of these differences, Mr Kinghorn has argued that the evidence of the other doctors should be accepted as their examination of Ms Gordon was more thorough, spanning more than one visit whereas Dr Cheeks saw her only once for 40 minutes. It was also pointed out by Counsel that there had been no mention of scarring by Dr Cheeks in any of his reports and his comment on the ability of the other doctors to offer an impairment rating was also not reflected in his report. It was argued that these factors should call into question the reliability of the doctor's report as they disclose an approach of withholding information from the report and presenting them in court.

[158] In my consideration of these submissions and criticisms, I noted that in the segment of his report which was titled 'physical examination,' the doctor did make mention of observing a surgical scar to the lumbar region of the Claimant. In response to questions on why he insisted that the surgery made her condition worse, he explained that this was so for a number of reasons one of which was the scar/scarring which the doctor indicated was added to the scar tissue injury which would have been occasioned from the fall and which would cause restriction on movement, impact flexion and cause pain.

[159] In respect of his comment on the ability of the other doctors to assign a level of impairment to Ms Gordon, this was again in response to questions in which he was commenting on the reports and findings and added '*there is an issue with assignment of impairment rating as someone who doesn't treat the condition itself but only treats one symptom of the condition that individual isn't usually regarded as valid to rate that condition in terms of PPD'.* I also noted that in response to the suggestion that this observation did not appear in his report, Dr Cheeks was candid in accepting that it did not and stated that was not the purpose for which he had provided his report.

[160] In my analysis of the reliability of the evidence of Dr Cheeks on this point, having observed the witness as he gave his evidence in the dynamic context of the Courtroom, it was clear that the evidence complained of was not delivered in a deliberate attempt to attack the evidence of the Claimant's witnesses from the witness box. The Court finds that it was pellucid that the doctor was responding

to direct questions on these issues and in doing so would have provided information which may have been outside the exact confines of his report, specifically if he had been asked to comment on findings of these experts.

[161] While I agree that it had been open to the doctor to make these observations of the other experts, I did not believe that this was deliberately excluded from his reports. What has not changed in any event is that his findings were always different from those of the other physicians, save for Dr Isaacs as was his observations on impairment. As such, it could not be argued that the Claimant could be left with any doubt as to his view of her experts. It was also interesting to note that in making these criticisms of the other doctors, no such pronouncement was made against Dr Webster who had assigned the highest level of impairment at 26%.

[162] In assessing the value of the impairment ratings provided in the Claimant's exhibits, I noted that the reports of Doctors Rose and Dawson were prepared in 2007 and 2010 respectively and that these would have pre-dated the Claimant's surgeries and outcome. It is clear from the literature that any such assignment would likely have preceded her maximum level of improvement and this is a factor which would have to be carefully considered in this regard.

[163] On the question of the actual harm/injury suffered by the Claimant as a result of her falls, the following cross-examination and responses were recorded:

Q: Did the first surgery contribute to that assessed PPD

A: I don't understand the question

Q: Did the effect of the first surgery contribute to your finding of 5% PPD?

A: ***Whatever her disability would have been prior to first surgery it got worse, not PPD. PPD means permanent which is that the patient is as good as it is going to get. (***emphasis supplied)

Q: Did the effect of the first surgery contribute to the 5% PPD

A: Since I did not do the surgery or examine her myself at the time, I can only tell you what the PPD was at the time when I examined her myself.

Q: Is this answer the same in respect of the second surgery, did it contribute to the PPD?

A: The 2nd surgery put her in a medical state which I assessed at 5%.

[164] The upshot of these responses indicate that while it is accepted by Dr Cheeks that the Claimant suffered a disability as a result of the two incidents, it is his opinion that the surgery worsened same. This distinction is important as he also pointed out that the PPD assigned is different from the actual disability as the former means that the state of the claimant is at the maximum level of improvement. It is evident that in his approach, Dr Cheeks assessed what this was after the 2nd surgery had been done to 'repair' the Claimant's spinal instability which had been apparent after surgery. It is this 'repaired' state that was assessed taking into account the issues caused by the 1st surgery which he was able to assign as 5%. He also pointed out that it would have been likely that her impairment rating would have been about 3% if the surgery with its attendant difficulties had not been done. It is clear from his evidence that the results of the MRI and X-ray which were conducted on the Claimant's spinal region immediately prior to surgery play a significant role in his conclusion on the likely disability.

[165] On the other hand, the 21% and 26% which were assigned by Doctors Waite and Webster were clearly assigned on a holistic approach to the Claimant's condition. In light of my findings that the Claimant's physical state was adversely impacted by the 1st surgery and that this worsened her situation, I believe that the impairment assigned by Dr Cheeks is a more accurate reflection of her true level of impairment as a result of the Defendant's negligence.

AWARD OF DAMAGES

General Damages

[166] The aim of an assessment of damages is to arrive at a figure that will provide adequate compensation to the Claimant for the damage, loss or injury suffered as was enunciated by Lord Blackburn in ***Livingstone v Rawyards Coal Co.*** *[1880] Appeal CAS.25*. Thus, it is trite law that the sum of money that should be awarded as General Damages for personal injury suffered by a Claimant ought to be a sum which as "**nearly as possible**" puts the Claimant in the same

position she would have been in if she had not sustained the wrong. (per Lord Blackburn in **Livingstone supra**)

Post-Traumatic Stress Disorder (PTSD)

[167] Apart from the contents of her witness statement on the impact that this issue has had on her mental state, the Claimant also relies on the report of Dr Abel which has been reviewed above. In this report, he outlined his diagnosis as being Post-Traumatic Stress Disorder and Major Depression. While Mr Gordon has sought to highlight discrepancies between the account of the Claimant and what she reported to Dr Abel in terms of her injuries, there has been no evidence provided from a like specialist to rebut the diagnosis proffered. The outcome of this situation is while there may be questions in respect of the Claimant's veracity, the report of the doctor makes it clear that outside of the information provided by Ms Gordon, a clinical approach was also applied in arriving at his diagnosis. In these circumstances, I was unable to agree that the Doctor's conclusions are open to question.

[168] In determining the type of award that should be made, I have considered the decision of ***Angeleta Brown v Petroleum Corporation of Jamaica*** *(supra)* which was cited by both Attorneys in this matter. I have also considered the opinion of the doctor that the Claimant would not be able to function in a like position employment wise. This was an opinion offered in 2011 which was 11 years prior to the hearing of the assessment. On her own admission, the Claimant is employed in a position which requires more of her physically. She also works longer hours and has to travel for work. All of which seem to indicate that the level of functional impairment envisioned by the Doctor did not come to pass or there has been a level of recovery since this conclusion was arrived at. In light of the foregoing, I am satisfied that the appropriate award that should be awarded to this Claimant is $1 million.

Pain and Suffering and Loss of Amenities

[169] In seeking to determine the appropriate award for pain and suffering and loss of amenities, the Court adopts the dicta of Lord Hope of Craighead at page 507 of the case of ***Wells v Wells*** *[1998] 3 All ER 481*: -

> *"The amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the claimant's general damages."*

[170] In respect of the award under this head, I carefully considered the guidance provided in all the cases which were relied on by the Parties. Although none is on all fours with the instant case, they provided useful assistance as to the quantification of the award. I also gave due regard to the prinicple enunciated by Campbell J. in ***Beverly Dryden v Winston Layne SCCA 44/87*** *(unreported)* delivered 12th June 1989 that personal injury awards should be reasonable and assessed with moderation.

[171] Counsel for the Claimant has proffered five (5) cases to assist the court in arriving at an appropriate figure. Of the cases cited, I find **Marie Jackson** to be most closely comparable in terms of the nature and severity of the injury suffered. The main point of difference being that Ms Jackson's level of impairment is higher. Counsel for the Defendant sought to rely on a number of cases as well, the case of ***Melvin McCurdy*** being more closely aligned with the evidence of injury and level of impairment accepted in the case at bar with the distinction being that Ms Gordon's situation was somewhat more serious as her initial injury was compounded by a 2nd fall.

[172] She also continues to complain of ongoing discomfort. It was also noted by Dr Cheeks that she would continue to have flare ups if engaged in certain types of activities such as sitting and standing for certain periods and it is clear that she has to do both in the course of her employment. While neither case is exactly on all fours with the instant claim, I am of the view that her situation would fall within the midpoint of the awards cited with the relevant adjustment in respect of her level of impairment. Accordingly, it is my conclusion that an award in the sum of **$5,000,000.00** will adequately address the level of the Defendant's liability on quantum of damages under this heading.

Handicap on the Labour Market

[173] To succeed in obtaining an award under the head of Handicap on the Labour Market, there must be evidence of the following;

a. the claimant's earnings at the time of the trial,

b. evidence of loss of these earnings,

c. evidence of difficulty finding alternative employment and

d. evidence that any subsequent employment would result in diminution of earnings

(***Dovan Pommells v George Edwards et al Khans Vol 3***, pp.138-144)

[174] On a detailed review of the evidence presented, I note that the Claimant was kept on staff by the Defendant at full salary and did not lose her earnings. While there was an adjustment to this position in January 2020, there was no updated report presented which outlined her inability to work after this period. Although Ms. Gordon sought to persuade the Court that she did not believe that the Defendant had expected her to resume, she made no effort to confirm this with them and continued to collect a salary even while she was outside the jurisdiction of over 6 years, unknown to the Defendant.

[175] I also observed that she did not present evidence of any difficulty that she experienced finding alternate employment in the intervening period when she experienced a reduction in earnings or ceased receiving a salary. This was significant given her complaint of being financially challenged as a result of her injuries. Ms Gordon also failed to provide any evidence that she would attract reduced wages because of her incapacity. It is evident from her account that Ms Gordon commenced working in her current position in April 2021 in a job that requires her to travel and is more physically demanding than her previous job with the Defendant. Although she would have been in receipt of wages from them for over a year, she did not provide any evidence to show that her earnings had been reduced.

[176] For these reasons, it is my considered view that no foundation has been laid to suggest that she is incapable of working at the same level or finding suitable employment. The aim of an award of damages is to restore the claimant's pre-accident status by providing a sum which, as far as possible, equates to the income which she would have earned during the period she is unable to earn as a consequence of the injuries that have been caused by the defendant's negligence. Based on the requirements outlined in the authorities and having considered the evidence and submissions on this point, I make no award under this heading.

Future Medical Care

[177] It has been submitted by Mr Kinghorn that the sum of **$680,000.00** should be awarded under this heading. In arriving at this figure, reliance was placed on the cost for future medical expenses as outlined by Dr. Wendel Abel in his report.

[178] In relation to an award for future medical care, I have considered the guidance provided in the authority of ***Orlando Adams v Desnoes & Geddes Limited t/a Red Stripe*** *[2016] JMSC Civ. 21* where the Honourable Mrs. Justice Sonia Bertram Linton (Ag) (as she then was) stated at paragraph 64: -

> "*Future medical expenses are reasonable and necessary health care expenses required for the treatment of injuries sustained as a result of the negligent act at issue. To recover future medical expenses, the claimant must show a "reasonable probability" his injuries will require him to incur medical expenses in the future. The claimant may recover future medical expenses if he shows the existence of an injury, that medical care was rendered for the treatment of that injury prior to the time of trial, the cost of that past medical care, and that he is still injured to some degree at the time of trial. At a bare minimum, the claimant must show the reasonable value of his past medical treatment and the probable necessity of future medical treatment.* ***AG v Tanya Clarke Supreme Court Appeal No.109/2002."***

[179] While I accept that at the time that the Claimant was assessed by Dr Abel, he may have been of the view that the treatment plan outlined was required for the impairments noted, I have already observed that the Claimant has been able to move beyond the functional impairment noted which was a significant indicator of this diagnosis. Additionally, there is no updated report to assist the Court on

whether the treatment indicated is still required twelve years later. In light of the foregoing, I was unable to find that there is any justification at this stage for an award under this head of damages.

Special Damages

[180] It is a general principle that special damages must be specifically pleaded and strictly proven. However, failure to do so is not necessarily fatal to a claim. The Court is expected to look at all the evidence offered to substantiate the claim, however tenuous each aspect may be (***Dalton Wilson v Raymond Reid SC Civ. App. no 14/2005 per Smith J.A. at p.12***).

[181] Under this head of damages, Counsel for the Claimant provided this court with receipts which were tendered into evidence as exhibits. Based on my calculation of the documents exhibited as Exhibit A 1-22 and C1-6, I am satisfied that in respect of medical expenses, an award in the sum of the **$339,334.46** has been proved.

Transportation

[182] In respect of this award, Counsel for the Defendant argued that in the absence of documentary evidence, this sum should not be awarded. Although this submission has been advanced by Mr Gordon, it is not in dispute that the transportation system in this jurisdiction is not one in which receipts are usually generated and an award under this heading is usually for the Court's discretion bearing in mind any cogent evidence presented on the point. In this regard, I have considered the decision of ***Shaquille Forbes v Ralston Baker*** *Claim No. HCV 02938 of 2006*, in which Fraser J, in holding that the Claimant was entitled to costs for transportation, stated:

> *"It is not hard to fathom that at the time of taking the claimant to the doctor for treatment and check-ups, the need to obtain receipts to prove that expenditure would not have been uppermost in the mind of the Claimant."*

[183] I also considered the decision of ***Ezekiel Barclay v Clifford Sewell and Kirk Mitchell****,* Suit No. CL.B 241 of 2000, in which Anderson J opined that transportation is one of those situations where it is not the custom for taxi drivers

to issue receipts in Jamaica. It is not in issue that the claimant made several visits to the various doctors for treatment and consultation. In her Witness Statement at paragraph 12, she averred that she "*had to do physiotherapy 3 times per week for approximately 8 months, that is approximately 96 visits. Each visit to the doctors of physiotherapist cost me approximately $1,500.00*." She stated that $1500 was paid to a taxi for each round trip. I have considered that she had ambulatory challenges for a considerable period and that the treatment of same required that several trips be made in that regard and I am prepared to make an award for ninety-six (96) trips in the sum of **$192,000.00**.

[184] In relation to the Police Report, I agree with Learned Counsel for the Defendant that this is not a matter involving a motor vehicle accident and therefore this Court will not make any award for the Police Report.

CONCLUSION

[185] The assessment of damages for injury and loss incurred by the Claimants are as follows:

1. General Damages for: -
    a) Pain and suffering and loss of amenities: Five Million Dollars ($5,000,000.00) with interest at a rate of 3% per annum from March 18th, 2008 to March 22nd, 2023;
    b) Post-Traumatic Stress Disorder: One Million Dollars ($1,000,000.00)
2. Special damages in the sum of Five Hundred and Thirty-One Thousand Three Hundred and Thirty-Four Dollars and Forty-Six Cents ($531,334.46) with interest at a rate of 3% per annum from the 2nd of March 2007 to October 20th, 2022;
3. Costs to the Claimant to be taxed if not agreed.