[2021] JMSC Civ 171

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV06038

BETWEEN	**JOY MURRAY**	**CLAIMANT**
AND	**CHRISTOPHER MORRIS**	**1ST DEFENDANT**
AND	**JAMAICA URBAN TRANSIT COMPANY**	**2ND DEFENDANT**
AND	**METROPOLITAN MANAGEMENT TRANSPORT HOLDINGS LIMITED**	**3RD DEFENDANT**

IN OPEN COURT

Mrs Andrea Walter-Isaacs for the Claimant

Ms. Sue-Ann Williams instructed by Lightbourne and Hamilton for the 2nd Defendant

Heard: September 16th, 2021 and November 4th, 2021

Negligence – Public Passenger Vehicle – Conductress falling and injured while bus in motion – duty of care - skill and care of a reasonable driver – quantum of damages to be paid – contributory negligence – handicap on the labour market

HUTCHINSON, J

INTRODUCTION

[1] On the 31st of December 2002 the Claimant who was employed as a conductress with the 2nd defendant was on duty on-board a Tourino motor bus owned and operated by the 2nd defendant which was being driven by the 1st Defendant. While en route to Constant Spring to commence the day's duty, the 1st defendant drove along Half Way Tree Road before turning onto Balmoral Avenue and Skibo

Avenue. The latter roadway was accepted by the parties to have a number of potholes covering its expanse. It is the Claimant's contention that while negotiating this area at high speed, the driver fell into a pothole, causing her to be thrown from as a result of the impact and she sustained injuries to her person.

[2] It was clear from the pleadings and evidence subsequently given, that after this incident, the Claimant continued in the 2nd Defendant's employment and financial assistance was provided by them in respect of her medical expenses. She was also assigned alternate duties. In 2008, she was released from employment and on the 23rd of December 2008, she filed this claim against all three defendants in which she seeks;

a. Damages (Specific and General)

b. Interests

c. Costs

It should be noted at this point that the 1st and 3rd defendant were never served with this claim.

[3] The special damages incurred by Ms. Murray was agreed between the Parties in the sum of $140,000. In her particulars of claim, the particulars of her injuries were pleaded as including;

a. Sacroiliac pain

b. Back pain radiating down to the lower limbs

c. Stiffness in the back from the cervical to lumbar region

d. Disc bulge L5/S1

e. Disc material protruding into the existing nerve root

f. Spinal injuries

[4] In the course of the trial, the following medical reports were admitted in evidence as exhibits;

a. 1a- Report of Dr Ballin – Sept 2008
b. 1b- Report of Dr Dundas dated June 2004
c. 1c – Report of Dr Dundas dated May 14th, 2010
d. 1d – Report Dr Dundas dated January 21, 2011
e. 1e – Report of Dr Warren Blake dated November 7th, 2013
f. 1f – Report of Dr Blake dated October 13th, 2014

Statement of Issues

[5] In order to arrive at my decision in this matter, I had to determine the following issues:

- whether the defendant owed a duty of care to the claimant as a passenger; and if so, whether there was breach of that duty;
- whether the claimant was the author of her own injuries or contributed to them;
- the nature and extent of the claimant's injuries; and
- the quantum of damages, if any, to be awarded to the claimant

Summary of the Claimant's Case

[6] The Claimant provided a witness statement which was allowed to stand as her evidence in chief. Permission was also granted for amplification of her statement to comment on aspects of Mr Morris's statement which was filed prior to the commencement of the trial. It was her account that about 11:30 am that day she had been sitting in the seat reserved for her as conductress. This seat was on the left side of the bus, the passengers would enter through the door beside her and pay before sitting. She described the area as having rails above her but none around her seat and she also stated that her seat was not fitted with a seatbelt. It was suggested to her that the area was secured by rails and a seatbelt which she had failed to use and this was denied. She described her seat as having a handle and the cash machine was positioned in front of her.

[7] Ms. Murray outlined that on their way to Constant Spring to commence duties Mr Morris was travelling at a high rate of speed along Half Way Tree road and entered Balmoral Avenue in the same fashion. She stated that while he was still speeding, he made a right turn on Skibo Avenue and hit a large pothole with great force, the impact threw her forward then backward in her seat and caused pain in her back. As a result of this, she cursed an expletive and shouted at Mr Morris that he had hurt her back.

[8] It was suggested to her that this area where the incident occurred is usually busy and as such Mr Morris could not have been speeding. She agreed that this was usually the case, but insisted that at the time when the events unfolded the roadway was not busy. Ms Murray agreed that Skibo Avenue had several potholes but insisted that in the past other drivers negotiating this area would do so slowly and as such she had never had to do anything to secure herself. It was suggested to her that the turn onto Skibo Avenue was a sharp one and she agreed, she maintained however that the driver made this turn while speeding and hit the pothole. She was asked about the length of the bus and she stated that she did not know this.

[9] In submissions made on behalf of the Defendant it was argued that the length of the bus would have prevented Mr Morris from making such a sharp turn while travelling at a high rate of speed. My review of the evidence revealed that the only measurement provided was an approximate length of 40 feet which was given by Mr Morris. No other evidence was provided to confirm the actual length of same. Ms Murray was cross examined as to whether or not she had filed a formal report about the incident, she stated that she made a verbal report the same day and a written one after she returned to work. It was noted that her viva voce account as to the timing of this report was contrary to what was outlined in her witness statement. In Court, she initially stated that she made a written report a day after the incident, this was then changed to 3 days, but in her statement she spoke of returning to work after 7 days.

[10] It was suggested to Ms Murray that during her employment most of her medical expenses were underwritten by the 2nd Defendant and she was also able to use her Blue Cross card. She agreed that both suggestions were correct. She informed the Court that since 2008 she had made no effort to secure other employment as a result of ongoing pain.

[11] She indicated that at the time of the incident she was earning the sum of $28,000 monthly and had received a redundancy payment of $400,000. She stated that based on information received, she would now be receiving a salary of $100,000 monthly if she had still been employed as a conductress. Ms Murray concluded her account by detailing the negative physical and mental impact that the injuries had caused. She also outlined her expenses for future medical care in the sums of JMD $140,000 and US $61,500.

Summary of the Defendant's Case

[12] Mr Morris was the sole witness for the Defendant. Although he had never been served he appeared at trial to give his account as the driver of the 2nd Defendant's vehicle. A witness summary had initially been filed on the 8th of March 2021 and on the 10th of September 2021 a witness statement was filed. In his account, Mr Morris gave details of the make of the bus and indicated it was that it was fairly new. He outlined the safety features on the bus and the standard checks which would be made by him as well as by Ms Murray. He stated that Ms Murray's seat came equipped with seatbelts and handrails for safety.

[13] He recalled that on the day in question he had worked with Ms. Murray and acknowledged that they had travelled along the route she spoke of. He also added that he had no recollection of Ms Murray being injured. He stated that while he was unable to recall how many passengers had been on the bus at the time, this was a route that he drove frequently and he was accustomed to the potholes which would cause vehicular traffic to slow down. He insisted that he had not been speeding and asserted that if he had been, he would not have been able to

negotiate the right turn onto Skibo Avenue. He said that on the day, he put on his right indicator, slowed almost to a complete stop and then turned. He described the roadway as always busy with vehicles in front and behind him.

[14] He concluded his statement that at no time on the day in question did Ms Morris indicate that she was feeling any pain or suffered any injuries as a result of his driving. He also asserted that no complaints were made by passengers to him or the company about his manner of driving. He described the journey in question as being uneventful and stated that he had no reason to believe that Ms. Murray was in any pain or distress. In amplified evidence he stated that the intersection at Half Way Tree and Balmoral Avenue is light controlled. He was asked to comment on the evidence of Ms Murray that she had alerted him about her injury and he responded by saying that it had jogged his memory and he now recalled her saying that she had 'hurt up her back.' He said that he then asked what she meant and continued the journey.

[15] He disagreed with the suggestion that the conductress's seat was not fitted with a seat belt and when asked if there were rails by this seat, he stated that rails were in front of her to hold the machine and operated like a housing to hold the machine from the roof of the bus to its floor. He added that there were rails to the left of the seat but none to the right which was a walk in. He insisted that the seat was equipped with a handle which he also referred to as a hand rest. He was cross examined about whether passengers had been on the bus and disagreed with the suggestion that there were none.

[16] He denied that he had been speeding and had fallen into a pothole at great speed. He was asked if he would still describe the journey as uneventful and his response was most curious as he stated that he didn't understand what Mrs Walters-Isaacs was saying. He then asked the Court the meaning of the word uneventful. He also conceded that he was unable to say if any complaint was made to the company about his driving.

Analysis and Discussion

[17] In order to prove liability, the Claimant must provide evidence to show that she was injured as a result of the defendants' negligence or in this case, that of its servant and/or agent. It has not been disputed in this matter that on the 31st of December 2002, Mr Morris was the servant and/or agent of the 2nd Defendant. The Claimant must also establish that the defendant owed her a duty of care and breached that duty. The evidence must also show that the breach caused her to suffer injury and loss. This principle was expressed by Lord Atkin in ***Donoghue v. Stevenson [1932] A.C. 562,*** in the following terms: -

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question".*

[18] In the local authority of ***Glenford Anderson v. George Welch*** **[2012] JMSC Civ. 43** at paragraph 26, Harris JA enunciated the principle in these terms:

> *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 of 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.*

[19] Applying these legal principles to the instant matter, it is clear that Mr Morris as the driver of the JUTC bus was under a duty of care to other road users which included the Claimant. This duty required him to operate the motor vehicle in a manner that would not cause harm or create a risk of harm to others.

[20] The learned authors of Bingham and Berrymans' Motor Claim Cases 11th Edition, page 421, stated the standard of care expected of the driver of a public passenger vehicle as follows:

> *... a person who undertakes to carry another person in a vehicle either gratuitously or for reward will be liable to that other party if he causes him damage by*

> *negligence. The duty is to use reasonable care and skill for the safety of the passengers during the period of carriage. There is no absolute duty. (para 12.1)*

[21] This duty was also considered in ***Barry v. Greater Manchester Passenger Transport Executive*** (19th January, 1984 unreported) CA, cited at page 443 in Bingham and Berrymans. In that matter the defendant was driving slowly as the bus approached a stop. He saw three girls with two dogs, one on a leash. As he was about to pass them, one of the dogs dashed out into the road in front of the bus. The driver braked suddenly and the passengers who had risen from their seats in preparation for alighting, were thrown to the floor and injured. The driver was found not to blame as he had acted on instinct to preserve life. This decision was confirmed on appeal.

[22] In ***Gardner v. United Countries Omnibus Co. Ltd*** **[1996] CLY 4477**, a seventy-eight (78) year old passenger was thrown from her seat and sustained injuries as the bus negotiated a corner. The court found that she had not been properly seated and held that it would have been an impossible burden on the defendant if its bus driver had a duty to ensure that passengers sat appropriately and properly safeguarded themselves prior to the commencement of the journey. The Court ruled that the plaintiff could not recover because she had failed to ensure her own safety.

[23] The decision of ***Janet Stewart-Earle v JUTC [2015] JMSC Civ 51*** was also considered, in that matter, the Claimant had risen from her seat and had been holding onto the upper rail as well as the back of the seat in front of her in anticipation of alighting at her stop. She also had a number of items in her hand. The Court accepted that while the Claimant was standing in this position, the driver of the bus swung around a pothole in a 'violent' manner and she fell between the seats and sustained injury. The Court ruled that the driver ought to have had it in his contemplation that it is normal for passengers to rise from their seats in preparation for alighting and may not be in a position to hold the railing with both hands. The Learned Judge concluded;

> *Therefore the bus should be manoeuvred such that a passenger would not be in a state of imbalance to occasion a fall.*

[24] On a comprehensive review of the foregoing authorities it is clear that a driver will not be liable for injuries caused by sharp/sudden braking in response to the unexpected actions of third parties where such an emergency justifies his action. Additionally, in cases where the claimant is proved to be the author of his own injury, the bus driver will not be held liable, without more. Applying the principles extracted to the present case, it is evident that Mr Morris owed a duty of care to Ms Murray. Having arrived at this conclusion I then considered whether this duty had been breached and if Ms Murray was the author of her own injury or in some way contributed to it.

Was there a breach of the duty of care and did the evidence disclose contributory negligence on the part of the Claimant

[25] On a careful review of the evidence of the Claimant, I found that she was a honest and forthright witness as to the events which resulted in her injuries. I accepted her account that the bus was not equipped seatbelts for the conductress and that this was a feature which was unique to the driver's seat. I also believed that although it was New Year's Eve, that thorough fare was not very busy at 11:30 am which would to my mind be after peak hour traffic. I accept that because Mr Morris had been the replacement driver that morning, he was travelling quickly to Constant Spring road in order to commence duties as precious time had been lost given Ms Murray's account that the shift had started at 9:30 am. I found that because the bus had been travelling at great speed the sharp turn onto Skibo Avenue caused it to hit the pothole with great force and had the end result of jolting Ms Murray from her seat.

[26] I had serious doubts as to the credibility of Mr Morris on this point and this was also the case in respect of his overall reliability. It was evident on an analysis of his account that it was fluid and subject to change. This was seen in a number of instances one of which involved his sudden ability to recall that the Claimant had spoken about him 'hurting up' her back even though the Defence, witness statement and witness summary all denied that she had sustained any injury or

made any complaint of being injured. I was also left with questions in respect of the authenticity of his account when he took issue with the description of the journey as uneventful even though this term had been used by him in his statement. It was interesting to note also that his description of the rails in the area where the Claimant was seated, largely supported the evidence given by her on this point.

[27] In assessing the reliability of Ms Murray's account, I considered the fact that there were some inconsistencies, the most significant of which was her conflicting responses as to when she made a formal report. While Counsel for the Defence made much of this and suggested that it was later than 7 days after the incident, what was undisputed is that there was a written complaint about this matter and the company raised no issue in respect of challenging same. In fact, for a significant period of time they accepted the responsibility of underwriting her expenses which seemed in my view to indicate a tacit acceptance of liability.

[28] Mr Morris's eleventh hour recollection that the Claimant had made a complaint about her back also provided additional support for the Claimant's position that her injury was not a later fabrication but had been raised in the course of the journey. I did not believe his assertion that she mentioned her injury as a pre-existing condition. His concession that he could not rule out the possibility that a complaint may have been made about his driving that day was also important.

[29] In respect of the submission that Mr Morris being seated at the front right section of the bus would have been unlikely to be travelling at high speed given the fact that he would also have suffered the ill effects of hitting the pothole, I found that this argument was speculative and without merit. Both Mr Morris and Ms Murray were in agreement that his seat had seatbelts. It was also his evidence that he observed all safety precautions before leaving the station. It is clear that if he had been belted/secured in his seat, the impact felt by him, if any, was unlikely to have had the effect of throwing him around in his seat as I believe happened to Ms. Murray. In light of the foregoing conclusions, I was satisfied that the defendant's

driver had breached his duty of care as he was negligent in his operation of the bus.

[30] Having arrived at this conclusion, I then considered whether Ms. Murray had in some way caused or contributed to her injury. The principle of contributory negligence dictates that any damages awarded to a claimant should be reduced to the extent that her fault contributed to the injury or damage. The test which was outlined in ***Jones v Livox Quarries Limited*** **[1952] 2 QB 608** is whether the claimant had taken proper care for her own safety. In order to establish contributory negligence, the Defendant must prove on a balance of probability that the Claimant is partially to be blamed for her own injuries. That is, that she failed to take actions that she could reasonably have taken, for example using the seat belt or holding on to the rails.

[31] In light of the evidence I found to be proved in this case, I was unable to agree that had been any action or omission on the part of this Claimant that could be considered as vesting her with any liability. From Mr Morris's account she had concluded her safety checks before the vehicle departed on its journey. She was also properly seated in the assigned area within the housing which also held the cash register. With the cash machine being in front of her she would have been within a somewhat secured area and there was no evidence to suggest that she had been sitting inappropriately. It was also impossible for her to hold onto the railing as from the evidence it was located above her. I have already accepted that the seat had no belts to secure her. In these circumstances I was not persuaded that Ms. Murray had failed to secure her safety and the Defendants submissions on this point were not accepted.

Quantum of Damages

[32] In light of the foregoing findings, it then remained for me to determine what damages, if any were payable to Ms. Murray. It was stated earlier that Special Damages have been agreed between the parties, as such, the central issue to be

determined is a suitable award for general damages. In respect of the award sought for pain and suffering and loss of amenities, the Claimant has asked that the sum of JMD$8.5 million be favourably considered. I have also been asked to consider whether a sum should be awarded for future medical care for the placement of a spinal cord simulator to provide long term relief for the severe back pain that the Claimant continues to suffer. In submissions filed on her behalf Counsel also requested damages in respect of handicap on the labour market in the sum of $2 million.

[33] Counsel made reference to a number of authorities, the first of which was ***Stephanie Burnett v Metropolitan Management Transport Holdings & Jamaica Urban Transit Co. Ltd,*** Khans 6 Page 195. The injuries sustained by that Claimant included compression of lumbar nerve roots, degenerative disc disease and acute chondromalaica of the left patella. She was left with a P.P.D: of 13% of the whole person. The current value of this award is $8,725,848.56. The second authority relied on was **Icilda Osbourne vs. George Barned & MMTH Et al Claim No. 2005HCV 294**, that Claimant sustained whiplash injury, tenderness to the posterior aspect of the neck and painful swelling of the lower back. The prognosis was that she would be plagued by intermittent lower back and neck pains which would be aggravated by activities of daily living including sitting, bending; lifting and sudden movements of the neck. Her P.P.D: was 10% of the whole person and he current value of this award is $7,672,176.30.

[34] Other authorities cited were ***Marie Jackson vs. Glenroy Charlton and George Harriot 2006HCV294***, Khan's 5 page 167 and ***Evangelia Deyannis v Half Moon Bay Limited HCV 2007/ 001001***. In *the* ***Marie Jackson*** decision, the injuries included Whiplash, left sacro-iliac contusion; developed dysaesthesia in the lower extremity causing her to limp; lumbar disc prolapse. Her P.P.D was 8% whole person and the current value of the award is $9,114,545.45. In ***Evangelia Devannis***, the Claimant’s injuries were persistent pain along the right side of her lower back, right hip region and along the lateral aspect of her right thigh; chronic pain disorder. No PPD was assigned and the current value of the award is $

$10,238,970.58. Counsel also made reference to ***The Attorney General v Phillip Granston S.C.C.A No. 125/2009*** in which similar injuries were sustained. No PPD was assigned but the Claimant required further surgery. That award updates to $13,860,031.84.

[35] In respect of the claim for handicap on the labour market, Counsel submitted that the Claimant's injuries and her inability to attend work consistently were the likely basis of JUTC's decision to make her redundant in 2008. She argued that these injuries rendered Ms Murray incapable of competing as effectively as her peers since being thrown on the open labour market she relied on the principles in support of this position which was enunciated in ***Smith v Manchester Corporation [1974)*** and ***Moeliker v Reyrolle and Co. Ltd (1977) 1 All ER***. Counsel submitted that Ms. Murray was honest in her admission that she has not made any effort to find work since 2008 and asked the Court to note that this was due to the severe pain which she continues to suffer.

[36] On the issue of damages, Counsel for the Defence submitted that the report of Dr. Warren Blake makes it clear that the whole person disability suffered was not entirely caused by the accident as he stated that degenerative changes are age related and would have existed prior to any injury sustained. Counsel also asked the Court to note that Dr. Dundas commented in his May 14, 2010 report that the Claimant's painful episodes cannot be explained. Reference was also made to an extract from a medical report which had been prepared by Dr Davidson and Counsel asserted that this undermined the Claimant's report of her injuries. This admission of this report had in fact been opposed by the Defendant and it was not admitted as an exhibit. As such, the extract relied on does not form a part of the evidence or submissions considered in this regard.

[37] A number of authorities were relied on by the Defendant, the first was ***Michael Baugh v Juliet Ostemeyer and others [2014] JMSC Civ 4.*** The Claimanr was diagnosed with cervical strain, permanent lumbar spondylosis, posterior disc bulge at the L2/3, posterior annular tear, L4 disc narrowed, L5-S1 posterior disc

protrusion, restricted spinal mobility in the neck and lumbar spine. His PPD was 4%. Damages awarded in February 2014 updates to $1,646,305.41.

[38] The second decision was ***Richard Henry v Marjoblac Limited [2017] JMSC Civ 42.*** The Claimant was diagnosed with blunt trauma to the back and prolapsed lumbar disc. He assigned 7% whole person disability and awarded a sum in March 2017 which updates to $1,262, 993.89.2,500,000 in February 2006, which it was submitted updates to $7,734,159.78 using the CPI 112.3, August, 2021. The final decision commended was ***Ann Lutas v Lilieth Hanson and another 2003HCV0563*** in which the Claimant suffered chronic whiplash injury and prolapsed lumbar disc. She was assessed as having 6% WPI and damages awarded in July 2012 was updated to $1,269,515.66.

[39] Counsel asked the Court to find that the injuries and disabilities suffered by the Claimants in the ***Icilda Osbourne*** and ***Marie Jackson*** cases were more serious than those suffered by this Claimant. She also submitted that the central issues suffered by the Claimant were to the lumbar spine which has been assessed as causing a 7% whole person disability by Doctors Dundas and Blake. The Court was also asked to note that on a review of the Claimant’s MRI, Dr Blake noted that it revealed "previous laminectomy/discectomy at L5/SI and multi-level degenerative disc disease without compromise of the spinal canal".

[40] In respect of the Claimant’s request for an award for handicap on the labour market, Counsel submitted that this is an award was not pleaded neither was an application made to amend either the Claim Form or the Particulars of Claim. Although the written submissions raised questions in respect of the special damages claimed, I note that in the course of the trial a figure was agreed in this respect. The award of damages for future medical care was also opposed as not having been pleaded.

DISCUSSION

Pain and Suffering and Loss of Amenities

[41] In order to arrive at an appropriate award under this heading a careful review was conducted of the various medical reports which were exhibited in this matter. I also considered the account of Ms Murray who outlined the intensive range of treatment which she has had to undergo over the years which included physiotherapy, steroid injections and surgery. She also stated that as a result of the ongoing pain that she has experienced since sustaining this injury, she has been unable to seek or obtain employment.

[42] The first medical report reviewed was that of Dr Neville Ballin, a Consultant in Anaesthetics, Critical Care and Pain Management, who saw Ms Murray in December 2003 when she presented to him with lower back pains. An examination conducted by him revealed spasms in the paraspinal muscles and tenderness over the thoracic and lumbar spinous process. A recommendation was made for her to be fitted with a Spinal Cord Stimulator, the estimate for which at that time was US$22,000, the cost of the replacement battery was stated as US $18,000. Other attendant fees were quoted such as JMD$120,000 for the operating theatre and trial stimulation, JMD $20,000 for follow up visits and USD $3500 for professional fees and stimulator trial.

[43] The next report reviewed was that of Dr. Grantel Dundas, Consultant Orthopaedic Surgeon, this was dated June 2004. It was noted that Ms Murray complained of severe pain and an examination of her MRI showed that she had an annular tear at her L5 with a small disc protrusion at that level. A subsequent CT scan showed a broad based disc protrusion for which surgery was recommended to have the disc excised. Histology on the excised disc confirmed degenerative changes which the doctor opined was consistent with a prolapsed intervertebral disc.

[44] In an updated report prepared in May 2010, Dr Dundas stated that upon examination of the Claimant he observed exaggerated responses and a tendency

to go into spasms when the back muscles were tested. He noted that the Claimant's range of motion appeared unimpeded and she was able to do straight leg raises but complained of pain in the sacro-iliac region. He was unable to explain her persistent pain but commented that it may be as a result of the surgical intervention. In a final report produced in January 2011, Dr Dundas stated that an examination of an updated MRI revealed pathology at the LS/51 where the intervertebral disc surgery was done. Her level of impairment was noted as 7% of the whole person.

[45] The final documents reviewed were the two reports of Dr. Blake, Orthopaedic Surgeon, who was instructed by the Defendants. Although the report was dated the 13th of October 2014, the date on which Ms Murray was seen by him was redacted. He noted that on examination she was able to stand in an erect position and he observed no spasm of the paraspinal muscles. He like Dr Dundas observed that she jumped at the slightest touch in this region. His neurological examination of her lower limb was normal. He assessed her impairment as Class 1 due to the intervertebral disc herniation. In response to questions, Dr Blake explained that while degenerative disc disease was age related and likely existed in the Claimant prior to the accident, this trauma caused her previously asymptomatic disease to become symptomatic. He also provided a whole person impairment of 7%.

[46] While it would appear from the opinions of Doctors Blake and Dundas that the Claimant's response to a physical examination of her lower back may have been somewhat exaggerated; what has been agreed by all the doctors is that she suffered a very serious and traumatic injury the effects of which were entirely in keeping with her complaints about severe pain. It is also significant that although she was able to have surgery, the pain returned and severely impacted her ability to work. The impact of her injury on her ability to work was well known by the defendants as she was assigned less strenuous duties and rostered for fewer days.

[47] On comparing the personal circumstances of the instant Claimant with those named in the authorities cited above, I was struck by the fact that though there was some similarity with those individuals, in the cases cited on behalf of the Claimant, the whole person impairment was higher than the 7% which was assigned by the doctors who saw Ms. Murray after her surgery. While I acknowledge that the Claimants in the ***Evangelia Devannis*** and ***Phillip Granston*** cases had no WPI assigned, it was noted that their range of injuries were greater than those suffered by Ms. Murray. As it stands however, the Claimant has undergone a substantial change of life experience as a result of this incident which has left her with injuries which seem to have reached maximum improvement status.

[48] In respect of the authorities cited by the Defendants, the injuries of **Michael Baugh** in my opinion most closely mirrored those sustained by Ms. Murray. His whole person impairment however was considerably lower. The award which was given in that decision was also noted as having been at a very conservative end. In light of the personal circumstances of this Claimant, I am persuaded that an appropriate award in this situation is $6 million dollars.

Handicap on the Labour Market

[49] It is the Defendant's submission that an award ought not to be given under this heading as the Claimant has failed to specify this loss in her pleadings. In ***Fairley v John Thompson (Design and Contracting Division) Ltd*** [***1973] 2 Lloyd's Law Rep 40, at page 42,*** Lord Denning MR explained the difference between loss of future earnings and loss of earning capacity (handicap on the labour market) as follows:

> *"It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence.* ***Compensation for diminution in earning capacity is awarded as part of general damages."***

[50] At the time that the Claim was filed and the matter subsequently tried, the Claimant was no longer employed. The medical evidence provided amply demonstrated that for the rest of her life, she would suffer a severe handicap in the labour market. Her viva voce evidence outlined that it was her ongoing pain which deterred her from seeking other employment and she was reduced to relying on the charity of others. In these circumstances, I am persuaded that an award under this head is not only justified but can properly be made as part of general damages. Although the authorities on the point indicate that the multiplier/multiplicand method is appropriate in this regard, I have elected to make a lump sum award of $2 million.

Future Medical Care

[51] In their submissions opposing an award under this heading, the Defendants asserted that this specific head of damage was never pleaded. On a review of the pleadings filed on the 23rd of December 2008, it is clear that the Defendant is mistaken as the particulars for future medical care in both JMD and USD currency was clearly stated at the 2nd page. The distinction I have noted is although Dr Ballin's projections as to the local expenses do amount to $140,000, the USD amount that his report speaks to is USD$43,500 and not $66,523 as pleaded. It is clear from the medical reports and the evidence of Ms Murray that she continues to suffer constant pain and her best recourse would be the placement of the spinal cord simulator. Although these figures were provided some time ago, no updated figure was placed before me. In the circumstances, I'm constrained to award the sums which were outlined by Dr Ballin.

CONCLUSION

As such, my award to the Claimant is as follows;

- pain, suffering and loss of amenities - $6,000,000.00 (with interest at 3% per annum from the date of service of the claim to November 4th, 2021;
- handicap on the labour market - $2,000,000.00 (with no interest);

- Future medical care – JMD $140,000 and USD $43,500;
- Special Damages - $140,000 (as agreed) with interest from the 31st of December 2002 to November 4th, 2021;
- Costs.