



[2023] JMSC Civ 71

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 02508

BETWEEN	SHAUNETTE NUNES	CLAIMANT
AND	THE BOARD OF SHORTWOOD TEACHERS' COLLEGE	1ST DEFENDANT
AND	THE ATTORNEY GENERAL	2ND DEFENDANT

Mr. Richard Reitzin instructed by Messrs Reitzin & Hernandez Attorneys-at-law for the Claimant

Mr. Monroe Wisdom instructed by Nunes Scholefield DeLeon and Co Attorneys-at-law for the 1st and 2nd Defendants

HEARD: November 28, 2022 and April 13, 2023

Assessment of Damages – occupier’s liability – loss of earning capacity/handicap on the labour market – lump sum approach or multiplier/multiplicand method – personal injuries

JUSTICE T MOTT TULLOCH-REID

BACKGROUND

[1] Ms. Shaunette Nunes, now married Hamon, was injured on November 2, 2011. Since the claim is in her maiden name, I will refer to her as Ms. Nunes to prevent any confusion.

[2] The Claim Form and Particulars of Claim were filed on April 23, 2013. A Defence was filed in response on June 24, 2013. On September 17, 2020, Justice Kirk

Anderson permitted the Claimant to rely on Amended Particulars of Claim so long as it was filed on or before December 31, 2020. The Defendants did not file an Amended Defence in response.

[3] Pursuant to orders made by Justice Martin Gayle on January 9, 2020, Witness Statements were to be filed and served by April 22, 2020. The Claimant filed Witness Summaries on April 21, 2020 but no statements or summaries were filed on behalf of the Defendants. The Claimant filed her Witness Statement on March 31, 2021.

[4] Since no witness statements or summaries were filed on behalf of the Defendant as per the order of Gayle J, on September 17, 2020, by consent it was ordered by Anderson J that judgment was entered in favour of the Claimant against the Defendant, the trial dates were vacated and a date set for Damages to be assessed.

[5] Mr. Reitzin informed the Court as it relates to the claim against the Ministry of Education that the Ministry was not served as it ought not to have been sued and as such the Ministry of Education was removed as a party in the Claim and is not named as a party to the proceedings in this judgment.

The Evidence – Examination in Chief

[6] Ms. Nunes' case is that as she walked from the kitchen of her place of employment to the dining room to eat her lunch, she had to walk over a ramp. Her evidence as contained in her Witness Statement filed on March 31, 2021 which had an amendment at paragraph 52 pursuant to an order I made in Court on the date of the hearing, is that the ramp tiles were slippery and she slipped on the tiles, fell on her bottom and hit her back.

[7] Ms. Nunes said she immediately felt pain in her bottom and back. She was not able to move even though a co-worker immediately offered her assistance. She was not able to move because she was in too much pain and so had to stay right

where she was for several minutes. She was thereafter assisted to the nurse's station at the Shortwood Teachers' College where she was advised to seek medical attention from a doctor.

- [8]** She took the nurse's advice and went to see Dr. Clifford Soares who prescribed Voltaren for the pain she had in her back. The prescribed medication offered temporary relief and then the pain returned worse than before and so after two days she went back to the doctor who recommended x-ray, which was done, prescribed other pain killers and prescribed 4 or 5 days' sick leave.
- [9]** Because of the pain in her back, Ms. Nunes was not able to attend to her normal functions of daily living. She could not bathe, get out of bed, dress or undress, cook, clean, wash, iron, sit, stand or walk for long periods, bend down, ascend or descend stairs, and more, so she went back to the doctor.
- [10]** The pain was ongoing and several visits were made to the doctor. According to her, sick leave and physiotherapy were recommended after an MRI was done. Physiotherapy was not very helpful and upon return to her doctor, she reports 50 days' sick leave prescribed. The physiotherapist advised her to stop all exercises and rest which she did. On March 28, 2012 when she had her eighth visit to the physiotherapist she did not have pain in her upper back so was advised to resume her home physiotherapy exercises. Pain in the lower back had already gone by the time she had her 7th visit to the physiotherapist on March 22, 2012.
- [11]** Physiotherapy had to be stopped because it became unaffordable. Though it assisted, Ms. Nunes had to be very guarded in carrying out her household chores as she had pain even after moderate activity.
- [12]** After being away from work for a long period of time she returned to work and was placed on light duties after some resistance from her immediate supervisor. She could not carry on her work activities which required standing and serving on the line as she was in pain.

- [13]** In January 2014, Ms. Nunes stopped working at Shortwood Teacher's College because she migrated to the United States of America. She was not employed between January 2014 and February 2016. She finally got employment in Walmart in February 2016 where she worked as a stocker. Her duties included taking stock from the stock room in bins to the retail area and then arranging the stock on the shelves. She had to bend, kneel and lift. It was stressful on her back but she did it just the same because she needed money. She could only manage to work 20 hours per week. She says had she not been suffering from her injuries she would have been able to work 80 hours per fortnight and as such she has not only suffered physically but also financially.
- [14]** Her fortnightly average income was US\$531.95 net. She stopped working in January 2020 because she injured her wrist. She has not been able to work since then because the employment opportunities which are presented to her are outside of her reach because of her injuries and disabilities.
- [15]** On a visit to Jamaica in December 2018, Ms. Nunes consulted with Dr Melton Douglas a Consultant Orthopaedic Surgeon. She complained to him of the pain in her back she was experiencing which was aggravated by sitting for long periods of time, lifting heavy objects, during sexual intercourse and while carrying out her domestic chores. She gave her pain score as being 8 out of 10, said she could not work for 5 days consecutively and that she had to lie stretched out on the ground, presumably to get relief.
- [16]** Ms. Nunes is a trained Commis Chef and security officer. She has however never worked as a security guard because she would have to do a lot of walking as she patrolled the premises and she does not believe that that is something she can manage.
- [17]** Her evidence is that because she cannot work as a security guard she is losing US\$1,600 per fortnight.

[18] She reports that her current disabilities include having trouble bathing, using the bathroom, dressing and undressing, rising from bed from time to time, driving for long periods, lifting heavy objects, being intimate with her partner and exercising.

CROSS EXAMINATION

[19] Ms. Nunes denied that her inability to work was because of her wrist injury. She agreed that she was working for a period in the Florida, United States of America but stopped working when she developed a wrist injury. She agreed that she worked at Shortwood Teacher's College for 4 years post-incident. It was suggested to her that the reason she stopped working at Walmart is because of a wrist injury she sustained. The suggestion was objected to on the basis that it was not pleaded. I allowed the suggestion because in giving that evidence it opened the door to the suggestion being made. The injury to wrist (although not relevant to the cause of action) was not raised in the original or amended Pleadings and so even if the Defendant had filed an amended defence, the issue could not have been addressed since it was not raised. When the Claimant gave the evidence of her having to give up her job at Walmart because she had an injury to her wrist, it opened the door to the Defendant to question her on that issue.

[20] Ms. Nunes could not say whether she went to Dr Boyd after she received the medical report he prepared. Mr. Reitzin objected on the basis that there was no proof that Ms. Nunes knew when the report was prepared. The question was allowed as the report was prepared for Ms. Nunes in regard to injuries she sustained. I suspect that at the very least she should have read the report to know what the doctor had to say about her injuries. The medical report would have a date and as such she should have some idea as to when it was prepared and could therefore state whether since its preparation if she had returned to see him to consult with him concerning her injuries. When asked if she went to Dr Boyd after 2012 she could not recall but she knew she saw him sometime in 2012. She did not remember if she made requests for medical reports post 2014.

[21] When asked whether she went to Dr Doulgas on the recommendation of a medical doctor or lawyer, Mr. Reitzin objected on the basis that the manner of the recommendation was irrelevant. Mr. Wisdom responded that the period when she went to Dr Douglas and how she got him were relevant in determining the witness' credibility concerning the issue of pain and suffering she experienced between the time she last saw medical practitioners in 2014 and 2018 when she saw Dr Douglas. Mr. Reitzin responded that the Defence filed agrees to the admissibility of the medical reports. The Defence also said they would wish to cross-examine the doctors or ask that the Claimant see a doctor of their choosing but they did neither of those things and could not now wish to attack the medical report. He referred me to Part 10.5(3)(c) of the CPR and to the Court of Appeal decision of **Cameron v Troy & Co [2001] WASC 400 (11 December 2001)** (see page 4 of unfiled Speaking Notes on First Defendant's Submissions prepared by the Claimant's attorneys-at-law). I overruled the objection on the basis that I did not see that the question was seeking to attack the medical report but was merely seeking to determine whether the Claimant went to Dr Douglas because a medical practitioner referred her to him or because her lawyer made the recommendation. In the end Ms. Nunes agreed that she was not referred to Dr Douglas by a medical doctor but Mr. Wisdom did not go further to find out who recommended her and so that brought that issue to an end as far as cross-examination was concerned.

[22] With respect to her job at Walmart, Ms. Nunes said she did not have to lift the bins, she pushed them along the floor. She did not agree that being a stocker at Walmart was more strenuous labour than working as a pantry maid. She said as a pantry maid she had to lift pans with food, plates and produce from the freezer. She agreed that she earned more as a stocker at Walmart than she earned as a pantry maid.

[23] Ms. Nunes agreed she had no medical reports for the time she worked at Walmart and gave the reason as because medical reports "*aren't just issued*". She said she went to doctors while working at Walmart and that she went specifically for her back injuries. She however did not request a medical report from any of them. She

did not get any sick leave because Walmart does not accept sick leave and that not even a doctor's note is accepted.

[24] She agreed she received pay slips from Walmart. No pay slips were put forward to be admitted into evidence.

[25] It was suggested that she did not submit any medical reports from 2014 to present except for the medical report prepared by Dr Douglas because the effects of the 2011 incident had been resolved. This suggestion was objected to by Mr. Reitzin because it was not a part of the Defendants' case as set out in its pleading. The objection was overruled as I was of the view that the suggestion is legitimate in the face of paragraph 13 of the Defence which puts the Claimant to strict proof of the injuries sustained by her.

RE-EXAMINATION

[26] In re-examination Mr. Reitzin sought to find out what doctor Ms. Nunes went to while she was in the United States. The question was objected to on the basis that there was no ambiguity in the answer given as to whether Ms. Nunes had been treated in America while she was working at Walmart. It was believed that there was no probative value to be gained from the answer as the opinions of those medical doctors Ms. Nunes would have seen were not before the Court and as such any answer Ms. Nunes gave would only be prejudicial to the Defendant.

[27] Mr. Reitzin correctly responded that the by asking the whether Ms Nunes had consulted with doctors while working at Walmart, Mr. Wisdom had in cross-examination, opened the door to the question being asked in re-examination. I however overruled the objection as even if Ms. Nunes named doctors who she went to in Florida, their medical reports were not before the Court and naming the doctors would add very little, if any, value to her case.

Agreed documents

- a. Medical Report prepared by Dr Clinton Boyd
dated January 25, 2011 - Exhibit 1
- b. Medical Report prepared by Mr. Robert McDonald
dated December 27, 2012 - Exhibit 2
- c. Medical Report prepared by Dr Melton Douglas
dated January 18, 2020 - Exhibit 3a
- d. Medical Report prepared by Dr Melton Douglas
dated May 14, 2020 - Exhibit 3b

Medical evidence

[28] Dr Boyd reports that he first saw Ms. Nunes on November 11, 2011, 9 days after the slip and fall incident. She was treated initially on the day of her fall by Dr Soares who works in the same office as Dr Boyd does. The initial diagnosis was contusion of the back, and voltaren tablets were prescribed. X-rays were requested on Ms. Nunes' return on November 4, 2011 but the report showed mild scoliosis and early degenerative changes in the dorso-lumbar spine. We do not know whether these findings were related to the fall. Baralgin was prescribed and 5 days' sick leave.

[29] When Dr Soares saw Ms. Nunes on November 11, 2011 she had significant tenderness in the muscles of thoracic area. There was no deformity, swelling or laceration and there was full range of movement in the vertebral column. He diagnosed her as moderate soft tissue contusion and prescribed Cataflam for pain and inflammation.

[30] She returned on November 30, 2011 saying that the pain was not resolving so MRI and physiotherapy were recommended. MRI did not detect anything abnormal but Ms. Nunes was adamant that she was still having pain. Dr Soares did not believe that Ms. Nunes' injuries were life threatening as there was no deformity or dislocation or permanent or irreparable damage sustained. He did not anticipate

long term sequel and felt that she should recover fully from her injuries. On the advice of the physiotherapist he prescribed 50 days' sick leave.

- [31]** Total number of doctors' visits, Dr Soares and Dr Boyd is 5 during the period November 2, 2011 and January 2012.
- [32]** Mr. Robert McDonald is a physiotherapist. He also saw Ms. Nunes. He diagnosed her as having traumatic low back pain, scoliosis and degenerative changes to the spine. Mr. McDonald saw Ms. Nunes first on December 17, 2011 when she complained of significant tenderness and spasm with palpation to the region of the middle and lower back muscles bilaterally, significant tenderness with palpation over T1-T9 spinous processes and pain the region of the mid back with movement of the trunk in flexion, rotation and side bending. He assessed her as having pain and muscle spasm secondary to aggravation of the degenerative process in the spine. He says there may have also been direct strain of the muscles and ligaments as a result of the fall.
- [33]** Treatment was physiotherapy twice per week with the aim of reducing pain and improving function and strength. She was taught how to posture correctly when sitting and sleeping, advised not to engage in strenuous activities, had back strengthening exercises. She reported in January 4, 2012 that because she was sitting properly there was mild improvement but by January 7, 2012 she was still experiencing moderate to severe pain. The next four sessions saw significant improvement in her condition. On March 28, 2012, 5 months' post fall, Ms. Nunes reported to her physiotherapist that she had no pain or discomfort to the thoracic spine. The physical examination confirmed this. She did not return for her follow up appointments but telephoned the physiotherapist to say that she continued to progress well and inform of financial difficulties which also curtailed her attendance to her sessions.
- [34]** Mr. McDonald was of the view that Ms. Nunes only needed about 6 more visits if her symptoms returned and that she should continue her home exercises and

practice good posture as that would be helpful. He also believed that adequate muscle strengthening exercises should be embarked on before she returned to strenuous activities.

- [35]** Dr Melton Douglas saw Ms. Nunes on December 21, 2018 at the request of her attorney. In 2018, 6 years after she reported to Mr. McDonald that she had no pain or discomfort in her thoracic spine or no low back pain, she reported to Dr Douglas that she experienced pain in her upper back and to a lesser degree in the waist area at the back. She reported having pain in the lower back when she sat for long periods, she avoided lifting heavy objects as that aggravated her injuries as did sexual intercourse which aggravated the pain in her lower back. Doing housework had the same effect. Her pain was intermittent and when severe was 8 out of 10. She has pain 1 to 2 times per week but this is relieved with the use of Ibuprofen. She cannot work 5 days consecutively.
- [36]** She did not have to take time off for work since 2018 but in 2017 she took two weeks off work. There was no reason given as to why this had to be done, whether it was for medical reasons relating to the pain she was experiencing as a result of her fall or otherwise, or simply, vacation leave. She informed the doctor that she had to lift boxes and pack shelves either kneeling or standing. The information given to the doctor concerning the lifting of boxes was important to me because she had in cross told Mr Wisdom that she did not have to lift boxes, she instead dragged them along the floor.
- [37]** When examined by Dr Douglas, she is reported to have normal gait and could tip toe walk with ease. She had stiffness on forward flexion not pain. Her lateral bending was pain free but rotation of the spine aggravated pain in upper back. She was tender to palpation over the left medial aspect of the scapula muscles. The MRI results showed degenerative changes which were age related but the pain could be contributed to by the abnormalities seen on the MRI scan which the fall could have caused to become symptomatic. She was diagnosed with chronic lumbosacral strain and assessed as having a 2% PPD.

[38] An addendum medical report was prepared by Dr Douglas in answer to a question posed by Mr. Reitzin. The question posed was not disclosed to the Court but the report emphasised the fact that the chronic pain which Ms. Nunes was feeling was more likely than not caused by the injury.

Claimant's submissions – Pain and Suffering and Loss of Amenities

[39] Mr. Reitzin relies on several cases in support of his claim for \$4M for General Damages Pain and Suffering and Loss of Amenities. He relies on the Court of Appeal decision of **Natasha Richards and anor v Judan Brown** [2019] JMCA Civ 27. Mr. Brown had a mild laceration to his inner lip, soft tissue injuries and muscle spasms. to his neck and back. Seven years post-accident he had severe pain in his neck on flexion and extension, restricted movement in neck, pain and tenderness in the lower back and pain in the hip. He also had tenderness in both knees. He was diagnosed with chronic pain with whiplash injury. He was seen by Dr Christopher Rose at which time he continued to have pain and walked with a limp. He was diagnosed with mechanical lower back pain and mild whiplash injury. He had physical therapy. He was also assessed after an MRI with discogenic lumbar pains and mild whiplash injury with a 2% PPD. His period of suffering from injuries sustained up to the final medical report was 8 years. He was awarded \$1.8M which updates to approximately \$2.3M.

[40] In the case of **Elaine Graham v Daniel James and anor** reported at page 154 of Khan's Volume 5 the Claimant had head injury with loss of consciousness for 90 minutes. She was diagnosed as having a concussion with memory loss because of her age her prognosis as it related to that injury was not good. She also had injury to the back, left lower limb and neck. She had a limp, tenderness to both sides of neck and lower lumbar spines. X-rays showed mild degenerative changes of cervical and lumbar spines. She was diagnosed with whiplash injury to cervical and lumbar spines with mild lumbar disc prolapse. She had complete disability for 2 months and partial disability for three. Doctor felt that complete recovery would

take several years and that the Claimant should avoid heavy lifting and strenuous activity. Her award of \$600,000 updates to \$3.6M.

[41] In the case of **Stacey Ann Mitchell v Carlton Davis and ors** reported at Khan's Volume 5 page 146 -147, the Claimant had severe tenderness in back of head and neck, laceration to the back of the head, marked stiffness of the lower spine in the back, continuous pain in the back of neck and across waist and swollen and painful arm when lifting weight. She was diagnosed as having moderate whiplash with disability for approximately 10 months. Her award updates to \$3.4M.

[42] I will say that the **Stacey Ann Mitchell** and **Elaine Brown** cases were both uncontested decisions.

Defendant's submissions – Pain and Suffering and Loss of Amenities

[43] The Defendants' attorneys rely on the case of **Michael Baugh v Juliet Ostemeyer and ors** [2014] JMSC Civ 4. In that case the claimant sustained cervical strain, permanent lumbar spondylosis, mildly desiccated and a mild posterior disc bulge at disc L2-3, posterior annular tear at disc L3-4, at disc L4-5 disc narrowed and desiccated and a diffuse posterior disc protrusion with associated mild facet hypertrophy, at L5-S1 a central posterior disc protrusion and a PPD of 4%. The injuries were confined to the musculoskeletal system and spinal mobility in both his neck and lumbar spine were restricted. Physiotherapy did not help much and the Claimant was referred to a pain specialist. Mr. McDonald was of the view that Ms. Nunes only needed about 6 more visits if her symptoms returned and that she should continue her home exercises and practice good posture as that would be helpful. He also believed that adequate muscle strengthening exercises should be embarked on before she returned to strenuous activities. The sum of \$1.2M was ordered in Mr Baugh's favour which updates to \$1.9M approximately. Mr. Baugh's injuries are in my view more serious than Ms. Nunes' injuries.

[44] In **Carl Jackson and anor v Millicent Bailey Dennis and anor** [2017] JMS.C Civ 109 the Claimant sustained pain in his lower back and pain in his neck and across

his shoulders. He was diagnosed as having lumbosacral pain discomfort and limitation of movement with pain in the upper back extending across the shoulder involving the trapezius muscle. X-rays showed moderate muscle spasms in the lower back and there was also tenderness to deep palpation in the lower back. A spinal injection was recommended by the pain specialist but this was refused. He said he could not play with his son as he did before or perform mundane activities which he once took for granted. Moving from a sitting to a standing position also caused pain. An award of \$1.2M was made in his favour which updates to \$1.7M.

[45] Finally, the case of **Jhamiellah Gordon v Jevon Paul Devere Chevannes [2016] JMSC Civ 79** was relied on. Ms. Gordon had 14 sessions of physiotherapy, had symptoms in the region of lower and mid back, pain was aggravated with standing stationary while attending to her clients, performing household chores and while engaging in sexual activity. On examination there was no obvious painful distress, no localised tenderness along the midline or para spinal muscles, there was mild tenderness on palpation of the midline after examination of the dorsal spine, lumbosacral spine was normal after review of radiograph. She was diagnosed as mild mechanical lower back pain and mild dorsal spine strain which a PPD of 2%. An award of \$1.4M was granted in the Claimant's favour which updates to \$2,040,000.

Analysis of submissions and cases relied on by the parties

[46] None of the medical reports presented by Ms. Nunes shows that she had indicated to her doctors that she had any injury to her neck. The emphasis was on injury and pain to her mid and lower back. There was no treatment regimen set out in any of the medical reports concerning a neck injury. My decision will therefore focus on the injury she had to her back when she fell. I will take that into account when comparing the cases relied on by the parties as for the most part all the cases referred to neck and back injuries.

- [47]** I note that when she was first seen by Dr Boyd and Dr Soares they did not believe her injuries were very serious. In fact, it was surprising to me that despite no objective finding from the MRI and X-ray results that Dr Boyd on the advice of the physiotherapist prescribed 50 days' sick leave for Ms. Nunes. The Physiotherapist did not explain in his medical report why this number of days was recommended. Ms. Nunes would have had a total of 65 days' sick leave – 15 on the recommendation of her doctors and 50 on the recommendation of the physiotherapist.
- [48]** I note that the MRI scan which is usually quite accurate did not show anything abnormal but the doctor reports that Ms. Nunes was adamant that she was feeling pain. At the end of 8 physiotherapy sessions she had no complaints.
- [49]** I am concerned that her visit to Dr Melton Douglas was 6 years post her last visit to the doctor and physiotherapist. There is no evidence that she saw any medical doctors in between that time or if she had what she saw them for and what they had to say. Unfortunately, no issues in relation to intervening events were raised by the Defendant and so the Court has to contend with the very big gap in time. Dr Douglas explained in his medical report that although degenerative changes were obvious on her scans which were as a result of the aging process, these degenerative changes could have become symptomatic because of the accident. I will take that statement into account when coming to my decision. I note though that neither the x-ray results nor MRI scans as reported by the doctors indicated any spasms.
- [50]** I am also concerned that in March 2012, Ms Nunes, indicated to her physiotherapist that she had no complaints and that after January 2012 she did not go back to her doctor. Prior to that time, she had visited consistently for the pain she was experiencing. Thereafter she stopped with no explanation. This action taken together with her comment to her physiotherapist suggests to me that her symptoms had improved. It was therefore quite surprising to me that in 2018, 7 years post her fall and 6 years after her last visit to her doctor and physiotherapist

that she now complained to Dr Douglas that she was having severe pain with a score of 8/10. That pain rating is very significant. I also note that the physical examination as set out by Dr Douglas did not support her complaints. She walked on tip toe with ease, she had stiffness when bending forward not pain, lateral bending was pain free but admittedly she was tender to palpation over the left medial aspect of the scapula in the muscles.

[51] Notwithstanding all of the above, Dr Douglas diagnosed her as having chronic lumbosacral strain. He said that

“She has had an extensive course of physiotherapy and analgesics treatment and this has not resulted in any major improvement in her function.”

This statement is in direct conflict with the physiotherapist’s statement who in 2012 had the following to say:

“Follow up visit March 22, 2012

*Ms. Nunes reported experiencing only **mild pain in the thoracic region and no low back pain.** Her treatment was geared towards pain relief.*

Follow up visit on March 28, 2012

*Ms. Nunes reported experiencing **no pain or discomfort to the thoracic spine.** On examination **there was no tenderness of the thoracic spine or associated muscle spasm**”. (my emphasis)*

[52] I am also very cautious in accepting the evidence of Dr Douglas that Ms. Nunes

“will not be able to perform her regular duties at work or perform routine domestic chores because of her pain.”

I find that conclusion somewhat curious given that only a 2% PPD is assigned. A 2% whole person PPD suggests to me that the resulting disability as a result of injuries sustained was not very serious.

[53] In the **Natasha Richards case** the claimant had pain in neck, knees, hip and whiplash injury. Ms. Nunes did not have any of those complaints. In the **Graham case**, the Claimant had head injury, concussion, loss of consciousness for 90 minutes, memory issues as a result of the concussion, walked with a limp and in addition to the back injury had a neck injury. Again this case in my view is more serious. In the **Stacey Ann Mitchell case** the claimant had head and neck injury with a diagnosis of whiplash. It was more a neck related injury than the back injury. In the case of **Michael Baugh** the claimant had tears to discs, disc bulges, neck and back injury and a 4% PPD, again injuries more serious than Ms. Nunes'. I find the cases of **Carl Jackson** and **Jhamiellah Gordon** more on point with the injuries sustained by Ms. Nunes.

[54] I observed Ms. Nunes in the witness box. Based on her evidence and her demeanour in the box I at times felt she was exaggerating how the injuries affected her. When I consider the objective findings of the X-rays and MRI results, Dr Boyd's conclusions and Dr Douglas' assessment of her, in particular the PPD rating assigned, I believe that while Ms. Nunes had some pain and suffering as a result of her fall, I do not believe that the suffering she says she experienced was as extensive as she has tried to make the Court believe.

[55] I am of the view that she had pain between November 2011 and March 28, 2012. I believe that by March 28, 2012 she was well. I do however believe that doing some activities would or could on a balance of probabilities aggravate her injuries and based on that I accept Dr Douglas' 2% whole person disability rating. I am aware that the physiotherapist had recommended good posture and strengthening exercises. I have no evidence that the physiotherapists' recommendation has been continued.

[56] While it is true, as Mr. Reitzin submits, that Dr Douglas was not cross-examined on the medical reports he prepared for Ms. Nunes, the Judge is not bound to accept all the expert says especially when all he says is juxtaposed against all the other evidence presented to the Court on the particular issue.

[57] Mr. Wisdom has suggested an award of \$1.4M for Ms. Nunes' pain and suffering. I believe the sum is low and not reasonable in the circumstances but I do not believe that in light of my assessment of the evidence before me that Mr. Reitzin's submission of \$4M is reasonable. I believe that for a period of time, Ms. Nunes had difficulty lifting heavy things, that she lost consortium with her partner and that she had pain and suffering and was unable to carry out her daily activities comfortably. I have taken not only her pain and suffering into account in coming to my decision but I also take into the loss she would have experienced on account of the loss of amenities she suffered. I believe in the circumstances the sum of \$2.5M is reasonable to compensate Ms. Nunes for her pain and suffering and loss of amenities.

Loss of Earning Capacity

[58] Dr Douglas in the medical report stated that

"She [the Claimant] will not be able to perform her regular duties at work or perform her routine domestic chores because of her pain. So she will have to make lifestyle adjustments to compensate for her pain and function."

Sykes J (as he then was) in the case of **Andrew Ebanks v Jephther McClymont 2004 HCV 02172 decision March 8, 2007** very clearly set out how this item of General Damages should be determined. Paragraph 53 of the judgment gives the summary. Of particular note is paragraph 53(e) which reads as follows:

"if the claimant is not working at the time of the trial and the unemployment is the result of the loss of earning capacity then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment or if employment is found but the job is very likely to be less well paying than the pre-accident job, assuming the person held a job. ..."

[59] I highlight that section of the judgment only because Mr. Reitzin has submitted that the appropriate method of determining Ms. Nunes' loss is the multiplier/multiplicand method. It is true that Ms. Nunes was not working at the

time of the trial. However, she did in fact work after the fall. She had a total of 65 days' sick leave and returned to her job at Shortwood Teacher's College where she was eventually put on "light duties". There was no evidence as to what the "light duties" entailed. She worked at Shortwood Teacher's College until 2014 when she migrated and then was unemployed until 2016. There is no evidence as to why she was unemployed during that two-year period. The Court is not sure if it was because of the pain she was experiencing as a result of her injuries or because of the transition period between moving from Jamaica and starting her life and settling down in Florida. The evidence does not state and the Court will not speculate.

[60] What is clear is that she eventually found work despite the injuries she received as a stocker. She said the job was stressful on her back but she had to do it because she needed the money. She however could only work an average of 20 hours per day because of the pain and disabilities and limitations that she suffered. She said if she were healthier she could have worked 80 hours per fortnight, even more. Despite her limitations, she worked with Walmart until 2020 and stopped not because of pain in her back but because she injured her left wrist while working there.

[61] I cannot then say that Ms. Nunes' unemployment was a result of the injuries she sustained because of her fall. There is no evidence that when she went on "light duties" at Shortwood Teacher's College that her wages were reduced. There is no evidence that between 2014 and 2016 when she was unemployed it was because of injuries she sustained in 2011. She agreed with Mr. Wisdom that her wages as a stocker were more than the wages she earned when she was employed to Shortwood Teacher's College.

[62] I also note that Ms. Nunes is qualified as an armed security guard and as a Commiss Chef. She has not utilised any of those skills to generate an income. Mitigation was not pleaded in the Defence and as such I must agree with Mr.

Reitzin that the issue of Ms. Nunes' failure to take steps to earn income is not an issue which the Court must concern itself with.

[63] I am mindful however of Dr Douglas' note on ability to work. I do not interpret his statement to mean that Ms. Nunes can never work but I understand it to mean that she has to be careful in carrying out her tasks and be mindful of how she does them so as to prevent or alleviate any pain she may have and function effectively. The unrefuted evidence is that the average work week for her was 20 hours. The regular work week is 40 hours. Given that there is no evidence before me to refute Ms. Nunes' statement concerning why she could only work 20 hours, I find on a balance of probabilities that she was limited in the number of hours worked because of the type of work she had to do or is qualified to do and how it could potentially aggravate her injuries.

[64] The multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment or if employment is found but the job is very likely to be less well paying than the pre-accident job. I do not find that this is the case here. I do not believe that the Claimant is not likely to find any kind of employment. I believe she is suitably qualified and can do so if efforts are made. She is a young woman of 42 years. I do however believe that she is not able to compete in her field of expertise with other women of her age because of her limitations and as such an award for loss of earning capacity is warranted. I believe the more appropriate method of assessing the sum would be the lump sum approach. Sykes J said that

“the lump sum is not arrived by reference to and comparison with previous cases.”

While this is true, it is always useful to see what the Courts have taken into account in determining the lump sum.

[65] In the **Elaine Graham case** in which the claimant suffered more significant injuries than Ms. Nunes, the Court awarded Handicap in Labour Market (Loss of Earning

Capacity) in the amount of \$815,000. The sum updates to \$4.8M. Ms. Graham however had memory loss, walked with a limp, had mild lumbar disc prolapse and was a 55 year old cultivator and higgler. I am not of the view that Ms. Nunes award for Handicap on the Labour Market should be the same as Ms. Graham's given that Ms. Graham's injuries and consequential disabilities were more significant and would therefore, in my view, impact her ability to carry out her work as a cultivator and higgler. There is no evidence that Ms. Graham had any other skill set or was trained in any other field. In the **Stacey Ann Mitchell case** where there were similar injuries, except for the memory loss, there was no award for handicap on the labour market (although it is not clear whether the sum was claimed). In the **Jhamiellah Gordon decision**, an award of \$1.4M was made for handicap on the labour market. The sum updates to \$2,040,000. Ms. Gordon, like Ms. Nunes had a 2% PPD and her pain was aggravated by long standing because of her work as a part time hairstylist. Although Daye J did not find that the injury was severe, he believed it was painful and that she had suffered some disability which would result in a diminution of her income. I find the same is true for Ms. Nunes. I am of the view that given the evidence before me, which I find in some instances to be exaggerated, Ms. Nunes' loss of earning capacity as a result of injuries she sustained in monetary terms would be a lump sum of \$1.8M.

Special Damages

[66] Special Damages in the amount of \$195,000 plus interest at 3% per annum from November 2, 2011 to the date of judgment was agreed at the beginning of the hearing. Mr. Reitzin however indicated to the Court that he wanted to deal with the issue of Loss of Income differently. Mr. Wisdom said there could be no award of Loss of Income as it was not pleaded. Mr. Reitzin responded that if a person never got income he could not lose it. I am not sure what to make of that statement but I realise that his submissions did not speak to the issue at all. Just to be clear, no loss of income will be awarded as it was not pleaded in the Particulars of Claim or Amended Particulars of Claim. CPR 8.9A provides that

“The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.”

Any diminution in income which Ms. Nunes would have experienced because of her inability to work a full 40-hour week would not be subsumed under the head of Loss of Income but rather would have to be an assessed sum under the head of Loss of Earning Capacity.

[67] My orders are as follows:

- a. Damages are assessed in favour of the Claimant against the Defendants who are to pay the Claimant General Damages (Pain and Suffering and Loss of Amenities) in the amount of \$2.5M plus interest at 3% per annum from April 24, 2013 to April 13, 2023, Handicap on the Labour Market in the amount of \$1.8M and Costs in the claim which are to be taxed if not agreed.
- b. By consent the Defendants are to pay the Claimant Special Damages in the amount of \$195,000 plus interest at 3% per annum from November 2, 2011 to April 13, 2023.
- c. The Claimant’s attorneys-at-law are to file and serve the Judgment.

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T. Mott Tulloch-Reid
Puisne Judge