



[2023] JMSC Civ 86

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV04305

BETWEEN	JAMELLIA STODDART	CLAIMANT
AND	WHITE DIAMOND HOTEL AND RESORTS LIMITED	DEFENDANT

IN OPEN COURT

Ms. Christine Hudson instructed by K. Churchill Neita & Co. for the Claimant

Ms. Faith Gordon instructed by Samuda & Johnson for the Defendants

Heard: March 6, 2023 and May 17th, 2023

Civil Practice and Procedure- Negligence – Whether employer provided safe system of work – Whether the premises were reasonably safe for the purpose for which the claimant was permitted to be there – Handicap on the Labour Market - Personal injury - Damages.

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] On the 7th of November 2018, the Claimant, Jamellia Stoddart, filed a Claim Form accompanied by a Particulars of Claim seeking damages against the Defendant company, White Diamond Hotel and Resorts Limited for negligence and/ or breach

of statutory duty. She has also claimed interest pursuant to the Law Reform (Miscellaneous Provisions) Act ('LRMPA') and costs.

- [2] Ms. Stoddart has averred that on or about August 27, 2017, she was employed to the Defendant as a waitress. She stated that while in the lawful execution of her duties, she slipped and fell on the floor in the kitchen as a result of which she suffered loss and incurred expenses.
- [3] The Defendant is a registered company in the service industry with its registered address at 48 Duke Street in the parish of Kingston. The Claimant was assigned to work temporarily at Royalton Blue Waters, a registered business owned and operated by the Defendant.
- [4] In her further amended particulars of claim filed on November 7, 2022, the Claimant alleged that her employer was negligent in failing to provide a safe place and system of work, and breached its statutory duty under the Act to ensure that she would be reasonably safe when using the premises of the Defendant. Specifically, she claimed that her fall was due to water that was leaking from the dishwashing machine in the kitchen of the Defendant's premises, and the failure of her employer to display sign warning of the danger of the slippery condition of the walkway, to place a mat to absorb the moisture at the entrance of the kitchen and/or to lay a non-slip covering on the floor of the walkway of the kitchen. The claimant further claimed that her employer failed to take any adequate precautions for the safety of the Claimant while she was engaged in her work.
- [5] A defence was filed on the 24th of April 2019 in which the defendant denied being negligent. The Defendant also indicated that the accident was occasioned by the claimant's negligent action in not wearing the appropriate foot wear, while in the performance of her assigned duties that caused or contributed to her accidental fall. The matter was referred to mediation and the parties were able to arrive at an agreement, pursuant to which judgment on admission was entered on the 25th of October 2019.

THE ISSUE

[6] The issue which arises for determination in this claim is:

1. What is the quantum of damages, if any, which should be assessed for the various heads of damages pleaded by the Claimant?

THE CLAIMANT'S ACCOUNT

[7] On the day of trial, Counsel for the claimant and the defendant agreed a number of documents which were admitted as exhibits. Special damages for extra help was also agreed in the sum of \$30,000 and the particulars were further amended to reflect earnings as \$22, 284.60 per fortnight. The evidence in chief of Ms Stoddart was outlined in her witness statement, which was amplified with permission to a limited extent, after which she was cross examined. It was her evidence that on the night of August 27, 2017, she slipped in the kitchen, dropped to the floor and hit her right shoulder on a wall. She also said that she immediately started to feel pain in her lower back.

[8] Ms Stoddart stated that she was taken to the nurse at the hotel who rubbed medication on her back. She was subsequently taken to the Cornwall Regional Hospital as she was experiencing pain. Ms Stoddart recounted that she was given an injection, some painkillers and sick leave for one week.

[9] She stated that due to her injuries, she suffered severe pain which the painkillers prescribed failed to alleviate. As a result of these ongoing issues, she visited Trident Medical Centre in Sam Sharpe Square, Montego Bay. She was examined, given additional pain killers, sick leave and a referral to have an x-ray conducted.

[10] The Claimant was also examined by Dr. Fray who explained to her that she had suffered a back strain and a right shoulder strain. He prescribed painkillers and a cream to rub on her back. He also gave her a referral to undergo an MRI. The MRI was done at North Coast Imaging and on a follow up visit she was informed by Dr Fray that she had a bulge in her back. She was advised to do physiotherapy

to ease the pain. It was Ms Stoddart's evidence that she saw the physiotherapist on five occasions. She was unable to comply with most of the instructions by the physiotherapist however because of pain in her lower back.

- [11] As a result of on-going challenges in performing her assigned tasks, Ms Stoddart left the Royalton Hotel. She subsequently obtained employment as a hostess/waitress at Coral Cliff in Montego Bay. This job was short-lived as she left after 9 months. She explained that this was due to pain in her lower back coupled with the fact that it was mandatory for her to wear shoes with a heel which aggravated her injury. She also acknowledged that she was frequently absent from work because of illness.
- [12] On January 22, 2020, Ms Stoddart was examined by Dr Rose who advised her that her back issues could not be fixed with surgery and she would have to make life-changing adjustments instead. She was also advised to continue with physiotherapy which she did, completing in total 22 sessions. Ms Stoddart acknowledged that there was some improvement in her condition. As a result of her complaints of emotional upheaval, Dr. Rose recommended that she be assessed by a psychiatrist. She was examined by Dr George Leveridge who diagnosed her as suffering from Major Depressive Disorder and Alcohol disorder for which she was prescribed medication. Ms Stoddart also recounted that she was examined by Dr Sewell a few years later. She asserted that he misunderstood the information that she gave him about her drinking as she never told him that she drank liquor once a week.
- [13] She was cross examined and in response to the questions about the night of the accident and nearly every other question asked about the details of the incident, her response was that she could not remember. On one such occasion when asked by Counsel what day of the week the accident occurred, she responded by saying that "I do not remember the day. I do not remember if it was Monday, Tuesday, Wednesday, Thursday."

[14] Ms Stoddart was cross examined about the fact that she had not been employed after leaving Coral Cliff and indicated that she would not go back to the work she did before or a call centre work. She was asked about other employment and stated 'nuff job deh a Bay' but went on to insist that she was not able to engage in what she alleged was available. She was asked about her employment at Coral Cliff and acknowledged that she had not been terminated there. She insisted however that she was going to be sent off the job for not wearing the appropriate shoes and that was why she did not return to work.

THE EXPERTS' EVIDENCE

Dr Delroy Fray

[15] Dr Delroy Fray, a Consultant Orthopaedic Surgeon, attended to the Claimant after she was seen at the Cornwall Regional Hospital. He stated that when he saw her on September 15, 2017, she was experiencing low back pain and right shoulder pain.

[16] Dr Fray indicated that on examination of Ms Stoddart he found;

"She had a normal gait. Normal muscle bulk was noted. Spinal mobility was mildly restricted in her lumbar spine. Power, tone, sensation and reflexes were normal in her upper and lower limbs. Saddle sensation was normal. Spasm of the right trapezius muscle was noted with marked spasm of her right shoulder girdle."

[17] Dr. Fray noted that his investigations demonstrated that there was no bony injury based on plain x-rays of her right shoulder and lumbar spine. He observed however, that there was muscular spasm of the lumbar spine. Ms Stoddart was assessed as having a lumbar strain and strain to her right shoulder girdle. She was treated with NSAID and antispasmodics.

[18] She was reviewed on February 21, 2018 and reported that she continued to experience low back pain and right shoulder pain. The doctor noted however that the examination did not show any deficits and Ms Stoddart was referred to have an MRI conducted on her lumbosacral spine. Dr Fray stated that another review

was conducted on June 18, 2018 during which Ms Stoddart complained of low back pain, an inability to work or engage in sexual activities. The examination conducted revealed no deficit, there was however restricted movement in her lumbosacral spine but the spasm to her right shoulder girdle had subsided.

- [19] Dr Fray reported that the MRI lumbosacral spine done on March 28, 2018 at North Coast Imaging by Dr. Konrad Kirlew, Consultant Radiologist showed the following:

“...small disc bulges L3/4, L4/5 and L5S1. No herniation, spinal stenosis or nerve impingement. Mild oedema in the L1, L2 and L3 spinous process, possible resolving bone bruises. She was then referred for physical therapy.”

- [20] Dr Fray conducted two further reviews of the Claimant on July 11, 2018 and November 26, 2018. He observed that she had undergone an extended period of physical therapy and there was a 75% improvement in her low back pain whilst the neck and shoulder pain had completely resolved. In his final review of Ms Stoddart on October 14, 2019, Dr Fray noted that there was minimal back pain with no abnormality on examination. He also recorded that she reported 95% improvement and was now attending school.

- [21] His prognosis was as follows:

“....at this stage, this patient has reached maximum medical rehabilitation. She sustains mild disc bulges of her lumbar spine bone bruises as is evident on the MRI. Repeated exacerbations of her low back pain can be anticipated in the future. This will require physical therapy on and off.”

- [22] In relation to disability rating, Dr. Fray assessed her as having a whole person impairment rating of 3-5%.

Dr Christopher Rose

- [23] The evidence of Dr Rose is that he first saw the Claimant on January 22, 2020 when her presenting complaints were exacerbation of low back pains, right shoulder pains and neck pains which resulted in her discontinuation of work at Coral Cliff.

[24] His examination of the Claimant revealed the following findings:

- **Cervical spine**

- i. Mild tenderness on palpation along the right paraspinal muscles, right trapezius muscle and along the medial border of the right scapula.
- ii. Neck pains were precipitated by extension and lateral rotation, forward flexion of the cervical spine precipitated by low back pains.
- iii. The neurovascular status was intact in both upper limbs.
- iv. Assessment of motor strength in both upper limbs showed greater strength in the dominant left upper limb.
- v. Examination of right shoulder revealed full active ranges of motion.

- **Lumbar spine**

- i. Moderate pain on palpation along the midline of the lumbar spine and along the right erector spinae muscles.
- ii. In terms of range of motion, all elicited low back pains but no radicular symptoms were elicited on active range of motion of the lumbar spine.
- iii. Slump test was positive on the right side.
- iv. The neurovascular status was intact in both lower limbs.
- v. Straight leg raising in the right lower limb was 45 degrees.

- **The claimants revealed no abnormalities.**

- **Her right shoulder revealed full active ranges of motion.**

(emphasis added)

[25] Ms Stoddart was seen on a follow up visit in August 2020. In addition to ongoing physical issues, Dr Rose noted that she complained of depression which she attributed to her inability to work. She also informed him that she had attempted suicide and stuck herself with hot pins. His diagnosis was as follows:

- i. Chronic, moderate low back pain with radicular symptoms into the right upper limb.
- ii. Chronic mild to moderate neck pains (cervical strain) with intermittent radicular symptoms into the right upper limb

iii. Depression

[26] In terms of treatment, Dr. Rose recommended physiotherapy and strengthening exercises for neck, core and back for the rest of her life. He also noted the following;

- Her neck, right upper limb and lower back symptoms will recur, thus necessitating the use of analgesics and supervised physiotherapy.
- Pain will be triggered by activities of daily life such as household chores, sexual activities, wearing heels, activities that involve prolonged sitting, standing, bending and lifting heavy loads.

[27] In relation to impairment, he indicated the following:

- Permanent partial impairment rating of the lumbar spine as 3% of the whole person
- Impairment rating of the cervical spine as 2% of the whole person
- Total permanent partial impairment rating is 5% of the whole person

[28] His prognosis was stated as follows:

- The Claimant has obtained partial recovery now but further functional recovery is uncertain.

Dr George Leveridge

[29] In his report, Dr. Leveridge stated that he first saw the Claimant via the zoom virtual platform on two occasions, September 23, 2020 and December 16, 2020 when her presenting complaint was that she had been depressed for four (4) years.

[30] He stated that she reported experiencing:

- Sleep disturbance due to pain when she tries to lay down
- Inability to stand or sit for long hours because of the pain
- She cannot have fun the way she used to
- The loss of her friends as she is incapable of participating in their usual interactions
- Inability to a job due to the back pains
- Loss of her independence due to the back pains causing her to be relying on people to give her monetary support and
- The loss of her spousal relationship as the injury interrupted intimate activities.

[31] Dr Leveridge also recounted that the Claimant indicated that she had been resorting to alcohol consumption to make her feel better or start her day. She also reported recurring suicidal thoughts and difficulties attending to her daughter. Following a mental status examination, he made the following diagnosis:

- i. Major Depressive Disorder
- ii. Alcohol Use Disorder

[32] Dr Leveridge prescribed anti-depressant medication for the claimant.

[33] His prognosis was stated as follows:

“... will need an appropriate course of psychological therapy. She needs to continue her orthopaedic and physiotherapy interventions as well as an intervention for the current alcohol use disorder. She was encouraged to adhere to home programmes recommended by her specialists. She needs to keep her follow-up appointments for both medication review and therapy sessions.”

Dr Clayton Sewell

[34] Dr Sewell examined the Claimant on October 10, 2022, at the request of Mr. David Johnson of Samuda and Johnson who asked him to review the Claimant based on the findings of Dr George Leveridge. He made the following assessment:

- i. Adjustment disorder with depressed mood.
- ii. Mild mental impairment indicating some impairment in social or occupational functioning.

[35] Dr Sewell noted that the Claimant denied having any suicidal or homicidal thought and she reported consuming alcohol only once per week and smoking ganja about 3 times a week. He also reported that she informed him that her relationship had ended because her partner had lacked understanding and wanted to engage in intimacy in positions which caused her discomfort.

[36] In conducting his assessment he utilised a number of tests which included the Beck Depression Inventory II, this yielded a result of a person experiencing minimal symptoms of depression. He also used a life event checklist to isolate and identify the stressor. A Post Traumatic Stress Disorder Checklist was also utilised by Dr Sewell to ascertain how much she had been bothered by PTSD symptoms in the past month. Her responses indicated that she may be having trauma related problems warranting further investigation.

[37] Under the heading Prognosis and Recommendations, Dr Sewell noted;

- i. The Claimant experienced a significant stressor that has impacted her emotional state, thereby causing the development of an Adjustment Disorder with Depressed Mood.
- ii. There is likelihood of good outcome relative to the symptoms remitting if there is the removal of the precipitating stressors. However, this could be prolonged if the Claimant is exposed to reminders such as pain in the Claimant's case.
- iii. The Adjustment Disorder is usually less severe than other major psychiatric disorders in terms of chronicity, need for hospitalisation and disposition.
- iv. She can be assisted by her support system in addition to reduced exposure to traumatic experiences or reminders.
- v. The Claimant has attained maximum expected recovery.

- vi. The Claimant no longer requires any treatment/psychotherapy but would benefit from the termination of this personal injury matter so as to continue with her family and social support.

[38] Impairment

- i. In Dr. Sewell's opinion, her current impairment related to Mental and Behavioural Disorders is in the region of 75 % of normal (whole person) level.
- ii. This represents an approximate 5% residual Mental and Behavioural Disorder Impairment based on the American Medical Association's Guides to the Evaluation of Permanent Impairment.

Physiotherapist – Shauna Shelton Webster

[39] Mrs. Shauna Shelton Webster, a physiotherapist, examined and treated the Claimant. She treated Ms. Stoddart and produced a report dated the 24th of June 2020 outlining the treatment program that was utilized over a total of twenty-two visits.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[40] It is the Claimant's contention that she suffered physical injuries to her lower back and neck consequent on her fall in the kitchen at the Defendant's premises. She insisted that because of the injuries she had to undergo an intense course of physiotherapy and visited various medical practitioners.

[41] Counsel for the Claimant observed that it is not in dispute that Ms Stoddart was initially seen at the Cornwall Regional Hospital. While acknowledging that this report is at best non-descriptive, Counsel highlighted that the Claimant's history of back pain is noted under the heading – Diagnosis, where she was found to have disc bulges, at L3-L5 and L5-S1. She was administered an injection for pain along with pain killers and thereafter sent home. Ms Hudson referred the Court to the reports and findings of Dr Fray as well as the MRI, which revealed mild edema in

L1, L2 and L3 of the spinous process. She also described it as significant that the Claimant had to undergo several sessions of physiotherapy. Counsel asked the Court to carefully consider the assigned impairment rating between 3-5% as well as his prognosis which she described as somewhat bleak, as he opined that the Claimant is likely to experience repeated exacerbation of her lower back pain for which she will require physiotherapy on and off.

[42] The findings of Dr Rose were also highlighted with emphasis on the remark that Ms Stoddart will have recurrent neck and lower back pain which will require analgesics and supervised visits when she experiences flares. Ms Hudson asked the Court to consider the opinion of the doctor that this pain will be precipitated or triggered by activities of daily living, to include household chores, sexual activities, wearing of heels and activities which involve prolonged sitting, standing, bending and lifting loads.

[43] The diagnosis made by Dr Leveridge as well as that of Dr Sewell were also examined by Counsel. In her submissions on the relevant legal principles to be considered, Ms Hudson made reference to the decision of the Hon. Sykes J (as he was then) in the decided case of ***Phillip Granston v The Attorney General of Jamaica 2003 HCV 1680*** delivered on the 10th August 2009 where he stated:

"...In assessing damages, there is a subjective and an objective component. The subjective aspect is the specific effect on the particular Claimant. The objective element focuses on similar injuries in the past. The goal of looking at past awards is to make sure that awards are consistent but the desire for consistency cannot be used to suppress awards that are properly due to the injured party even if that award is outside of the past cases..."

[44] Ms Hudson submitted that while the utility of comparable cases cannot be underscored, the Court should always be mindful of the general principle, that the Claimant for whom damages is assessed is not an abstract¹. Counsel argued that

¹ Sykes J in *Icilda Osbourne v MMTH*

in the case at bar, the Claimant who was 18 years of age sustained injuries, to the spinal region. Following treatment, she was assessed with a combined impairment rating of 5% Whole Person Impairment, being 2% Whole Person Impairment to neck and 3% Whole Person Impairment to the back. Ms Hudson posed the question for the Court as assessing 'how does this 5% Whole Person Impairment impact on the Claimant's quality of life?'

[45] Counsel submitted that from the Witness Statement and the history set out in medical reports the Claimant had hitherto led a highly active life. This included wearing high heels and going to parties. Counsel argued that all this changed following the accident and despite undergoing an intense course of physiotherapy among other adjustments, she continued to grapple with the effects of the injuries on her quality of life.

[46] Ms Hudson submitted that the pain had impacted Ms Stoddart's intimate relations and disrupted her spousal relationship. She was also unable to sit for more than an hour as this precipitated lower back pains. Her freedom to enjoy life and her loss of financial independence occasioned by her inability to find suitable work were also attributed to the residues arising from the injuries. On this point Ms Hudson commended to the Court the comments of Lord Reid in ***H. West & Sons v. Shepherd 1964 2AC***, where he said;

So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life...

[47] Counsel acknowledged that the reports from the doctors who examined the Claimant were somewhat dated, but asked the Court not to draw any negative inference from the absence of evidence to support any ongoing treatment being pursued by the Claimant.

[48] In terms of Ms Stoddart's Loss of Future Earning Capacity/Handicap on the Labour Market, Counsel submitted that there is in fact a clear and defined nexus between

the residues arising from the injuries and the challenges in performing at the Claimant's pre-accident level. Ms Hudson argued that the Defendant has not led a scintilla of credible evidence to challenge the Claimant's eligibility for damages under this head of damage.

- [49] In response to the authorities cited and award recommended by the Defendant for pain and suffering, Ms Hudson contended that the proposed sum of **\$1.450 million** is "*dastardly low*" and '*not only offends the sensibilities of the ordinary man but represents a retrograde step in the assessment process.*'"
- [50] Learned Counsel submitted that the cases cited on behalf of the Defendant are archaic and there is judicial pronouncement to exercise caution when using the older decisions as comparable guides. In support of this position, Ms Hudson cited the authority of **Seepersad v Persad & Another** (2004) 64 WIR 378 where Lord Carswell enunciated this relevant guidance.
- [51] In analysing the Defendant's authorities, Counsel postulated that the **Iris Smith** case is not on all fours with the case at bar as she was assessed with approximately 5% whole person impairment and it was not made clear how the residues of her injuries interfered with her daily living activities. Counsel also submitted that **Barbara Brady** is a wholly inappropriate guide that should not be used in the assessment on the basis that **Barbara Brady** was 64 years compared to the young Claimant in the case at bar and the fact that **Brady's** injuries were superimposed on a degenerative lumbar sacral spine. In respect of the decided case of **Cordella Watson**, Counsel highlighted that it was the trial judge's findings that the plaintiff's symptoms would have been reduced to a major extent since 1995 if she had undergone a proper back care program.
- [52] On the issue of transportation cost, Counsel for the Claimant agreed with Ms Gordon that the claim as pleaded is not supported by the vive voce evidence. Ms Hudson asked the Court to allow a sum of **\$200.00** per roundtrip for transportation cost to physiotherapy. Accordingly, this would be reflected as:

- i. 22 trips to physiotherapy at **\$200.00** per roundtrip **\$4,400.00**
 - ii. Transportation cost to Dr. Rose (sum pleaded) **\$30,000.00**
- \$34,000.00**

[53] In respect of the medical expenses incurred, Ms Hudson submitted that this had been proved in the sum of \$399,400 through the receipts and other documents submitted between exhibits 14 to 21. The overall figure for special damages with extra help included would then be **\$463,800.00**.

[54] In respect of an award for loss of earnings, Ms Hudson submitted that the sum of **\$22,384.60** agreed by the parties is reflective of the Claimant's bi-weekly earnings or an amount of **\$11,192.30** per week while employed to the Defendant. She asked the Court to accept that the Claimant's loss was as follows:

- i. Loss of Earning @ **\$22,384.60** per fortnight from April 2018 – December 2018 **\$358, 153.60**
- iii. January 2020 – March 2023 and continuing **\$1,880,306.40**

[55] In relation to pain and suffering, Ms. Hudson insisted that the Claimant has sustained a most serious injury. She highlighted the opinion of the doctors that Ms Stoddart will continue to have pain permanently even with life-style adjustments to minimize same. Counsel submitted that an award of **\$6M - \$6.5M** is appropriate under this head of damages in the circumstances. In examining the comparable cases, Ms Hudson submitted that the Claimant's injuries and sequeale can be placed in two (2) broad categories:

- i. The soft tissue injuries involving the back and neck and
- ii. The psychiatric damages;

[56] In respect of the injuries to the soft tissue injuries affecting the spinal process Ms Hudson submitted that the following cases are instructive:

- i. ***Nicole Linton v Georgette Burnett claim No 2006 HCV 0120 unreported decision and consolidated with Velma Richards v Georgette Burnett.*** The Claimant experienced headaches, lacerations, whiplash on the right side of her neck, moderate lower back pain and spasm on the right side, abdominal pain on the right side and pain the right hip but no fracture was observed. She was admitted in the hospital for couple of hours and then released. Her injuries were resolved without any permanent partial disability. An award of **\$2,000,000.00** was made in March 2012 at a CPI of 69.4 which now updates to **\$3,665,706.05**.

- ii. ***Claston Campbell v Omar Lawrence et al Suit No C.L C135 of 2002.*** The Claimant sustained a whiplash injury to the neck found to be moderate, trauma to the back and chest, and laceration. His injuries affected him at work so he had to ask permission to sit at work due to back pain. However, he was able to resume work within two (2) weeks after the accident. He was never required to consult a specialist or undergo physiotherapy. Although the Claimant was assessed with a "10% disability of function", this was disregarded by the Court which found that this was:

"not a permanent disability, it [was] not so stated in the medical reports, nor has the doctor made any permanent disability. [therefore] that the section of the Statement of Claim dealing with disabilities and complications at paragraph 9, which states "Ten Percent (10%) permanent disability" is not supported by the evidence.

An award of **\$650,000.00** was made by the Court in February 2003 at a CPI of 24.7 which now updates to **\$3,347,368.42**.

- iii. ***Evoni McLean v Pepsi Cola Bottling Company Limited [2014] JMSC Civ 55.*** The Claimant suffered mild whiplash injury, mild soft tissue injury to right shoulder, mild mechanical lower back pain and resolved triggering of tinges on both hands. She was treated with

analgesics and completed 6 sessions of physiotherapy. There was no assessment impairment. The Claimant was assessed with PTSD and major depression. An award of **\$2M** was made for general damages in April 2014 at a CPI of 81.8. This now updates to **\$3,110,024.45** using the CPI of 127.2 for the month of January 2023. An award of **\$800,000.00** was made for PTSD which now updates to **\$1,244,009.78**.

- iv. ***Clifton Williams v Anthony Brown*** [2022] JMSC Civ 189. The Claimant suffered from multiple abrasions to the head and shoulders and soft tissue injury to the shoulder and chronic lumbar spondylosis. He was assessed with a 2% Whole Person Impairment. The Court made an award of \$5M for pain and suffering on December 22, 2022 using a CPI of 127.9 which now updates to **\$4,972,634.80** using a CPI of 127.2.
- v. ***Lucille Moore v Stephen Powell and Restaurant of Jamaica Ltd*** [2021] JMSC Civ. 62. The Claimant, 70 years of age, suffered soft tissues injuries to right groin/thigh, diagnosis of blunt trauma to the right thigh, pain to back radiating to leg and intermittent pain in neck. She had chronic back pain with radiculopathy associated with multiple level disc herniation and bulges and chronic strain to the neck. The doctor indicated that the chronicity and nature of her symptoms are unlikely to resolve fully. The Claimant was referred to physiotherapy and orthopaedic care. An award of **\$2.2M** was made for General Damages on March 26, 2021 at a CPI of 108.3. This award now updates to **\$2,583,933.52** using a CPI of 127.2 for the month of January, 2023.
- vi. ***Natasha Richards & Phillip Richards v Judan Brown*** [2019] JMCA Civ 27. The Claimant was diagnosed with discogenic lumbar

pain and whiplash injury and was treated by way of pain killers, muscle relaxants and physiotherapy. She was assigned a 2% whole person impairment. An award of **\$1,800,000.00** was made for General Damages in October 2019. The award now updates to **\$3,261,538.46**.

- vii. ***Norman McBean v Wade et al*** [2017] JMSC Civ. 74 The Claimant was assessed with 8% whole person disability and awarded **\$6M** in May 2017 using a CPI of 91.8 which now updates to **\$8,313,725.00** using the current CPI of 127.2.

[57] Ms Hudson acknowledged that the cited cases represent a bracket of award ranging from **\$2.5M — \$8.3M** for soft tissue injury involving neck and back separately and, in some instances, both neck and back with and without impairment rating.

[58] Counsel argued that based on the medical evidence, the circumstances of the Claimant at bar are more grievous than those of the Claimants in the cited cases. Ms Hudson asserted that this is evidenced by the more extensive nature of the injuries affecting both neck and lower back and the protracted period of rehabilitation, marked by the intense course of physiotherapy.

[59] Ms Hudson conceded however that the impairment rating of 8% in the ***Norman McBean*** case is higher than the combined impairment rating of 5% whole person impairment in the case at bar. She argued however that the impairment rating itself is not de-facto evidence of the pain and suffering suffered by the Claimant or reflective of the period of rehabilitation or effects of the injury on the Claimant's quality of life.

[60] Learned Counsel also pointed out that whereas the Claimant in *Norman McBean* underwent 9 sessions of physiotherapy, the Claimant at bar underwent 22 sessions and was admitted in hospital for one day due to a severe flare of back pain. Ms Hudson also insisted that on comparison of their loss of amenities, Ms Stoddart's inability to enjoy activities of daily living including sexual activity and relationship were greater than his inability to do gardening.

Psychiatric Damages

[61] In respect of an award under this heading, Ms Hudson submitted that it is settled law that the Court can make an award for psychiatric damage, without offending the principle against duplication of awards. In assessing the psychiatric damages, she asked the Court to find that Dr. Leveridge's early evaluation that the Claimant was suffering from Major Depression Disorder in December 2021 is not inconsistent with Dr. Sewell's subsequent assessment that the Claimant is suffering from Adjustment Disorder with Depressed Mood, which translates to 5% whole person impairment. Ms Hudson asked the Court to find that the differences between the psychiatric reports represent the Claimant's psychiatric status at the date of examination by the Experts. On the question of the Claimant's reported alcohol use, Ms Hudson asked that special note be taken of the fact that in her Witness Statement, Ms Stoddart distanced herself from Dr. Sewell's findings that she consumed alcohol for social reasons.

[62] In considering how to treat with the differences between the Claimant's account and that of Dr. Sewell, Counsel asked the Court to prefer the Claimant's account rather than that of Dr. Sewell as the Court is always at liberty to accept or reject any part of a Witness Evidence/ Statement and in this regard, an Expert Witness is not exempt from this rule. Counsel also asked the Court to find that the termination of these proceedings is only but one stressor and that while same may result in some improvement in the Claimant's mental health, it is not a panacea of sufficient magnitude to return her to her pre-morbid status.

[63] By way of comparable awards, Ms Hudson cited the case of ***Charmaine Manning-Allen vs Caledonia Medical Laboratory Limited 2022 JMSC Civ 202***. In that matter, the Claimant brought an action seeking damages for a misdiagnosis with HIV. She was assessed and evaluated by Drs. Walcott and Sewell, both Consultant Psychiatrist. The accepted diagnosis was PTSD in partial remission and; Adjustment Disorder with depression mood with mild to moderate impact on her emotional and physical functions and 10% whole person impairment in accordance with the AMA guide.

[64] Ms Hudson accepted that the initial psychiatric damage would have been more devastating on the Claimant in the cited case compared to the Claimant at bar and the impairment rating of 10% WPI is greater. She argued however, one of the most distinguishing features which takes the case at bar outside the ambit of the cited case is in the cited case, Dr. Sewell opined that '...Continued successful therapy could have the effect of returning her to her premorbid status over a period of 12 months', a rather encouraging and positive prognosis. Unfortunately, no such long term benefit is expected for Ms Stoddart, given that her psychiatric status is linked to her continuing pain as one of the major stressors. Ms Hudson recommended an award within the range of 5.5 million to 6 million dollars for Psychiatric Damage using the ***Manning-Allen*** decision as a guide.

LOSS OF FUTURE EARNINGS/HANDICAP ON THE LABOUR MARKET

[65] Ms Hudson acknowledged that the Claimant is unemployed. In explaining this set of circumstances, she submitted that Ms Stoddart had to separate herself from the Defendant Company as up to 8 months after the incident she had to be admitted at Falmouth Hospital for severe lower back pain. Following this separation, she was employed to Coral Cliff but had to leave for a similar reason. Counsel highlighted Ms Stoddart's evidence that based on the physically demanding nature of waitressing/hosting, she would not be able to tolerate work of that sort. A similar challenge would be posed by working in a call centre which called for long hours of sitting and a cold environment. Ms Hudson also made reference to the findings

of Dr Rose in which he indicated that the Claimant would have challenges when sitting for extensive periods and lifting heavy loads. Counsel conceded that the Claimant is not unemployable but insisted that her capacity to earn, is significantly eroded and she would face challenges in competing on the open labour market with able-bodied women, of similar age and similar qualification, suffering from none of her disabilities.

[66] Ms Hudson relied on the dicta of Hon. Justice Skyes J (as he was then) in the decided case of ***Andrew Ebanks v Jephther McClymont Claim No. 2004 HCV 2172***, wherein the Learned Judge having reviewed the authorities on loss of future earning capacity/handicap on the labour market, set out the following relevant considerations when determining the appropriate method to calculate damages under this head of damage. In summary:

- a. *If the Claimant is working at the time of trial and the risk of losing the job is low, then a lump sum method should be applied and the award should be low;*
- b. *If the Claimant is working at the time of the Trial and there is a real risk of losing and a high probability that there would be difficulty finding an equally paying job, then the lump sum method is appropriate depending on when the loss of employment is seen as likely to occur. The sum awarded is dependent on when the risk may occur;*
- c. *multiplier/multiplicand method is only appropriate if the Claimant is not working at the time of trial, the unemployment is as a result of injury and there is evidence that the Claimant is unlikely to find any kind of employment or if employment is found, the job is very likely to be less well-paying as the pre-accident job. The financial impact would have already begun and the likelihood of the financial impact being reduced would be virtually non-existent;*

[67] Ms Hudson submitted that the Hon. Justice Sykes J. reasoned, that in determining whether in applying the multiple/multiplicand approach is applicable, much will

depend on the evidence placed before the Court, as noted in the decided case of **Campbell v Whyllie 1999 59 WIR 326** in which the Court of Appeal sanctioned the use of the multiplier/multiplicand approach. In this case, the Claimant a young doctor was in employment at the date of the assessment. However, sufficient evidence was placed before the Court to justify the mathematical approach.

[68] Adopting this approach, Ms Hudson recommended a multiplier of 12 years based on the Claimant's age. Counsel submitted that in the absence of a settled income as at the date of assessment, the minimum wage could be used as the appropriate multiplicand. At March 2022, the national minimum wage was **\$9,000.00** per week. Using this approach, the award under this head would amount to **\$5,616,000.00** computed as **\$9,000.00** per week x **52** weeks x **12** years. In support of this approach, Ms Hudson commended to the Court the cases of **Mark Scott v. Jamaica Pre-Pack Ltd.**, cited from Harrison's, page 284, **Monex Limited v. Derrick Mitchell and Camille Grimes SCCA No. 83196.**

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[69] The Defendant adumbrated its submission by challenging the credibility of the claimant. Ms. Gordon argued that the Claimant's evidence cannot be trusted not only because of the discrepancies in her case but also because there is no medical evidence that she sought treatment after August 2020.

[70] Learned Counsel contended that the following authorities may be useful to the Court in arriving at its decision for quantum:

- i. **Irish Smith v Arnett McPherson & Donald Oldfield, Khan Vol. 5** pg. 246-247. The Claimant suffered blunt trauma to lower back, blunt trauma to right side of neck, obvious soft tissue swelling around the left knee, low back pain, lumbar sacral strain, multiple soft tissue and spam of neck and lower back. Her disability was assessed at 5% of the total person and she was required to have twice yearly follow-up treatments. She was awarded **\$350,000.00** for her pain and suffering

and loss of amenities on June 9, 2020. This award updates to **\$2,135,000.00** using the CPI of 127.2 for January 2023.

- ii. ***Barbara Brady v Barling Investment Co. Ltd & Vincent Loshusan & Sons Ltd., Khan Vol. 5***, pg. 252-253. The Claimant suffered loss of consciousness, severe lower back pains and marked tenderness along lumbo-sacral spine as well as both sacroiliac joints. She was awarded **\$300,000.00** for pain and suffering and loss of amenities on November 11, 1998. This award updates to \$2,040,000.00 using the CPI of 127.2 for January 2023.
- iii. ***Cordella Watson v Keith James & Errol Ragbeen, Khan Vol. 5***, pg. 252 – 253. The Claimant suffered injury to her back causing severe lower back pain. She was advised that her lower back pains could be aggravated by prolonged sitting, bending and lifting (all part of her daily existence) but with a proper back care programme, her symptoms could be reduced. Her disability was also assessed at approximately 5% of the lumbosacral spine and 3% of the whole person on November 28, 1987. This award updates to **\$2,135,000.00** using the CPI of 127.2 for January 2023.

[71] Counsel commended the ***Cordelia Watson*** case to the Court as the closest in terms of comparison as ***Watson*** also had a knee injury and was undergoing treatment up to the time of hearing. Counsel also argued that the Claimant is at maximum improvement. Ms Gordon sought to distinguish the ***Brady*** case as more serious and observed that in that case, there was a loss of consciousness and injury to the sacrosanct iliac joints. Learned Counsel submitted that in light of the authorities, a reasonable award to make for General Damages is One Million Four Hundred and Sixty Thousand Dollars (**\$1,460,000.00**).

[72] In supplemental submissions, Counsel made reference to the authorities already cited and indicated that when examining the pain and suffering endured, the loss

of amenities suffered and the extent to which the Claimant's pecuniary prospects have been affected, her loss was significantly reduced from as far back as October 2019 or at the most recent August 2020 as by the later date she had been in a position to do most things that she complained that she had not been able to do following her fall. Miss Gordon also pointed to the evidence given at the start of the trial by the Claimant which she described as instructive, as when the Claimant was asked about her current position, she said that it was the same as at the time of the witness statement.

[73] Ms Gordon submitted that on a review of the medical report and the subsequent evidence of the claimant, it is clear that she was exaggerating her pain and suffering and pecuniary prospects in her written account. Ms Gordon contrasted this assertion with the report of Dr Fray where he noted in October of 2019 that the claimant reported 95% improvement. Counsel also commented that the report of Dr Rose, the last orthopedic surgeon seen by the claimant is instructive as on the 5th of August 2020, when he examined the Claimant, he had observed that she was in no obvious painful distress. He also stated that there was no indication that surgical intervention or continued supervised physical therapy was needed and he cleared the claimant for work albeit with modified duties.

Post-Traumatic Stress Disorder /Adjustment Disorder

[74] On the question of an appropriate award for Post-Traumatic Stress Disorder and Depression, Learned Counsel submitted that the findings of Dr. Sewell are to be preferred over that of Dr. Leveridge on the basis that Dr. Sewell conducted numerous objective tests. Ms Gordon submitted that the Court should also take note of the Claimant's personal history as disclosed by Dr. Sewell in his report. This included her poor relations with her parents. Counsel submitted that this stressful situation could be a contributing factor to the Claimant's psychological issues and not just the accident that occurred on August 27, 2017.

- [75] Ms Gordon directed the Court to the case of **Theron Scott v Huntley Manhertz** [2017] JMSC Civ 148 as a useful guide in deciding an appropriate amount to award the Claimant for any psychological issues as a result of the fall. The Claimant in that case experienced a major stressor that affected his emotional state. His Global Assessment of Functioning indicated that mentally he was functioning in the region of 60% of normal whole person levels. The Court awarded him **\$500,000.00** for PTSD which updates to **\$700,000.00**.
- [76] Ms. Gordon submitted that Dr. Sewell's assessment of the Claimant revealed that her disability rating indicated that mentally she is functioning at a rate of 75% of a normal whole person. This Counsel stated, is better than the Claimant in **Theron Scott** and in those circumstances, **\$700,000.00** would be excessive and a lump sum payment of **\$350,000.00** would be more reasonable in the circumstances.
- [77] Miss Gordon also highlighted an extract in Dr Sewell's report wherein he stated that the Claimant admitted having alcohol approximately once a week for the past four years and smoking cannabis for the past three years. Counsel asked the Court to take careful note of the fact that the Claimant tried to distance herself from this assertion describing it as a misunderstanding. Ms Gordon questioned whether the doctor's description of Ms Stoddart's relationship with her parents was also a mistake given the fact that this was a factor that was a possible stressor and likely contributed to her diagnosis.

FUTURE MEDICAL EXPENSES

- [78] Counsel submitted that no award should be made under this head of damages on the basis that there is no evidence before this court to substantiate same. Ms Gordon contended that the evidence before the Court shows that the Claimant has not sought medical treatment for her injuries since August 5, 2020 and there are no circumstances which show that any such disability has resulted.
- [79] Counsel highlighted that in July 2018, Dr Fray indicated that the Claimant showed a 75% improvement in her low back pain and the neck and shoulder pain were

completely resolved. In October 2019, he reported a 95% improvement. Counsel also made reference to the conclusion of Dr Rose that the Claimant had no indications for surgical interventions, neither was there was any cardi-pulmonary or obvious painful distress.

[80] Ms Gordon relied on the authority of *Trudy-Ann Silent-Hyatt v Rohan and Walters, Jason* [2021] JMSC Civ. 52 and posited that the Claimant needed to have led evidence of the costs of any possible future medical intervention and where said evidence is absent, no award can properly be made.

Handicap on the Labour Market

[81] For handicap on the labour market, Ms. Gordon submitted that no award should be made under this head as it is not substantiated by the evidence. Learned Counsel relied on the decision in *AG v Ann Davis SCCA No 1114/2004* wherein Harrison JA made it clear that for such an award to be made, evidence must be adduced in order to prove the loss i.e. loss of job and extent to which her earning capacity would be affected by her disability.

[82] Ms Gordon asserted that the Claimant has failed to lead any evidence that her employment was terminated. Counsel further submitted that it is significant that the Claimant returned to work after the accident and then resigned the following year. Ms Gordon asked that special note be taken of the fact that the Claimant obtained the job at Coral Cliff after leaving the Defendant's employment and worked there for 9 months.

[83] Learned Counsel also asked the court to consider the Claimant's admission that she has at least one skill (baking), which Counsel argued could be utilized to earn an income equally good or better than the jobs that she had held. Ms Gordon also referred to the evidence of the Claimant that since leaving Coral Cliff she has not applied for any jobs to include 'work from home jobs'. Counsel argued that in those circumstances, it is clear that the Claimant had elected not to work and mitigate her losses.

[84] Ms Gordon asserted that in any event when the Claimant had opted to work at Coral Cliff, she had earned **\$30,000** per fortnight which was more than she earned with the Defendant. Accordingly, there was no evidence of any reduction in her ability to compete on the open market because of the injuries that she sustained.

Loss of Earnings

[85] Ms Gordon took issue with the sum pleaded and argued that a more realistic award based on the Claimant's earnings is **\$470,076.60**. Counsel asserted that the Claimant should not be compensated for her refusal to work and insisted that the relevant period if any would be April 2018 to October 2019. Ms Gordon cited the decision of *Omar Young etal v June Black SCCA 106/2001* in which Harrison JA opined that the Claimant has a duty to mitigate her loss and is not entitled to refrain from working. Ms Gordon stated that the suggested period was drawn from Dr Fray's report wherein it was noted that at this period, the Claimant had reached 95% improvement and there was no medical report which stated that she is incapable of working.

Special Damages

[86] Ms Gordon questioned the figure of **\$3,378,550.89** claimed for Special Damages. In respect of the transportation costs, she submitted that the sum of \$13,000 had been made out for the visits to the physiotherapist, Dr. Fray and radiology centre. While she accepted that **\$30,000** was spent on transportation expenses to see Dr Rose, she submitted that the award should not exceed **\$44,000**.

[87] Counsel submitted that the claimant is only entitled to **\$803,545.68** for special damages which included the sum of **\$30,000** agreed for extra help, receipts totaling **\$265,609.68** and loss of earnings of **\$470,076.60**.

[88] Ms Gordon proposed that the appropriate award by the Court should be as follows;

Pain and Suffering and loss of amenities - **\$1,460,000.00**

Adjustment disorder (Psychiatric Damage) –	\$ 350,000.00
Medical Expenses and physiotherapy -	\$ 250,400.00
Extra Help -	\$ 30,000.00
Loss of Income -	\$ 470,076.60
Transportation –	\$ 44,000.00
Total	\$2,750,476.00

DISCUSSION AND ANALYSIS

[89] 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.²As such, 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.”

[90] In seeking to arrive at an 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.”

² Lord Blackburn in **Livingstone v Rawyards Coal Co.** [1880 Appeal CAS.25]

CREDIBILITY

[91] Although the Defendants have accepted liability in this matter. There has been some dispute as to the current status of the Claimant's injury, specifically its residual effect and the impact it has had on her quality of life. In determining this issue, the evidence of the Claimant has been carefully scrutinized and compared with the reports of the doctors who have treated her. While I was satisfied on the independent reports that she had suffered the physical injury outlined and some loss of amenities, I formed the view that contrary to her assertion in the witness statement and in her viva voce account, there had been much improvement in her overall condition. She evinced no discomfort to the Court while giving her evidence, even though she elected to stand while doing so and had to move around when asked to step on the outside in the course of providing her evidence. The absence of any recent visits to the doctor in connection with this injury was also instructive and, in my opinion, pointed to a situation in which there had been no severe flare up which warranted a doctor's visit or any pain which may have occurred was managed without medical intervention.

[92] The Claimant portrayed herself as a mature and sensible witness. However, when her evidence is considered with care, it becomes apparent that there are some issues with her account. Under cross-examination, Ms Stoddart was unable to recall matters in relation to the incident, dates and her employment. This raised questions as to whether this was a simple gap in her memory or a deliberate attempt to be coy in responding to questions from Counsel for the Defendant. While not all of the things that she was unable to recall were material to her claim, I found it incredible that she was simply not able to recall matters such as what age she started working with the defendant, whether her employment was on contract, the length of the contract or even when her employment started, factors which are of some significance and go to the heart of the case.

PAIN AND SUFFERING

- [93] In arriving at a suitable award for this head of damage, I carefully considered the evidence of the Claimant, the reports from the Orthopaedic Surgeons and my own assessment as outlined above. While it is evident that the Claimant's injury resulted in her being assigned a whole person impairment, it is also clear that when she was last seen by Dr Fray, she had made significant improvement. The report of Dr Rose also shows that while she may experience flare ups from certain activities such as prolonged sitting and lifting of heavy loads, her condition was such that he was able to clear her to return to work.
- [94] In the circumstances, as previously stated, I was unable to find that at the end of her treatment period, Ms Stoddart's physical condition was as bad as she had insisted. This does not mean, however, that the nature and seriousness of the Claimant's injuries are to be disregarded, but the foregoing observation is a significant factor when addressing the questions of ongoing pain and loss of amenities.
- [95] In arriving at a decision on the appropriate award for pain and suffering, useful guidance was found in the authorities cited by Counsel for the respective parties. Although none of the cases were on all fours with the instant case, the circumstances in a number of them were close enough for the purpose of determining the appropriate award.
- [96] In respect of the cases cited by the Defendant, I agreed that these authorities were all decided more than twenty years and while the sums awarded can be updated using the CPI, the preferred approach has tended in favour of more current decisions. Comparatively, I found that the injuries and loss of amenities of **Irish Smith** and **Natasha Richards** were the most similar to that of the instant Claimant. While the level of impairment suffered by Ms Richards was lower than that of Ms Stoddart, the type of injury and the need for physiotherapy more closely mirror those of the instant Claimant. Importantly, that award is of more recent vintage and is more in keeping with the current trend of awards of this nature. Applying the March 2023 CPI, this award would update to **\$2,265,029.46**. This figure would then

be adjusted upward to reflect the assigned level of impairment of the instant Claimant. Her improved physical condition would also be carefully considered. Adopting this approach, I am satisfied that an appropriate award would be **3.5 million dollars**.

FUTURE MEDICAL EXPENSES

[97] In relation to an award for future medical care, the Court considered 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.**”*

[98] Applying the relevant legal principles outlined in this decision to the instant case, it was noted that there were no recent medical reports presented which indicated the Claimant’s present medical status in respect of the injuries sustained. While I take no issue with the fact that she had been injured, I am unable to say with certainty to what extent she is still being affected and whether there is still a need for the care which had been recommended. In circumstances where the authorities tend to show that the need for this treatment is extant, I find that the Claimant has failed to discharge her burden in this regard and I am of the view that no award can properly be made.

HANDICAP ON THE LABOUR MARKET

[99] To succeed in a claim under the head of Handicap on the Labour Market, there must be evidence of the claimant's earnings at the time of the trial, evidence of loss of these earnings, evidence of difficulty finding alternative employment and evidence that any subsequent employment would result in diminution of earnings (*Dovan Pommells v George Edwards et al Khans Vol 3*, pp.138-144)

[100] The Claimant has pleaded handicap on the labour market on the basis that she continues to suffer from the effects of the accident, her ability to work as a waitress is severely compromised, she experiences severe pain in her neck and back, which are aggravated by sudden movements, long sitting and standing and she is unable to sit for any appreciable period due to severe pain in her neck and back.

[101] In addition to insisting that the claimant's capacity to work on the labour market has not been diminished, the Defendant contends that it was Ms Stoddart who voluntarily separated herself from two places of employment and cannot now claim the loss of employment as evidence to support her claim in this regard.

[102] It is settled law that as it relates to any award for damages under this head³;

“what has somehow to be quantified in assessing damage under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market”. (per Browne LJ)

[103] In the *Moeliker* case, it was established that the court has to apply a two stage test when making a determination under this head of damages. The two stage test is as follows:

³ *Moeliker v A Reyrolle & Co Ltd* [1977] 1 All ER at page 16:

(i) Is there a substantial risk that a plaintiff will lose his present job at some time before the estimated end of his working life?

(ii) If there is (but not otherwise), the court must assess and quantify the present value of the risk of 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 chances of getting a job at all, or an equally well paid job.

[104] The evidence of the Claimant is that she continues to be unemployed even though “a nuff job deh a Bay.” A close examination of her account does not establish any inability to work on account of the injury, neither does it assist the Court in determining whether her injuries have actually prevented her from obtaining like employment or placed her further down on the salary scale where she has in fact obtained employment. In fact, the evidence would tend to suggest that she was actually paid a higher wage at Coral Cliff which she moved to after leaving the Defendant Company.

[105] The aim of an award of this nature 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 had it not been for the consequence of the injuries suffered. On an examination of the evidence, I was unable to find that Ms Stoddart has satisfied the necessary requirements for an award under this head, accordingly, no award is made.

LOSS OF EARNINGS

The duty to mitigate

[106] The law on mitigation of damages was clearly stated in ***Pearl Smith v Conrad Graham and Lois Graham*** (1996) 33 JLR 189 in which Langrin J (as he then was) said:

“It is a general principle that a person who has been injured by the acts of another party must take reasonable steps to mitigate his loss and cannot recover for losses which he could have avoided but has failed through unreasonable inaction or action to avoid. The person who has suffered the loss therefore does not have to take any step which a reasonable and prudent man would not take in the course of his business.”

[107] In determining whether an award should be made for loss of earnings and the appropriate sum if any, careful consideration must be given to the fact that while the pleadings seek an award under this head of damages up to March 2023, the Claimant has failed to provide any evidence that she has sought other employment in keeping with the aforementioned duty. While the Court accepts that she had sustained a serious injury, there was no evidence presented that there was any sort of physical impediment to her returning to work or seeking new employment. In light of this fact, she has failed to mitigate her losses and cannot seek to be rewarded by the Court for having elected to sit at home and suffer financially for almost three years since she was cleared to return to work by Dr Rose. I am satisfied that by giving this approval, the doctor was offering his unbiased medical opinion that she should be able to work and this factor is of great significance in calculating an award.

[108] As such, I am satisfied that the relevant period would be April 2018 to August 2020 at **\$22,384.60** per fortnight. This sum would be broken down as follows:

- **\$22,384.60 x 61 weeks (1st April 2018 to August 2nd 2020) = \$1,365,460.60.**

PSYCHIATRIC DAMAGE

[109] While the findings of Doctors Leveridge and Sewell placed the Claimant at different points along the spectrum in terms of the psychiatric damage which was occasioned by this incident/injury, I found it instructive that she was not seen or assessed by Dr Sewell until 2022. From the interview conducted and history recounted by the Claimant to Dr Sewell, I believe that the factors which marked her assessment by Dr Leveridge were not as pronounced or overwhelming as they

were closer to the time of the incident which prompted the referral by Dr Rose. It is in light of this observation that I am able to conclude that there is not so much a conflict between the reports as the later in time had clearly been impacted by the passage of time and possible changes made by the Claimant.

[110] In arriving at my decision on damages, I formed the view that the findings of Dr Sewell were more current and certainly more relevant in determining the appropriate award. On a comparison of the assessment of the instant Claimant with that of **Mrs Manning-Allen**, it is evident that their illnesses placed them at entirely different places on the spectrum with Ms Stoddart's case being far less severe than that of **Mrs Manning-Allen** and even that of **Theron Scott**. I found it significant however that Dr Sewell was still able to identify some level of impairment in spite of the adjusted diagnosis and passage of time. I considered the submissions of Ms Gordon on this point and while it is true that the Claimant's situation could not be considered as among the most severe, I believe that the award which meets the justice of this situation is **\$500,000**.

SPECIAL DAMAGES

[111] 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*).

[112] Under this head of damages, Counsel for the Claimant provided this court with a number of receipts which were tendered into evidence as exhibits. There were also sums claimed for transportation and extra help.

TRANSPORTATION

[113] In addressing the request for an award under this head of damages, 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.”

[114] I have also reviewed the updated submission for the Claimant on this subject as well as those of Ms Gordon. While there had been some issue taken with the number of visits to the physiotherapist, I note that it has not been disputed that these visits were fully documented in the exhibited report of the physiotherapist and referenced by both doctors. As such, I found that there was cogent evidence presented on this point. I also accepted that the sum of **\$200** for round trip visits was reasonable. Accordingly, I am satisfied that the amended sum of **\$34,400** which includes the visit to Dr Rose is reasonable and ought to be awarded.

MEDICAL EXPENSE

[115] In respect of the medical expenses incurred, Exhibits 14 to 21 had been agreed between the parties with the total figure amounting to **\$341,249.00** and this sum is awarded to the Claimant.

EXTRA HELP

[116] At the commencement of these proceedings the sum of **\$30,000** was agreed for extra help.

ORDER

[117] In light of the foregoing discussion and findings, my assessment of damages for injury and loss incurred by the Claimant are as follows:

- a. General Damages for pain and suffering are awarded to the Claimant in the sum of **\$3.5M** with interest at 3% from November 7, 2018 to May 17th, 2023.

- b. An award is also made for Psychiatric Damage in the sum of **\$500,000** with no interest.
- c. Special Damages are awarded to the Claimant in the sum of **\$405,649.00** with interest at 3% from August 27, 2017 to May 17th, 2023.
- d. Loss of Earnings awarded in the sum of **\$1,365,460.60** with no interest.
- e. Costs are awarded to the Claimant to be taxed if not agreed.
- f. Claimant's Attorney to prepare, file and serve the order herein.