[2020 JMC Civ 31]

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 03597

BETWEEN	**DALTON DWIGHT THOMPSON**	**CLAIMANT**
AND	**CORPORAL OSBORNE McKENZIE**	**1ST DEFENDANT**
AND	**ATTORNEY GENERAL CHAMBERS**	**2ND DEFENDANT**

Ms. Oraina Lawrence instructed by Kinghorn & Kinghorn Attorneys-at-Law for the claimant.

Ms. Faith ~~Hill~~ Hall instructed by the Director of State Proceedings for the defendants.

Heard: October 14 & 15, 2019 and February 27, 2020

Whether defendants negligent. Cause of injury. Damages. Loss of earning capacity.

PETTIGREW COLLINS, J

BACKGROUND

[1] The Claimant, Dalton Thompson filed a Claim Form and a Particulars of Claim on the 17th day of July 2008 in which he claimed against the defendants Corporal Osborne McKenzie and the Attorney General of Jamaica, Damages for Negligence. He claimed that on or about the 14th day of January 2004 while training to become a Correctional Officer at the Carl Rattray Training College, he was instructed by the 1st defendant to carry out certain strenuous and difficult exercises as a means of punishment. He further alleged that the exercises were administered in a negligent manner and as a result, he sustained serious personal injuries and suffered loss and damage.

[2] At the time the alleged incident giving rise to this claim is said to have taken place, the first defendant was a Correctional Officer and Instructor at the Carl Rattray Training College, the entity responsible for training individuals to become Correctional Officers in Jamaica. That entity was and still is under the control of the Government of Jamaica. The 2nd defendant was made a party to the claim by virtue of the provisions of sections 3(1) (a) and 13(2) of the Crown Proceedings Act. Section 3(1) (a) provides that:

> *"Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity it would be subject;*
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> *In respect of torts committed by servants or agents*
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> ...
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> ...
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> ...
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> *"Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, an apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.*

[3] Section 13(2) in essence, provides that Civil proceedings against the Crown shall be instituted against the Attorney General. The provisions of the Act therefore extend the principle of vicarious liability to the Crown and the Crown's servants where the alleged tortious act is committed by a Crown servant during the course of his employment.

[4] It was not strictly necessary that the first defendant be joined as a party. However, it is to be noted that he is not a participant in these proceedings and it is also uncertain whether he is even aware of the proceedings, as there is no indication that he has been served, but a joint defence has been filed. The claim will proceed for the purposes of liability and damages if the court takes the view that any attach, as if the claim had been filed against the 2nd defendant only.

[5] The 2nd defendant filed a defence on the 16th day of February 2010 disputing the claim on the basis that the injuries the Claimant suffered were as a result of him falling on January 13, 2004 while participating in physical training, and that he never reported that he was being punished by the 1st defendant. The claimant denied ever reporting that he had fallen during training.

[6] Extensive and helpful written submissions were filed by both parties subsequent to hearing evidence in this matter. I shall not recite those submissions but will only make reference to them as I find it necessary during the course of this judgment.

THE ISSUES

[7] I will examine the issues in this case having regard to whether the requisite elements of negligence have been made out against the defendant. Therefore, the first issue arising is whether the claimant was owed a duty of care. Secondly, whether that duty of care was breached. Thirdly, did the claimant sustain injury, damage or loss and if he did, was the claimant's injury, damage and loss a result of that breach of duty? Was that injury loss and damage foreseeable. If all the elements of negligence are satisfied, what is the quantum of damages to be awarded to the claimant?

THE EVIDENCE

[8] The claimant filed a witness statement on the 5th of September 2012. Witness statements, each dated the 5th day of November 2012 were filed on behalf of Mr. Mervin Smith, Assistant Administrator for the Carl Rattray Staff College and Ms. Maureen Douglas, the witnesses for the 1st defendant. The witness statement of each witness stood as the evidence in chief and each witness was cross examined. Except to give a brief outline of Ms Douglas' role at the institution, I will

not at this stage delve into the evidence of each witness but will refer to aspects of their evidence as is necessary in the course of assessing the case for each side.

[9] Ms. Douglas stated that she was assigned as a Medical Orderly at the New Castle Training Depot in October 2003, and reassigned at the Carl Rattray Staff College since December 2003. She said she was responsible for the operation of a sick bay and she provided basic first aid treatment for minor cuts and bruises for both the general staff and trainees at the College. According to her, she is the first point of contact for all medical complaints at the college.

THE MEDICAL EVIDENCE

[10] The following are among the documents that with the agreement of the defence, were tendered and admitted in evidence in support of Mr. Thompson's claim:

1. Medical report from the St. Ann's Bay Hospital dated the 18th day of May 2004 as exhibit XXI.

2. Medical report of Dr Denton Barnes dated the 20th day of June 2013 as exhibit XXII.

3. Medical report of Dr Kimani White dated February 15, 2008 as exhibit I.

4. Report from Mr. Richard Henry of the Chiropractic Natural Care Centre as exhibit II.

Dr. Denton Barnes' report dated May 8, 2004 (Report from the St. Ann's Bay Hospital)

[11] Dr Barnes gave his qualifications as M.B.B.S. (UWI) MRCS (ED) and stated that he is an Orthopaedic Resident.

[12] Dr Barnes stated that the claimant presented at the St. Ann's Bay Hospital on January 28th 2004 with a history of lower back pain for two weeks. The claimant he said, reported that he began having lower back pain after several marches and that the pain to his lower back radiated to his right thigh and leg with numbness to the right leg and foot laterally. Dr Barnes reported that the claimant also stated that the pain was relieved by rest. The following were also stated in the report: That the claimant's past medical history was not significant, and that an examination in the Orthopaedic Outpatient Department revealed that the upper limbs were normal. In relation to the lower limbs, that straight leg raising was 10 degrees on the right and straight leg raising 40 degrees on the left and that those movements were limited by pain. It was also stated that there was "positive sciatic stretch test (LASEGUE SIGN), power grade 5/5 in all groups, that tone was normal and bulk was normal. Those findings were in relation to the claimant's muscular skeletal system.

[13] The doctor also observed that radiographs of the claimant's lumbar spine were within normal limits. The claimant was assessed as having mechanical back pain most likely secondary to a prolapsed inter-vertebral disc at L4/5 level, producing right sided radiculopathy. His treatment consisted of oral analgesic and muscle relaxant. The claimant was advised to rest and was referred to physiotherapy. A MRI of his lumbar spine was requested.

Dr Barnes' report dated 20th of June 2013

[14] In this report, Dr Barnes states that he is a fully registered Medical Practitioner with the Medical Council of Jamaica and the Medical Association of Jamaica. He repeated the history given in his earlier medical report. He stated that upon presentation, the claimant reported intermittent back pain, no numbness in the lower limbs, no weakness in the lower limbs, no bladder or bowel dysfunction. He however reported difficulty lifting heavy objects and that the pain was moderately improved by medication, that he was able to care for himself normally but with

increased pain, and that pain prevented him from lifting objects off the floor but he could manage objects if they are conveniently placed on a table. The claimant also reported that pain prevented him from walking more than a mile and he's unable to stand for long periods, but that he is not awakened at nights by the pain. His social life is normal but with increased pain. The claimant also stated that travelling increased his pain but that he is not significantly affected. He reported that he is able to perform most of his job duties but pain prevents him from performing more physically stressful activities such as lifting.

[15] The doctor also stated that upon further questioning certain important parameters were established from the claimant. He said the claimant told him that he was thirty- two years old at the time of the injury and that he had started the training session in October 2003 at the age of thirty-one and did not have any problems taking part in the physical activities from October up to the point of injury. The claimant reportedly said that he worked as a chef between 1989 and 2003 and that while working as a chef he had several periods of long standing each day while working and did not have any difficulty or pain with long standing. The doctor said that the claimant also reported that he played no sports as a young man and was not involved in any significant recreational activities; his only recreation was playing dominoes. On further questioning the claimant reported that he was passed fit for training by the Medical Doctor at the Institution and that the training course lasted four (4) months and would have ended on the 31st of January 2004. He reported that the injury occurred on the 28/01/04.

[16] It is recognized that the statement as to the date of the injury must have been an error on the part of the doctor since the earlier report of the doctor indicates that the claimant was examined on the 28th of January and that he had stated that he was experiencing pain for two weeks at the time of that examination.

[17] The doctor also said that the claimant was a young man in good general health and that his vital signs were stable at the time of examination. The doctor made the following findings on that occasion:

(i) In the lumbar spine near the thoracolumbar junction, there was mild spasm of the paraspinal muscles.

(ii) In his lumbar spine ranges of movement were; flexion 70, extension 20, rotation was 40; right side was equal to the left, lateral bending was 30.

(iii) Straight leg raising was 70 on the right, 80 on the left.

(iv) Positive sciatic stretch test with cross irritation from right to left.

(v) Powers in his lower limbs were grade 5/5.

(vi) Tone was normal.

(vii) Sensation was normal to temperature and light touch.

[18] The pain disability questionnaire was administered to him and his score was 77/150.

[19] An MRI scan of his lumbar spine done on the 12/03/08 revealed multi-leveled degenerative disc disease and multi-leveled dorsal disc bulging with focal annular tears present at T11:12 T12:L1 L4:5 and L4:S1.

[20] The claimant was assessed as having mechanical back pain secondary to muscle strain and inter-vertebral disc prolapsed (and?) multi levels and was advised that he needed to continue analgesia and to alter his lifestyle with no lifting of heavy objects and no prolonged standing. The doctor opined that the claimant is in class 3 of the lumbar spine regional grid which is equivalent to 20% impairment of the whole person as he has multiple inter-vertebral disc bulging without surgical intervention. He went on to state that the claimant has residual symptoms of radiculopathy despite maximum medical treatment.

[21] With reference to the claimant's prognosis, the doctor observed that if the claimant had axial loading of the spine bearing significant weight, based on the

stooping position the claimant was in, having several rifles placed in his grasp, the claimant could have received injury to his lumbosacral spine. He also noted the fact that the MRI was done some four years after the claimant's initial pain and continued that "it is likely that initially the disc bulges and that 4 years after injury, the MRI scan show degenerative changes rather than acute disc bulging and herniation. Therefore, the findings on MRI are consistent with the pain he is having and furthermore he reports that he has had no subsequent incident since this."

[22] The doctor stated that in preparing his report, he referred to Foy M, Fagg P: Medical legal reporting in Orthopaedic trauma: 3rd edition, Churchill Livingstone 2002 and Guide to the evaluation of permanent impairment AMA 2009, sixth edition.

Dr Kimani White's Report

[23] The medical report of Dr Kimani White is dated February 15, 2008. Dr White holds a MBBS and is the Chief Orthopaedic Resident to one Dr Kenneth Vaughan who is a Consultant Orthopaedic Surgeon in the Division of Orthopaedics at the University Hospital of the West Indies.

[24] In outlining the history of impairment of the claimant, Dr White stated that the claimant alleged that in January 2004 during training he developed severe pain which resulted in a number of other ailments. The claimant continued to experience similar pains occasionally until he visited the Orthopaedic Out-Patient Department on December 14, 2006. He stated that an examination revealed that the claimant suffered from left paraspinal muscle tenderness at the 3rd lumbar vertebral level (but no clinical evidence of nerve root irritation), and mild lumbar spondylosis. He was prescribed analgesia, referred for physical therapy and reviewed by the Orthopaedic Out-patient Department on a number of occasions

where his symptoms gradually improved despite incomplete compliance with his physical therapy regime. He also missed a MRI appointment on October 4, 2007.

[25] The report also revealed that as of February 15, 2008, the claimant had mild right paraspinal tenderness at the 3rd to 5th lumbar vertebral level, moderate limitation of forward and lateral flexion of the spine, positive straight leg raise sign but absent lasague's and bow string signs. It also indicated that he had no objective neurological abnormality in the limb but has an antalgic gait and uses a right sided walking stick for assistance. He was also found to have mild loss of disc height of the L5 inter-vertebral disc. The diagnosis was that he "likely has a prolapsed inter-vertebral disc with nerve root irritation." His prognosis was that he needed optimization of his analgesia and physical therapy. The doctor opined that the claimant would also need a MRI scan of the lumbar spine to complete his evaluation.

Report of Mr Richard A. Henry, D.C.

[26] The examination took place on the 17th of June 2009. Mr Henry stated that the claimant complained of having continuous moderate mid and lower back pain which is aggravated by daily activities. He said the claimant reported that he experienced those symptoms immediately and they are progressively getting worse. He said the claimant also complained of gradually experiencing moderate headaches on the left side of his head, also that the headaches are aggravated by straining and daily living.

[27] According to Mr Henry, a musculoskeletal examination revealed that the claimant had tenderness to his digital palpation and muscle tenderness, muscle hypertonicity, and edema and swelling on both sides of the thoracic, and lumbar spine. It was also noted that multiple active trigger points that were stimulated with moderate digital pressure to the thoracic and lumbar muscles and are associated with consistent referred pain.

[28] The report further indicated that the claimant's range of motion in his thoracic and lumbar spine was reduced in all ranges with pain. A manual muscle test revealed that he had general weakness in all cervical muscles, lumbar muscles, all upper extremities and all lower extremities.

[29] His final diagnosis of the claimant was lumbar radiculitis (724.4), thoracalgia (724.1), Lumbosacral Sprain (846.0), and Cervicalgia (723.1). He stated that the claimant was treated with conservative multi-modal chiropractic and physical therapy management, electric stimulation therapy, hot or cold packs, neuromuscular massage, traction, Swedish massage, moist heat, and trigger points. The claimant was then given a final recommendation as follows:

> *"Nerve Conduction studies of the upper and lower extremities to rule out motor and sensory spinal nerve root and peripheral nerve abnormalities if symptoms persist or worsen.*
>
> *2 times a week for 6 weeks and re-evaluate.*
>
> *The patient cannot perform heavy exercises or jumping and bouncing exercises.*
>
> *The patient is temporarily restricted from doing and heavy lifting, bending and straining."*

[30] It was noted that the claimant has reached a Maximum Medical Improvement with 13% impairment to the whole body resulting from the accident.

LIABILITY

WHETHER DUTY OF CARE WAS OWED

[31] It is the claimant who has the onus of satisfying the court on a balance of probabilities that the necessary elements of negligence have been established. That includes whether a duty of care was owed to him. As it relates to the duty of

care, in **Caparo Industries plc v Dickman** [1990] 1 ALL ER 568, the principle was stated as follows:

> *What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.*

[32] The undisputed evidence is that the first defendant, a Correctional Officer, purported to act within the lawful execution of his duties. The training institution to which he was employed at the relevant time is under the control of the government of Jamaica. The claimant asserts that he was injured due to negligence on the part of the trainer during the course of training. It cannot be disputed in the circumstances of this case that the relationship of proximity existed. The claimant was owed a duty of care by the Training College and by the 1st Defendant who was directly responsible for administering the training activities and by extension, he was owed a duty of care by the 2nd defendant.

WHETHER THERE WAS A BREACH OF DUTY

[33] It is generally recognized and accepted that the standard of care required is what would be reasonable in the circumstances. In addressing the question of whether there was a breach of the duty of care, this court must address the question of what was reasonable in the particular circumstance. In **Clerk & Lindsell on Torts** at paragraph 8-178, the learned authors addressed the difficulty of drawing a balance between the social value of an activity and the risk it creates. Reference was there made to the case of **Watt v Hertfordshire County Council** [1954] All ER 368, to which the defendants' Attorney-at-Law also directed the court's attention. In that case, the dicta of Asquith LJ in **Daborn v Bath Tramways Motor Co. Ltd & Trevor Smithey** was cited by Lord Justice Singleton. Asquith LJ said:

> *"In determining whether a party is negligent, the standard of reasonable care is that which is reasonably to be demanded in the circumstances. A relevant circumstance to take into account may be the importance of the end to be served by behaving in this way or in that. As has often been pointed out, if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk.*
>
> *The purpose to be served in this case was the saving of life. The men were prepared to take that risk. They were not, in my view, called on to take any risk other than that which normally might be encountered in this service. I agree with Barry J that, on the whole of the evidence which was given, it would not be right to find that the defendants as employers were guilty of any failure of the duty which they owed to their workmen."*

[34] During cross examination the Claimant said that prior to entering the training program, he was physically active. He did not say however that he was engaged in any kind of exercise programme. He said he didn't recall receiving any document or information prior to joining the program about the type of training he would be undertaking. However, he did recall the instructors indicating that training would consist of marching, exercising and drilling. He agreed with defence counsel that he understood that the training would be similar to that undertaken by police officers.

[35] The claimant agreed that a correctional officers' duty required him to restrain prisoners but curiously disagreed that one would be required to attain a high level of physical fitness in order to carry out the duties of a Correctional Officer and that the training he would have to undergo would have to equip him to be able to meet the demands of the job. He also disagreed that sprinting was a part of the physical training he was required to do. He however accepted that he was aware that he would have to undergo intense physical training and that by continuing the course after being at New Castle, he would continue to undergo that intense physical training. I accept the defendant's position that a breach of duty does not necessarily flow from the administering of strenuous exercises and that the claimant must show that the exercise was administered without due regard for his safety.

[36] I reject the claimant's evidence that the job of being a Correctional Officer did not necessarily require him to attain a high level of fitness. It would have been apparent to the claimant that rigorous training was required. The claimant himself agreed that a number of trainees dropped out of the programme because they were unable to manage. In any event, the question is not whether any, or the combination of exercises the claimant was required to do was outside the scope of rigorous training which the claimant expected or ought to have expected to undergo.

[37] The defendant's attorney submitted that by voluntarily participating in the training, the claimant assumed the attendant risks associated with the training. Again, I accept this proposition but in a limited way. The risks assumed must necessarily be the reasonable risks incidental to such training. This court accepts that a trainee would have been aware that there would be some risk of sustaining injury whilst undergoing training. That does not mean that a trainer is permitted to conduct exercise sessions in a way that exposed trainees to unreasonable risk.

[38] The claimant's Attorney at law also submitted that in certain instances, a court may be able to draw adverse inferences on account of the absence or silence of a witness. She cited the case of **Gerald Reid v United Estates Limited** Claim No. 2011 HCV06065 where B. Morrison J referred to the case of **Wisniewski v Central Manchester Health Authority** [1992] Lloyd's Rep 223. In that case, Brooke LJ referenced the case **of Mc Queen v Great Western Railway Company** (1875) LR 10 QB 569, where Cockburn CJ observed that:

> *"If a prima facie case is made out, capable of being displaced, and if the party against whom it is established might be calling particular witnesses and producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced it would not displace the prima facie case. But that always presupposes that a prima facie case has been established; and unless we can see our way clearly to the conclusion that a prima facie case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing."*

[39] I do not believe that the scenario in the instant case is one of those instances where it can be said that the absence of the evidence from a relevant potential witness for the defence Corporal Osborne McKenzie, can give rise to an inference as a matter of fact, that the absence of the evidence is to be accounted for by the likelihood that even if his evidence were adduced, it would not displace the prima facie case. It is inaccurate to say as the claimant's Attorney at law has asserted, that no explanation was given to the court as to why Cpl McKenzie was not called as a witness. In paragraph 6 of his witness statement, Mr Smith stated that Cpl McKenzie resigned from the Department of Correctional Services and it is his understanding that Cpl McKenzie has migrated. As indicated in **McQueen,** it is merely an inference of **fact** that **may** be drawn from the absence of evidence rebutting the particular assertion. This means that a court must assess the credibility and reliability of the evidence put forward before it can treat such evidence as fact.

[40] I do not agree with the claimant's Attorneys-at-Law's contention that "the unchallenged evidence of the claimant as to how he received his injuries satisfies the requirement of a breach of the duty of care owed by the defendant to the claimant." It is true that the defendant has led no direct evidence challenging the claimant's evidence that he was being punished, as Mr. Mervin Smith indicated that he was not a witness to the alleged event of which the claimant complained and Ms. Douglas also agreed in cross-examination that she could not say whether or not the claimant was being punished. Nevertheless, the court has to look at the claimant's evidence regarding the alleged punishment.

[41] He asserted in paragraph 1 of his witness statement that on the 14th of January 2004, he sustained serious personal injury as a result of certain strenuous and difficult exercises administered as a means of punishment by the 1st defendant who was the instructor, while he was at training school to become a Correctional Officer. He said the strenuous exercise and punishment continued for a few days without explanation as to why he was being punished. He also stated that on the 15th of January 2004, he explained to the instructor in charge of the drilling that he

was feeling pain, but was told by him that it was normal to experience muscle pain from the exercise and it would soon wear off.

[42] He said the punishment he underwent was not administered during the usual physical training activity. It was the claimant's evidence that Cpl McKenzie chose him randomly and that this was always done in the view of other persons. When asked if he mentioned "these other occasions" when he first filed this claim, the claimant responded that he did not. When it was suggested to him that the first time he mentioned these other occasions was in his witness statement, he answered in the affirmative. When he was asked by defence counsel if he complained to the instructor about the pain he was feeling, he said the instructor knew. Because of the absence of Cpl McKenzie from these proceedings and the absence of evidence from any other source regarding this alleged punishment, all the court was presented with is the claimant's account.

[43] The claimant agreed that the trainees were given an opportunity to report grievances they had. When it was suggested to him by defence counsel that he did not report to the medical orderly, the doctor at the St. Ann's Bay Hospital or the principal that he was being fatigued by Cpl McKenzie, he said he did. He further denied the suggestion that the first time he mentioned the incident was two years after he left the college.

[44] He admitted that he never stated in his witness statement that he reported the incident to the principal but stated that there was no particular reason why he didn't. He also agreed that what he reported to Mr. Smith was that he was feeling pain but said that he reported to Ms. Douglas that he was being fatigued and that that was the reason he was feeling pain. Ms Douglas denied that any such report was made to her. According to the claimant, when he was giving his history to the doctor at the Ann's Bay Hospital, he told the doctor that he was being punished. No such information appears in the doctor's report. The absence of that information from the doctor's report is however not definitive of the matter. He also

denied that he told the doctor that he was feeling lower back pain after several marches. The doctor's report indicated that the claimant told him so.

[45] I accept the evidence of Mr. Mervin Smith regarding the nature of the training generally. What he was not able to say however, is what transpired on the occasions when the claimant says that he was being punished and in particular, on the 14th of January 2004.He therefore as he indicated, could not say whether or not the claimant was being punished or whether he was undergoing training administered to trainees who fell below the required level of fitness.

[46] I also accept his evidence that the claimant was a trainee who did not meet certain fitness standards. Mr Smith recalled that during the 10 weeks that the trainees spent at New Castle, a physical trainer had concerns about the claimant's fitness level. He explained that generally when a trainee is below the fitness level required, he is placed on a special programme and will be made to undergo additional training when the other trainees are on down time or are involved in other activities. He stated further that such trainee is made aware that he/she is on the programme. He strongly disagreed with the suggestion that the claimant was not made aware that he was on a special programme. He said that the claimant was receiving additional training as was the usual practice in relation to a trainee who did not meet the required fitness standard. He gave evidence that such trainees would perform the same activities as in normal training but the activities are done outside of normal time.

[47] The defendant's Attorney at Law made the observation that the claimant has not called any of his fellow trainees to corroborate his claim that he was being punished. I should point out that there is no requirement that the claimant should provide independent evidence in support of his assertion that he was being punished by the first defendant. The claimant has not specifically stated why he formed the view that he was being punished. He stated in cross examination that the alleged punishment started on the evening of the 14th of January and continued for about three days. He stated that whenever Cpl McKenzie saw him,

he continued the punishment. When asked what time of day the punishment took place, his response was "randomly" He explained that Cpl McKenzie would just call him whenever he saw him. The claimant was asked whether it was his evidence that Cpl McKenzie just randomly chose him. In the context, that question was very clearly understood by me to mean whether he was randomly selected for punishment. The claimant's response was yes.

[48] The claimant accepted that during his time at the institution, he observed other trainees being fatigued. He was asked by this court to indicate reasons why trainees would be fatigued. He stated that lateness for parade, observation of a foreign body on a trainee's uniform, improper attire, shoes not being cleaned to the required standard, and failure to comply with directive, for example, running instead of walking or vice versa would be among the reasons. This evidence was not disputed by any of the defence witnesses. In all the circumstances, I conclude that to be fatigued is in essence some form of disciplinary measure that could be regarded as punishment but within the context of paramilitary training and which to my mind would not necessarily be an unacceptable or unreasonable course of conduct.

[49] I fully accept that the claimant was being made to carry out exercises over and above what the normal trainee was required to do on the 14th of January 2004. While recognizing that this could have been for the purposes of advancing the claimant so that he would meet the requisite standard of fitness, I am more inclined to accept that the claimant was being fatigued or punished by Cpl McKenzie. Even though I accept Mr Smith's evidence that the exercises described by the claimant were intrinsically normal exercises, he did not say whether the combination of exercises as explained by the claimant would have been normal to administer to someone who was known to be below the required fitness level. The claimant chose the term random to describe his selection for punishment. Based on the context in which this evidence was given, I do not think that he really meant that he was randomly selected, but rather that he was distinctively selected at, and in whatever place he was seen by Cpl McKenzie.

[50] Even if I were to be wrong in forming the view that the claimant was being fatigued, whether he was being fatigued or was being made to undergo additional training in order to allow him to advance so as to be at an acceptable level of fitness, would not make any practical difference to my mind. The critical question is whether the exercises were being administered without due regard for the safety of the claimant. There is of course the question of causation, which will be addressed at an appropriate juncture.

[51] I now turn to a consideration of the question of whether the fatigue was being administered without due regard for the claimant's safety. I do not agree, as was submitted in essence on behalf of the claimant, that once the claimant shows that his injuries were sustained in the course of being punished, that there is a breach of the duty of care owed to him.

[52] There is the further evidence of the claimant that the department has a policy whereby if a trainee, during a training exercise has difficulty keeping up with the training, and feels as if he cannot at that moment continue the training exercise, and he/she so indicates, the individual would be told to continue, comply then complain. It was accepted by Mr Smith that such policy exists. The claimant was asked if at any point he indicated to his instructor that he could not continue with the exercise and he stated that he did, and that the instructor's response was that he should continue comply then complain. I accept this evidence.

[53] When Mr. Smith was asked to explain the saying "comply then complain", he said it meant that if a trainee was given a legitimate instruction, he must first comply with the instructions and if he has any objections he can report the matter to the highest level. When asked if it would be fair to say that he would not know if a trainee is injured until the end of training, he said it would not be fair to say that. He further stated that during training, trainees are allowed to complain to the medical officer, the Corporal, Staff Officer, the Overseer, the Assistant Superintendent and the principal. According to Mr. Smith, that is the chain of

command. If a trainee is unable to carry out a routine effectively, he is able to complain to any of those persons at any time during training.

[54] According to Mr. Smith, if the claimant or any other trainee was being fatigued and could not manage the physical activities, there was nothing preventing them from stopping. He further stated that the principal met with the trainees every Monday morning at which time grievances and complaints were made to him, despite the chain of command earlier mentioned. He stated that he is not aware of the claimant making any such complaint. According to him, the complaint would have been brought to the attention of the staff during the principal's staff meeting. He explained that if a complaint is made that affects all the trainees then it is shared with the staff, but if the complaint only concerned one individual, then the principal would have a discussion with the individual against whom the complaint was made. He went on to say that he was made aware of the complaint made by the claimant against Cpl McKenzie two years after the incident.

[55] This bit of evidence in no way suggests to me that the complaint was only made for the first time by the claimant two years after the incident. Further, based on Mr. Smith's evidence, given the nature of the complaint that this claimant would have made, that is, one affecting him personally, and not a matter affecting all the trainees or a substantial number of them, there is the distinct likelihood that the complaint could have been made shortly after the incident and Mr. Smith not be aware of it, since such complaint would not necessarily have been brought to the attention of staff.

[56] Further and importantly in the circumstances of this case, based on the evidence in relation to the policy, it is apparent that even if the trainee complained during the course of the exercise, then he or she would be expected to continue with the exercise and the opportunity to complain would only come after the exercise was completed. It would therefore be reasonable to infer that the trainee would only stop in the course of a routine if he or she was physically unable to carry out the routine, or if he or she took the decision to be insubordinate and then discontinue

the routine. I accept based on the claimant's evidence, that when he complained that he was feeling pain, he felt obligated to continue the exercise programme.

[57] In paragraph 6 of his particulars of claim, the claimant detailed the exercises that he was required to do. The exercises included 10-15 press-ups, holding 2 heavy 303 rifles and sprinting the distance of a walk-way estimated to be 150-250 ft. in length before the 1st defendant was finished counting to 15. He was also ordered to get into the half-squat position while holding both rifles above his head with his arms extended in the air. He was required to do no less than 20 of those exercises. The claimant was also required to stand on his toes whilst doing those half-squats. He was required to do them without break. He was also required to rock from side to side whilst doing the half-squats on his toes whilst still holding the 303 rifles. He was further required to extend his hands to the front still holding the rifle whilst doing the half-squats. He was also required to hug the rifles whilst rolling on the ground.

[58] As it relates to the particulars of negligence, the claimant alleged the following against the defendants:

(i) Failing to ascertain the medical and physical condition of the claimant before instructing the claimant to carry out the said exercise.

(ii) Ordering or instructing the claimant to carry out very difficult exercises which the claimant could not do.

(iii) Ordering or instructing the claimant to carry out very difficult exercises which were at all material times likely to cause harm and injury to the claimant.

(iv) Injuring the claimant

(v) Failing to heed the complaints of the claimant that the claimant was in severe pain during the administration of the exercise.

(vi) Punishing the claimant with the said exercise without due regard to the safety and health of the claimant.

(vii) Failing to take reasonable care in all the circumstances to administer the said exercise so that the claimant did not sustain injury.

[59] It was Mr. Smith's evidence that when the claimant was a trainee at the College he Mr Smith was responsible for the drills, weapons and physical activities of the training, and he taught parade procedure. He described the training course as being paramilitary and involving risk assessment, skill at arms training and intense physical training. He stated that the physical training entails basic foot drills, push ups, jogging and rifle drills. Contrary to Mr. Thompson's evidence, during cross examination, Mr. Smith explained that exercises such as 10-15 press-ups, sprinting with a rifle, half squats with a rifle over the head with arms extended, and running around the parade square were normal training techniques. He didn't say whether such activities as described by the claimant as constituting the punishment were within the normal parameters of activities that trainees who fell behind the acceptable level of fitness required, would be made to do.

[60] With regard to the assertion that there was a failure to assess the claimant's physical condition before administering the exercises, it was Mr Smith's evidence that persons normally undergo a medical examination through the correctional services prior to embarking on training and that one must pass that examination before being admitted for training. The claimant himself according to Dr Barnes' second report, told Dr Barnes that he had been passed fit for training by the medical doctor at the institution (presumably Correctional Services). There is however no evidence as to whether there was an assessment at intervals throughout the training.

[61] The assertion that the first defendant failed to heed the complaint of the claimant that the claimant was in severe pain is not totally unfounded. I accept the claimant's evidence that his initial complaint was ignored and that it was only after

the injury and apparently subsequent to being taken to the hospital that he was allowed to stop after complaining that he could not manage an activity.

[62] The claimant stated that prior to going on the parade on the 15th of January, he had complained to the instructor that he was feeling pain and was told that it was normal muscle pain that would wear off soon. This would not have been an unreasonable position to adopt at that particular point in time, since it apparently had not yet become evident that the claimant was injured. The claimant stated that he was dismissed from the parade for looking down. It would appear that when it was obvious that the claimant could not participate in the activities, he was allowed to sit out. This according to the evidence would have occurred during what would then have been a normal parade when he evidently was not being fatigued.

[63] His evidence is also that on several occasions he complained to Staff [Officer] Smith who I understand to be the same witness in this matter that he was in pain but on each occasion he was told that it was normal muscle pain which will eventually go away. He did not state specifically when these complaints were made. It is noteworthy that Mr Smith said that it was around the last 3 weeks of training at the College that the Claimant complained to him about a pain in the region of his hip and he referred him to the medical orderly. He said that the claimant was thereafter taken to the St. Ann's Bay Hospital and treated by a doctor. However, according to Mr. Smith, as the training continued the claimant started complaining more frequently and was taken to the hospital on each occasion.

[64] The claimant was taken to the hospital on the 16th. He had prior to that been seen by the medical orderly who could only administer first aid treatment and who would not have been in a position to determine whether the claimant's pain was in the nature of the type of pain that would be normal after strenuous exercise.

[65] The precise circumstances under which the claimant came to receive the injuries are important. The objective to be achieved in the training of a correctional Officer

was to ensure that he was reasonably fit to carry out the responsibilities entrusted to an individual serving in such position. The job entailed among other responsibilities, being able to physically restrain prisoners. It does not mean however that a trainee who had demonstrated lack of capability to keep up with his fellow trainees should be put under extra pressure whereby he is given what on the face of it was a difficult and stressful routine.

[66] It is inconceivable that one could consider as prudent and reasonable, the administering of what was evidently a very difficult combination of exercises, some of which were apparently strenuous, to the claimant who Mr Smith stated was a trainee who was known to be at a less advanced level than his fellow trainees. Further, the fact of being distinctively selected by Cpl McKenzie at whatever time and place he chose suggests to me that what was being administered was not fatigue in a way that was reasonable or called for. To that extent, combined with my acceptance of the evidence that the claimant had indicated that he could not continue the exercise but was told to comply continue then complain, I find that the exercises were administered without due regard for the claimant's safety and more likely than not, at the particular point in time on the 14th of January have been administered as punishment.

WAS THE CLAIMANT'S INJURY AS A RESULT OF THE DEFENDANTS' BREACH OF DUTY

[67] The defendants' Attorney at Law raised the question of whether, even if it has been established that there was a breach of duty on the part of the defendant, the claimant has established that this breach of duty resulted in his injury. Counsel opined that there is no nexus between the claimant's injuries and the defendant's conduct. She contends that the aetiology of the claimant's injuries has not been explained and so there is no causal link between the training and the injury.

[68] Ms. Douglas' evidence is that on the 13th of January 2004, the claimant complained of pain in his right thigh. According to her, the claimant told her that he fell whilst participating in physical training that morning and as a result, she gave him pain tablets. She also stated that he had told her that the pain was normal. Based on her evidence, she kept a log of each medical complaint. It is not stated whether she referred to that record in order to have stated that the complaint was made on the 13th. I reject her evidence that the claimant told her that he had fallen. I am also mindful of the doctor's report which stated that the claimant stated that after several marches he began to feel pain. In light of the fact that I have seen and heard the claimant and determine that on a balance of probabilities he is speaking the truth about how he sustained his injuries, I prefer that evidence over the information in the doctor's report as to what the claimant allegedly told him about the origins of the pain.

[69] Counsel for the defendants has asked the court to have regard to the fact that while the claimant is relying on the evidence of medical doctors who purport to act as experts, there has been no application on the part of the claimant to declare them as experts pursuant to the provisions of rule 32.6 of the Civil Procedure Rules (CPR). Therefore, she has asked the court to consider that these reports are not expert reports and that the court should be mindful of that fact when deciding what weight to attach to the reports. She has also asked the court to disregard the report of Mr. Richard Henry, an overseas practitioner and in relation to whom there is nothing setting out his area and level of expertise and so the report clearly does not conform to the requirements of the CPR and further, it is well known that chiropractors are not medical doctors. I am mindful of those considerations and I will undertake a discussion of the matter when dealing with the issue of damages.

[70] The evidence of the claimant which I accept is that during the course of carrying out the exercises that he was made to do, he sustained injuries. The claimant reportedly told the doctor who examined him at the St Ann's Bay Hospital that he developed the pain during marches. It is significant that when the claimant was

examined by Doctor Barnes on the 28th of January 2004, he reportedly told the doctor that he had been experiencing the pain for a period of two weeks which coincided with the date on which he stated that the punishment took place. I am mindful that the timing would also roughly coincide with the date on which Ms Douglas stated that the claimant had told her that he had fallen, but I have already indicated my rejection of her evidence in that regard.

[71] Doctor Barnes' report also indicates that the claimant had no significant past medical history. I infer from that statement that the claimant had no history of pain and in particular, in the areas of his back and leg he was then complaining about. The claimant's evidence also supports the position that the pain came on suddenly and during the course of an exercise routine, rather than being as a result of a disease process that gradually became painful. It is true that the MRI revealed that there was 'multi-leveled' degenerative disc disease. However, this finding was made several years after the injury and it is known that degenerative disease process may eventually develop from an injury occasioned by trauma. In fact, it is my understanding that this phenomenon is what Dr Barnes explained in his 2013 report when he observed that the fact that the MRI was done some four years after the claimant's initial pain and said further that "it is likely that initially the disc bulges and that 4 years after injury, the MRI scan show degenerative changes rather than acute disc bulging and herniation. Even if I am wrong in coming to the conclusion that that was what the doctor meant, or even if I were to be wrong with regard to the statement in its entirety, and there was in fact an existing degenerative disease process, that process would have had to be significantly aggravated to have caused the sudden onset of pain that the claimant described.

[72] The diagnosis was that of mechanical lower back pain most likely secondary to a prolapsed inter-vertebral disc. The report from Dr White shows the same diagnosis of prolapsed inter-vertebral disc with nerve root irritation. Given that the claimant had no prior history of such injuries, an inference can be made that his

injuries were sustained on the occasion of the 14th off January when he was being fatigued.

WAS THE INJURY TO THE CLAIMANT FORESEEABLE

[73] It is my considered view that the type of injury sustained by the claimant was foreseeable. It could be said that it was foreseeable that the difficult exercises were likely to cause harm and or injury to the claimant. I believe that there is evidence from which a finding that the exercises were administered without due regard for his safety can be made. In the circumstances, because of the fact that it was known that the claimant was someone who had not attained a desirable level of fitness and needed training over and above that which was administered to the average trainee, then the administering of a combination of strenuous exercises and exercises which entailed a high degree of difficulty such as the claimant described would to my mind amount to a breach of the duty of care.

DAMAGES

[74] Having established that there was negligence on the part of the 1st defendant and by extension on the part of the 2nd defendant, the court must consider the claimant's entitlement to damages.

SPECIAL DAMAGES

[75] In his witness statement, the claimant stated that he had to charter taxis to see the doctors which amassed a total transportation expense of $694,100.00. He also stated that he had to get household help which amounted to $153,400.00.

[76] Certain items of special damages were not disputed. The sums evidenced by exhibits numbered 2 through19 are among those items. The claimant will recover those amounts. That sum amounts to $68,350.00.

[77] There was no objection to the sums evidenced by exhibit 2 which amounts to a total of $250,600 for household help and gardening services as well as the sum of $55000 which is included in those receipts indicating payment for building a one bed room structure. There is absolutely nothing in the evidence that could remotely explain a claim for that sum. The claimant is very clearly not entitled to recover that sum. This court cannot say as the defendant's Attorney at Law has submitted, that the claim in relation to the amounts receipted for household help and gardening services is excessive. The claimant is entitled to recover 195,600 on account of the claim for household help and gardening services. The claimant's Attorney unabashedly submitted that the claimant is entitled to recover the sum of $694,100.00 in special damages The fact that the receipts evidencing purported payments for transportation expenses were objected to and never made their way into evidence was apparently ignored. The claimant is entitled to $263,950.00 in the way of special damages.

GENERAL DAMAGES

CLAIMANT'S EVIDENCE RE PAIN AND SUFFERING AND LOSS OF AMENITIES

[78] The claimant stated that he received the injury in respect of which he has made this claim, on the evening of the 14th of January 2004. He stated that the following day during the parade, he was feeling pain but that he continued on the parade for the day and the pain became more severe and he experienced numbness in his right thigh. He stated that he was dismissed from the parade and he sat on a chair while the parade continued. The following day, the 16th of January, he could not participate in the rehearsal. He said that he was taken to the St. Ann's Bay Hospital where he was treated with pain killers, given an injection and three days'

sick leave. The claimant stated that after returning to the parade the following Monday on January 19, 2004 and feeling even more severe pain than before, his instructor dismissed him from the parade once again. Within the same week a doctor Leverage examined him and gave him pain killers, but he did not get any relief from the pain.

[79] He returned to the St. Ann's Bay hospital on the 23rd of January 2004 because of the persistent pain. He was given an injection and a referral to see a bone specialist on the 28th of January 2004. The specialist recommended that he did a MRI. Further tests were done and he was given 14 days' sick leave. He recalled that during his sick leave he had to sit with a rifle in his hand during his graduation exercise because he was unable to march.

[80] He gave evidence that the day after his sick leave ended, he reported to Horizon Adult Remand Centre where he was assigned. While he was there he would still feel pain occasionally, and he would see either the Medical Orderly at the institution or one of the prison doctors, Dr Pinto. He stated that he was absent from work on several days because of the persistent pain.

[81] He spoke of instances when he had difficulties driving and had to rely on his co-workers to drive him to work. He stated that on the recommendation of the Deputy Commissioner of Corrections, he was eventually reassigned to another location where he could sit and perform his duties and that after his involvement in a car accident in December 2006, he requested, and was transferred to a location closer to his home.

[82] The claimant further stated that upon doing an MRI, he was diagnosed with having a slip disc and advised to undergo surgery, but he could not afford to do so. According to the claimant, in 2008 after he gave one Superintendent Shepherd a medical report from his doctor, he was instructed to stay home until further notice. He explained that he has since written to both the Superintendent and the Commissioner of Corrections on several occasions to enquire about when he should resume duties, but has not received any response. He further stated

that he has not been placed on interdiction or redundancy and since April 2008, he has not received a salary from the department.

[83] He said that during his sick leave he received treatment from a chiropractor overseas and the pain somewhat subsided. He said that after being at home for almost four years he had to seek alternate employment.

[84] It was suggested that the Claimant may require additional visits to Dr. Henry's office approximately 30 times per year for the next 4 years. The estimated cost for his future medical expenses was said to be $23,000.00 (UD$) annually.

CLAIMANT'S SUBMISSIONS ON DAMAGES FOR PAIN AND SUFFERING AND LOSS OF AMENITIES

[85] The claimant commended to the court for its consideration five cases, in determining the claimant's award for pain and suffering and loss of amenities. Each will be summarized. In the case of **Marie Jackson v Glenroy Charlton and George Harriot** Suit No. C.L. 1999 J 113, the claimant who was a customer service representative endured severe pain to the neck and lower back as well as pain to the left rib cage and lower elbow. The pain to the lower back was especially to the left sacro-iliac joint. Tests showed no bone injuries. She was diagnosed with whiplash and also with lumbar disc prolapse at L4/5. The accident happened on the 26th of November 1998. By October of 1999, when the claimant was examined, she had normal symmetrical reflexes with unrestricted straight leg raising and a good range of motion in her lumbar spine without painful inhibition. Her permanent partial disability was assessed at 8% of the whole person. The claimant was awarded the sum of $1,800,000.00 in damages for pain and suffering and loss of amenities. The CPI at the time of the award was 57.39. In October of 2019, that award updated to $8,336,644.01.

[86] In **Schaasa Grant v Salva Dalwood and Jamaica Urban Transit Company Ltd (JUTC), the** claimant was a JUTC conductor when she sustained her injuries on the 3rd of February 2005. In August 2005, she was assessed as having objective

right sided lumbar radiculopathy secondary to prolapsed inter-vertebral disc, severe mechanical lower back pain and mechanical lower back pain. The final assessment was that she suffered from chronic cervicothoraic pain with subjective cervical radiculopathy and chronic mechanical lower back pain with subjective lumbar radiculopathy. Her permanent disability was assessed at 10%. She was awarded $3,000,000.00 for pain and suffering on the 16th of June 2008. The CPI was then 97.59. In October 2019, that sum updated to $8,170,919.15.

[87] In **Brenda Gordon v Juici Beef Ltd.** Claim No. HCV 2007/04212. the claimant slipped on wet floor, fell and injured her back. Her injury was indicated as double level lumbar disc prolapse and compression of the lumbar nerve roots with numbness to both feet. Her injury occurred in 2001. She had surgery on her back in 2005 and was declared to be pain free after the surgery. A different doctor opined that she would continue to have mechanical back pain. Her permanent partial disability was assessed at 13% of the whole person. She was awarded $4,600,000.00 for pain and suffering and loss of amenities on the 14th of April 2010. The CPI was 158.7. In October 2019 that figure updated to $7,704,347.83.

[88] **Stephanie Burnett v Metropolitan Management Transport Holdings Ltd. and Jamaica Urban Transit Company Ltd.** In this case, the claimant was a 69 years old vendor who was injured when she became trapped in the door of a moving bus with her upper body inside and her lower body on the outside and was dragged for some distance in that position. Her injuries included tenderness of abdomen and back, tenderness in lower regions especially in iliac and lumbar area, probable soft tissue injuries and subcapsular haematoma of spleen. She was admitted in the hospital from April 2nd to 24th 2003. In 2005, at the time of a subsequent examination, she complained of constant lower back pain which was aggravated by standing, turning in bed and prolonged sitting. She also complained of cramping in the whole of her left lower limb as well as to her right knee. She required the use of a walker. After an MRI was done, the doctor determined that severe trauma to the lumbo-sacral spine produced oedema around the nerve roots with resultant irritation and inflammation caused by

surrounding narrow foramena. The MRI showed bony degenerative changes in L2 to L4 with disc herniations at L2- L3, L3-L4 and L4-L5. The lumbar roots were compressed. She required surgical compression. She was assessed as having a whole person disability of 13%. She was awarded $3,000,000.00 for pain and suffering. The award was made on the 11th of December 2006. The CPI was then 100. In October of 2019 that sum updated to $7,974,000.00.

[89] **Marcia McIntosh v Elite Wholesale and Distributors Ltd and Devon Nelson** Claim No. HCV 1973/2005. In February 2007, she was found to be suffering from chronic cervical whiplash, chronic cervical spondylosis, chronic cervical myelopathy, right biceps tendonitis, right periscapular muscular spasms and right rotator cuff tendinopathy. There was degeneration of the disc at C5/C6 as well as osteophyte formation, mild disc space narrowing at C5/C7 levels and calcification of the anterior longitudinal ligament at C6/C7. Her PPD was assessed at 15% of the whole person.

DEFENDANT'S SUBMISSIONS ON DAMAGES FOR PAIN AND SUFFERING AND LOSS OF AMENITIES

[90] The defendant relied on three authorities, which it asserted can assist the court in deciding on a reasonable sum for pain and suffering and loss of amenities. The summary of these cases will for the most part be adopted from the defendant's submissions.

[91] In **Elaine Graham v Daniel James and Ezra Nembhard**, the claimant was injured in a motor vehicle accident. Her injuries included loss of consciousness for 90 minutes, injuries to back, left lower limb and neck. She was diagnosed with whiplash injuries to cervical and lumbar spine with mild lumbar disc prolapse. The claimant suffered complete disability for 8 weeks and partial disability for 3 months. She was awarded $600,000.00 for pain and suffering which using the CPI for October 2019, 265.8, updates to $2,842,780.75. the injuries in this case are similar to the injuries of the claimant in this case in regard to the injuries to the back. Ms. Graham however suffered the additional injury of loss of consciousness

which is serious; as such the defendants submit that a discount in the award of 30% would be justified.

[92] In **Cordella Watson v Keith James & Errol Ragbeen**, the claimant sustained injury to her back causing severe lower back pain. She was diagnosed with chronic mechanical back pain and assessed as having 3% whole person impairment. The award for general damages was $200,000.00 which using the current CPI updates to $1,161,180.00.

[93] In the case of **Barbara Brady v Barlig Investment Company Ltd.,** the claimant slipped and landed on her back on a slippery floor in the supermarket. She suffered loss of consciousness, severe lower back pains and marked tenderness along the lumbo-sacral spine as well as both sacro-iliac joints. X-rays revealed severe degenerative changes but no obvious fractures. Her PPD was assessed as 9% of lumbar spine and 5% of the whole person. The award in the case was $300,000.00, which updates to$1,633,413.90.

ANALYSIS AND FINDINGS ON DAMAGES FOR PAIN AND SUFFERING AND LOSS OF AMENITIES

[94] I very strongly disagree with the contention that the claimant sustained far more serious injuries than the claimants in the cited authorities. I am completely at a loss as to the "plethora of injuries" that counsel says that this claimant sustained. Dr Barnes' conclusion in the 2013 report was that the claimant was assessed as having mechanical back pain secondary to muscle strain and intervertebral disc prolapsed at multi levels. Dr White came to a similar conclusion adding that there was nerve root irritation. Mr Henry's final diagnosis was lumbar radiculitis (724.4), thoracalgia (724.1), Lumbosacral Sprain (846.0), and Cervicalgia (723.1).

[95] I observe at this juncture that Mr Henry is not a medical doctor. It is however noteworthy that his findings are not dissimilar to those of the two medical doctors who examined the claimant but there are the additional findings of pain to the

neck (Cervicalgia) and pain to the thoracic region (thoracalgia) as well as complaints of headache.

[96] There is no evidence regarding Mr Henry's training and competence to carry out the examination and make the diagnosis he made. That is a matter that would affect the weight to be assigned to the contents of his report. I accept the contents of his report to the extent that his observations and findings coincide with those of the two medical doctors who examined the claimant.

[97] There is nothing in the evidence of the claimant that would cause this court to say that any headache or pain to the neck complained about at the time of his examination by Mr. Henry was attributable to the exercises that he was made to carry out. Both medical doctors were silent on whether the claimant experienced cervical muscle weakness; however it was Mr Henry's finding that the claimant had general weakness in the cervical muscles. He also made a finding of edema [and] (sic) swelling to both sides of the claimant's thoracic and lumbar spine. Such finding was absent from the reports of both medical doctors but it is duly noted that swelling may not necessarily be a constant or ongoing feature of an injury.

[98] I should point out an area of inconsistency relating to the claimant's condition when examined. In Dr White's report, it was stated that the claimant was reviewed on the 15th February, 1st March, 29th March and 30th August 2007 and that his symptoms had gradually improved despite incomplete compliance with his physical therapy regime. Yet in his report which indicates that the claimant was examined on the 17th of June 2009, Mr Henry stated that the claimant's symptoms of mid back pain and lower back pain which had come on immediately (understood by me in the absence of explanation to mean immediately after the injury was sustained), were progressively getting worse. An indication as to such symptoms would necessarily have come from the claimant himself.

[99] There is no indication that the two medical doctors were appointed as experts by the court but I am mindful of their qualifications and of the fact that the reports were ultimately entered into evidence by agreement between the parties.

[100] The claimant had filed notices of intention to tender into evidence hearsay documents referencing all the reports in question. Objection was initially taken to Dr Barnes' 2013 report. That objection was eventually withdrawn at the trial. In the case of **Cherry Dixon- Hall v Jamaica Grande Limited,** SCCA No. 26/2007, Harrison JA (as he then was) cited the case of **Harrison v Liverpool Corporation** [1943] 2 All ER where Lord Greene MR explained at page 450 of the judgment that:

> *"... the phrase "agreed medical report" means and means only, a report where the facts stated are agreed as true medical facts, or other facts as the case may be, and the medical opinions expressed are accepted as correct."*

[101] Harrison JA also alluded to the dictum of Omerod LJ in **Eachus v Leonard** [1963] Solicitor's JournalVol.106 Part 2, page 918 where he stated that:

> *"The effect of agreeing medical evidence was to avoid the necessity of calling doctors at the trial and of discussing medical matters which might be controversial. The reports were evidence of the plaintiff's symptoms and condition at the time they were made, but prognosis in a report either had to be specially agreed as an agreed fact or else it was no more than an intelligent estimate by experienced doctors of a plaintiff's future condition. The prognosis in this case fell into the latter category, and in such circumstances, a judge had to form a conclusion on the basis of all available evidence, including that of the injured plaintiff...."*

[102] Based on the foregoing learning, it appears to me that the court cannot without more decide to attach less weight to the evidence of the doctors on account of the fact that they were not appointed as experts by the court. The defence at no point took issue with the qualifications and or competence of either medical doctor and there is no basis on which the professionalism of either of them could remotely be called into question. There is no basis on which this court should disregard or treat lightly, the findings and conclusions of the doctors. The evidence of the doctors must be assessed alongside that of the person or persons who are able to speak to the condition of the claimant.

[103] It is recognized that when documents are tendered into evidence pursuant to Section 31E of the Evidence Act, it does not render what is often referred to as hearsay upon hearsay admissible. However, in medical reports, it is not unusual for a doctor to refer to what is told to him or her by the patient. It seems to me that that is permissible on the basis that it is often partly by virtue of that information that the doctor is able to make a diagnosis and in this case as is the situation in many instances, that patient is the witness whom the defendant's Attorney at Law had the opportunity to cross examine.

[104] In the cases cited by counsel for the defendants, it is readily apparent that there is no evidence of prolonged suffering on the part of the claimants. There is evidence that the claimant in the instant case experienced pain over an extended period, from 2004 up to at least 2013 May when he was last examined by Dr Barnes, albeit, there had been some improvement in his condition in terms of the absence of numbness in his lower limbs by 2013. The injury to the claimant in this case to my mind most nearly equates to the injury to the claimant in **Brenda Gordon v Juici Beef Ltd.**

[105] It is noteworthy however that whereas the claimant in the last mentioned case was required to have and did have surgery, there was no indication that the claimant in the present claim did corrective surgery although it was recommended. There was notwithstanding, improvement in his condition. Further, whereas Ms Gordon experienced numbness to both legs, this claimant experienced pain and numbness to one leg. It is also noteworthy that the present claimant's permanent partial disability was assessed by Dr. Barnes at 20%, whereas Mr Henry assessed it at 13%, a similar assessment to that made in relation to the claimant in **Brenda Gordon v Juici Beef** who had a similar injury.

[106] Without any explanation of the terminology "maximum medical improvement" from Dr Barnes, the ordinary meaning to be attached to that phrase is that such status is reached when an injured individual reaches a point where his or her condition cannot be improved any further or when a treatment plateau in that

individual's healing process is reached. It may mean that the individual has fully recovered from the injury or that his/her medical condition has stabilized to the point that no major medical change should be expected in the injured person's condition, so that at that juncture, no further healing or improvement is expected despite continuing medical treatment or participation in rehabilitative programmes.

[107] From the medical evidence, it may be concluded that the claimant will continue to have lingering effects such as not being able to stand for prolonged periods and limited flexion of his spine. Though on the face of it these effects may not appear serious, they have the potential to be life altering limitations. Based on Dr Barnes findings, the claimant's injuries have affected him over an extended period and had not completely resolved up to the time of his last examination.

[108] I am of the view that in all the circumstances, a fair award for pain and suffering and loss amenities would be $8m.

FUTURE MEDICAL EXPENSES

[109] The claimant has also sought to recover damages under the heading Future medical expenses. The basis for this request is Mr Henry's opinion that the claimant would require additional visits to his office approximately 30 times per year for the next 4 years and that the estimated cost for his future medical expenses would be $23,000.00 (USD$) annually. Mr Henry's projection as to what the claimant's long term treatment needs might be was made in 2009. I would be hesitant to make an award in 2020 based on that prognosis. Moreover, I had already indicated some reservations on account of the absence of information regarding Mr Henry's qualification, training and experience. His diagnosis and findings compared to those of the two medical doctors, admittedly suggest that he is knowledgeable. A further consideration is that the claimant does not reside in the United States and would hardly be expected to travel every month over a period of four years to access treatment that more likely than not, would be

available in this country. The claimant has put forward no other evidence in this regard therefore there is no proper basis on which an award for future medical care can be made.

HANDICAP ON THE LABOUR MARKET

[110] The claimant has asked the court to make an award under this heading. The defendant has made no submissions in this regard. It is now settled law that a Claimant whose capacity in the labour market has been diminished as a consequence of injuries received, is entitled to be compensated for loss of that earning capacity. That capacity is regarded as an intangible asset. At paragraph 51 of the judgment in **Wayne Ann Holdings Limited (T/A Super Plus Food Stores and Sandra Morgan)** [2011] JMCA Civ 44, Harris JA said:

> *"A claim for loss of the ability to earn by being handicapped on the labour market may be sustained whether or not a Claimant is employed at the time of trial – see **Moeliker v A. Reyrolle & Co. Limited** [1977] 1 WLR 132 and **Cook v Consolidated Fisheries Ltd.** [1977] ICR 635. It is well recognised that a partial disability may not affect a Claimant's income immediately but may do so at some time in the future. Accordingly, a disability places him at a disadvantage in the labour market as opposed to a fit person. Where appropriate, the court should make an award for this head of damage to compensate him for the physical handicap produced by the injury."*

[111] The question also arises as to the method of calculation that should be utilized in calculating the compensation if the court takes the view that an award should be made under this head. In **Campbell and others v Whylie 50 WIR 326,** Forte JA in addressing the question of the appropriate method to be utilized in calculating loss of earning capacity, quoted Carey JA in **Kiskimo Ltd. v Salmon** (1991) unreported. Carey JA had the following to say:

> *"The method adopted by a judge will depend more often than not, on the adequacy of the evidence before him and in some instances on the nature of the injuries which might well create many imponderables as to the plaintiff's future. But I think, if we are to ensure some uniformity in awards under this head, the arithmetic approach should be preferred as it*

allows this court to maintain some equilibrium in the figure taken as the multiplier by trial judges."

[112] In **Campbell and others v Whylie** the court having determined that the Claimant was entitled to damages for loss of earning capacity on account of the fact that "she would be unable in the future to perform the functions of her chosen career to the extent and for the number of years she would have been able, were it not for the injuries she received in [the] accident," determined that her damages would be calculated on the multiplier/multiplicand basis.

[113] The circumstances of that case were that the Claimant was a 26 years old Medical Intern who received serious injuries including fractures of the left and right superior and inferior pubic rami, fracture of the post iliac crest with partial disruption of the right sacroiliac joint as well as fracture of the mid shaft of the right foot and a fracture dislocation of the lamina of the second cervical vertebrae. Her injuries resulted in significant pain and suffering which continued some two years later when she was last examined by a doctor. It was determined that she suffered a permanent disability as to 25% of the whole person. She was employed at the time of the accident and earned a fixed income. The trial judge in that case used as the multiplicand the net earnings of the Claimant at the time of that trial. That position was not challenged on appeal. However, the multiplier of 12 was determined to be too high and a multiplier of 7 was applied.

[114] In the case of **Icilda Osbourne v George Barned, Metropolitan Management Transport Holdings Ltd. and Owen Clarke** claim no. 2005 HCV 294, the Claimant was a 60 year old Practical Nurse whose career was cut short on account of injuries she suffered. The 1st Defendant was found liable. Sykes J. (as he then was) observed at paragraph 18 of his judgment that:

> *"The cases suggest that the choice of method is influenced by the information available to the court, that is to say, where the Claimant has been working for some time before the accident so that the court has some reliable data concerning her income, her remaining work life and so on, then the multiplier/multiplicand method may be used."*

Sykes J cited **Campbell v Whyte** (supra). Then at paragraph 21, he said:

> *"Unfortunately, the case law both here in the West Indies and England does not provide much help in determining which method is used.* ***Campbell's*** *case comes closest to suggesting a criterion, namely, the type of information about the Claimant that is available to the court. It seems to me that the matter has to be resolved by taking in to account that the aim of assessment is adequate compensation and not over compensation. What this means is that it is permissible for the judge to use the two methods and then look at it in the context of the global award on general damages is appropriate for the harm suffered."*

The learned judge went on to make an award on a lump sum basis but distinct from and in addition to damages for pain and suffering.

[115] The Claimant in **Icilda Osbourne** had lost her job because she was no longer able to carry out her duties as a Practical Nurse. She had sought work elsewhere at a nursing home but problems with her back made her unable to carry out the task. It was determined that her educational status did not allow her to do work far removed from manual work and she was clearly unable to do jobs which required much bending, lifting or sitting. The learned judge in **Icilda Osbourne** having made the observation that the aim of assessment of damages is adequate compensation but never over-compensation, took into account the fact that he was also making an award for loss of future earnings. It seems to me that that was clearly his reason for making an award on a lump sum basis and in a moderate sum.

[116] I am of the view that the claimant in the instant case is entitled to an award for handicap on the labour market. His evidence suggests that he had difficulties carrying out his functions at work due to his injury. In fact, he outlined a history of being placed on sick leave and being absent from work due to pain. His evidence that he was sent home in 2008 without being placed on leave, interdicted or dismissed is unrefuted. It is reasonable to presume that the reason at least in part, was due to his frequent absence from work and being unable to carry out his duties. Several years have elapsed and from his evidence in cross examination, his status with Correctional Services has not been finally determined. That fact should not however operate to his disadvantage. He has in fact been thrown on

the labour market. That course of action came about after the claimant had repeatedly gone on sick leave.

[117] I am fully alert to the fact that the claimant did indicate that he has had to find alternative employment and that he has not said whether it is employment from which he earns less than he had earned from the Correctional Services. The claimant stated that he had worked as a cook in the past but there is no evidence of his level of education or training. The inference from his choice of career is that he does not have tertiary level education. I accept that the claimant is precluded from doing certain tasks and consequently certain kinds of jobs requiring prolonged walking or standing or manual lifting of heavy objects at certain angles. This finding is supported by Dr Barnes' examination carried out in May 2013.It is also noteworthy that the findings of Dr Barnes, as to the claimant's limitations were made some nine years after the claimant received his injuries. That finding so many years after the injury is indicative of the long term nature of the injury. Further, the fact that he has suffered permanent partial impairment in my view supports a claim for damages under this head. It is therefore not unreasonable to say on a balance of probabilities that the claimant would have a disadvantage on the labour market, although this court is really not in a position to say that the claimant is presently suffering a financial loss.

[118] In this instance the claimant has given no evidence as to his earnings from correctional Services. Further, his evidence that he has had to seek alternative employment means that he able to work although there is no evidence as to the type of work that he now does. Considering these factors, the court is inclined to make an award on a conventional basis.

[119] In a number of instances, the court has made an award of $500,000.00 as representing a conventional sum. Counsel for the claimant directed the court's attention to the case of **Carline Daley v Management Control Systems**, claim no. 2008 HCV 00291 where an award of $1,200,000.00 was made and to the case of **Robert Minott v South East Regional Authority** [2017] JMSC Civ. 218

where the sum of $2,000,000.00 was awarded. An awarded of $3,000,000.00 was suggested as being appropriate. Without much to guide me as to the basis for determining the amount of a conventional award, I have determined that the sum of 1,200,000.00 is reasonable in the circumstances.

CONCLUSION

[120] Having regard to my findings, it has been established that there was negligence on the part of the first defendant. That negligence is attributable to the second defendant who is liable to the claimant in damages. The claimant is entitled to recover special damages that have been proven, general damages for his pain and suffering and for his handicap on the labour market. He is also entitled to interest where it is applicable and to his costs.

ORDERS

[121] Based on the above discussion, I make the following orders:

1. The 2nd defendant is liable for the injury sustained by the claimant.

2. Damages are awarded as follows:

    a) Special damages in the sum of $263,950.00 at the rate of 3% per annum from the 14th day of January 2004 to the date of judgment.

    b) General damages are awarded as follows:

        i. Pain and suffering and loss of amenities $8 m with interest at the rate of 3% per annum from the 18th of July 2008 to the date of judgment.

        ii. Handicap on the labour market $1.4 million with no interest.