[2019] JMSC Civ 218

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV00216

BETWEEN	**AVIS WILLIAMS**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

IN OPEN COURT

Ms. Ishia Robinson, Ms. Christine May Hudson instructed by K. Churchill Neita & Co. for the Claimant

Mr. Andre Moulton instructed by the Director of State Proceedings for the Defendant.

HEARD: 2nd and 3rd of July 2019 and 4th of October 2019.

Personal Injury - Negligence - Breach of Duty of Care - Employer's Duty to Employee - Occupiers' Liability Act - Common duty to take care - Assessment of Damages.

THOMAS, J

BACKGROUND

[1] The Claimant, Ms. Avis Williams, has brought this claim against the Defendant, the Attorney General of Jamaica seeking damages for negligence and/or breach of duty under the Occupiers' Liability Act. Ms. Williams alleges that on or about the

4th day of April 2007, while taking items to the records unit, she tripped over a desk drawer located in the records unit in the Ministry of Foreign Affairs and Foreign Trade and fell. As a result, she sustained injuries, suffered loss and incurred expenses. She contends that the Defendant failed to consider the duty they had to take reasonable care to provide and maintain a safe and proper place of work, and to take all reasonable precautions for her safety while she was engaged in her employment, not to be exposed to a risk of injury or damage which they knew or ought to have known.

[2] The Defendant, The Attorney General of Jamaica, contends that any injury suffered by the Claimant was due to her inability to reasonably care for her own safety. The Defendant countered by indicating that it was not aware of the desk drawer she allegedly tripped and fell over and that she must identify the desk in question. Further that there was no report of a faulty desk, either by the Claimant or any person who works in the Records Unit.

[3] Further, the Defendant contends that the Claimant:

(a) Failed to keep any or any proper lookout;

(b) Allowed and/or permitted the desk and/or desk drawer to be open and/or remain open

(c) Allowing and/or permitting the desk drawer to protrude into the pathway of the Claimant thereby exposing herself to risk of injury;

(d) Failing to have or any due regard for her own safety;

(e) Failing to take any or any adequate precautions for her safety, such precautions to include not walking into the path of the open desk drawer and/or closing the said desk drawer;

(f) Failing to report the presence of open desk drawer

The Claim

[4] The Claimant pleads that as a result of the fall she has sustained the following injuries:

(a) Pain and decreased power with plantar-flexion and dorsi-flexion in the lower back;

(b) Severe pain on deep palpitation over the right L4/5 facet area with radiation down to her right leg;

(c) Straight leg raising could not be performed due to pain;

(d) Nerve root irritation at L4/5 causing radicular pain;

(e) Mild posterior lumbar disc bulging at L4/5; L5/S1 and cervical spondylosis C3 through C5 with C/3/C4 sublaxation;

(f) Combined mysofascial pain and neuropathic pain;

(g) Cervical spondolysis

[5] The effects of her injuries on her activities of daily living are stated as follows:

(a) Inability to perform normal household chores functions such as washing and sweeping without help

(b) Inability to wear closed toe shoes for more than a few minutes

(c) Inability to engage in physical activities such as doing exercise

(d) Inability to sleep on the right side, back or stomach

(e) Constant feelings of nausea, drowsiness, dry-mouth, constipation, insomnia, stomach pains, itching due to plethora of medication

(f) Increased frequency and severity of headaches

(g) Inability to sit, stand or walk for long periods

(h) Feelings of depression due to uncertainty over future

***Issues as it relate to* Liability**

[6] This is a claim in negligence and breach of the Occupiers Liability Act. Consequently, the issues which lie to be determined are subject to the common-law duty of negligence and the statutory duties imposed by the Occupiers Liability Act.

[7] Therefore, the issues which arise in this case as it relates to the Claim in Negligence are;

(i) Whether the Defendant owed a duty of care to the Claimant

(ii) If it is established that the Defendant owes a duty of care to the Claimant; whether the Defendant has breached that duty of care to the Claimant.

(iii) Whether the Claimant has sustained injuries as a result of the Defendant's breach of its Duty of Care to the Claimant

[8] As it relates to the Claim for Breach of the Occupiers Liability Act: Whether the Defendant through its agent, the Ministry of Foreign Affairs and Foreign Trade has failed to take reasonable care in all the circumstances to ensure that the Claimant would be reasonably safe in performing her duties as an employee in the premises occupied by and under the control of the agent of the Defendant.

The *Law*

[9] In the case of ***Caparo Industries plc v Dickman*** [1990] 1 All ER 568, Lord Bridge of Harwich, after reviewing the relevant authorities expounded that the law as it relates to negligence 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 characterised 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." (See page 573-574)

[10] Section 3 of the ***Occupiers' Liability Act*** states that:

"3 - (1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there".

The* Evidence *of The Claimant

[11] The Claimant testifies that:

(1) She was employed to the government of Jamaica and assigned duties as a Records Clerk at Ministry of Foreign Affairs and Foreign Trade at 21 Dominica Drive, Kingston 5 in the parish of Saint Andrew. In carrying out of her duties she is required to go to other departments including the Registry and Protocol. On the 4th day of April 2007, she was required to dispatch the contents of a diplomatic bag containing parcels for the supervisor to sign in the Registry which is on the same floor as hers. There were about eight to ten industrial desks in the Registry at the time. These industrial desks are not single desk, they are attached together and cannot be moved easily. In order to reach to the supervisor's desk from the Registry door she had to pass about eight of these desks and it is about 9 feet from the door to the supervisor's desk.

(2) She walked through the door of the Registry and made a left turn. She was now facing the back of a chair in front of one of the desks. She walked pass the chair and then turned right at the end of the other desk and took about two steps when she tripped over something near the ground hitting her hands and knees. While on the floor she realized that she fell over the bottom drawer of one of the desk.

(3) On the same day the accident occurred, Mrs. Sharon Burrell-Green along with other persons working in the Registry converged on the scene of the incident and she told her what had happed. The nature of the accident to include date, the particular desk and things like that was made known to Ms. Sharon Burrell-Green who was present on the scene of the incident when the incident occurred. She was not aware of any time period in which the accident was to be reported. Her supervisor at the time was Ms Burrell Green. Faulty equipment is reported through Ms. Burrell Green, her Supervisor at the time, or anyone in office management. Mrs. Burrell-Green caused a letter to be sent to Medical Associates and Medical Centre for her to be treated at that facility.

(4) She made a formal written report of the accident about one month later. She also provided Ms. Julia King, the Director of Human Resources, with the names of the persons who were present at the time of the accident to identify the desk. In the year 2009, Miss King contacted her to ask if the desk/drawer was defective. She recalls giving the names of Dayton Thomas, Anthony Williams, Demisha Brooks, Miss Burrell Green, and Mr. Samuel Harris to identify the desk. She gave her the names when she contacted her. She was never contacted further by Ms. King or anyone else from the Ministry in relation to identifying the desk. Dayton Thomas worked at the registry at the time. She denies that she contributed to this accident

in any way. She did not work in the Registry and as such she could not have reported the desk as being defective because she was not aware that it was. Further, if she had seen that the desk drawer was open she would have closed it herself or walked around it. She knew the desk was defective because she saw that the drawer was taped shut the day she returned to work (four) 4 days after the incident.

(5) On cross examination she stated that she carried the contents of the bag in one hand. The books and documents did not obstruct her view when she was walking. She was careful with how she moved around. She was still looking where she was going. She did not see anything obstructing her path way.

The evidence of the Defence

[12] The only witness called by the defence is Ms. Julia King, Senior Director in the Human Resource Management and Development Department in the Ministry of Foreign Affairs and Foreign Trade. In examination in chief she admitted that Ms. Williams was employed to the Government of Jamaica assigned to the Ministry of Foreign Affairs and Foreign Trade. She further testifies that she is aware of an incident that took place involving the Claimant, Miss Avis Williams on April 4, 2007.

[13] She states that:

Miss Williams filed an accident report, claiming a desk drawer opened on its own and she tripped over it and she fell injuring herself. Miss Williams never identified the desk with the drawer that opened on its own, nor were any reports ever made to the Administrative Unit or to the (Human Resource Management Division) HRMD of the Ministry about a defective desk drawer located in the Records unit. There is also no record of any repair work conducted on any desk drawer in the Records Unit.

[14] However, on cross examination she indicates that:

She became aware of the incident when it was reported to her by the staff from the registry section. This report was just as it happened, within an hour after the incident. Subsequently, she received a written report. At the time that Ms. Williams sustained the injuries, she knew Ms. Burrell Green was her supervisor. There was no staff order or regulation that said how accident in the ministry was to be reported. There was no specific procedure to say a report should be made within five (5) days. Now, the regulation is in place which is to have the accident reported immediately. The culture would be to report it directly to the supervisor. She was the head of the department so it would move from the supervisor to her who is in the HR department. There are witness statements on file. When asked if she is saying that on the day no investigation was carried out as it relates to Ms. Williams; she said she spoke to the supervisor and she was told that there was **no** broken desk

[15] However, she further testifies that:

Mr. Dayton Thomas had told her that he had written something about the accident. It was his desk. He may have submitted it to the head of administration in the ministry. Up to the date of the incident, she was not aware of a formal system of reporting faulty furniture. She is aware of a furniture or inventory system. There is a general chart for inventory log. She does not know of an inventory record of faulty equipment in the Ministry of Foreign Affairs and Foreign Trade. It could be that there was no record. A memo was sent to the head of administration in 2013 reporting on the faulty desk. She did not cause an investigation to be done after speaking to Dayton Thomas. There is a head of that department that deals with equipment. There is no report of a formal investigation. On the 4th of April 2007, she agrees that there was a defective industrial desk in the Registry.

Whether the Defendant owes a duty of care to the Claimant

[16] There is no denial on the evidence that the Claimant was employed to the Defendant. There is equally no denial on the evidence that the alleged incident occurred while in the course of conducting her duties on the building under the control of the agent of the Defendant.

[17] The case of ***Wheat v E Lacon & Co Ltd*** [1966] AC 552, concerned an accident at a public house owned by the respondents. The manager and his wife, Mr. and Mrs. Richardson, occupied the first floor which they used both as their private dwelling and housing private guest for a profit. The appellant and her husband were paying guests of the Richardsons. One evening, as it was getting dark, Mr. Wheat fell down a staircase of the premises and died. Someone had removed the light bulb at the top of the stairs

[18] One of the issues that the court had to determine was whether the respondents owed a duty of care to Mr. Wheat. Lord Denning found that the respondents had sufficient occupational control to owe a duty of care to see that the structure was reasonably safe, including the handrail, and that the system of lighting was efficient.

[19] In the instant case, it has been established on the evidence of both parties that there is a relationship of proximity between the Claimant and the Ministry, the Agent of the Defendant. No issue has been raised as to whether the Ministry had sufficient occupational control over the building that housed its registry department. Therefore, I take the position that this is accepted by the parties. In light of the foregoing, I find that it has been established that the Defendant owed both a common law duty of care and the common duty of care under the ***Occupiers Liability Act*** to the Claimant to take such care in all the circumstances, to ensure that the premises was reasonably safe for the Claimant to perform her duties.

Did the Defendant Breach Its Duty of Care / Failed to take reasonable steps to perform its common duty of care

Submissions

[20] Counsel for the Claimant made the following submissions:

(1) The Defendant has not mounted a challenge to the Claimant's account as to how the accident happened. They have not challenged the findings of the Claimant's investigation and they have not denied that the desk/drawer was taped shut subsequent to the accident. The witness for the Defendant Ms. Julia Ann King agrees with the suggestion that there was a defective desk/drawer in the Registry at the material time. This admission runs counter to paragraph (six) 6 of the Defence where it is alleged there were no reports of faulty desk in the record unit.

(2) It is Ms. Julia King's evidence that no investigation was carried out by her, at her behest and none presented to her in relation to the accident, even though she was aware of the accident within hours of its occurrence. The Defendant was content to say that there was no faulty desk even though no investigation was carried out, nor have they submitted the Furniture Inventory of the Ministry as set out in their Defence to prove the contrary. The Court should not overlook Ms. Julia King's evidence that after receiving a report from Dayton Thomas who was present at the time of the accident no action was taken by the Defendant to carry out investigations into the accident. This begs the question as to whether or not there was any need for an investigation, particularly in light of the admission made by Julia King that there was a faulty desk in the registry.

In relation to contributory negligence her submissions are as follows:

[21] The Defendant had failed to establish contributory negligence. They have not presented a shred of evidence to support their allegations. The Claimant was never challenged nor was any suggestion made to her that she failed to have due regard for her safety as averred in the Defence.

[22] In cross examination, the Claimant maintained her evidence in chief that she took a turn and then two steps before she tripped and fell. The Court is being asked to find that the Claimant did not have a straight line of sight far in the distance to have allowed her to observe the desk drawer in sufficient time so as to allow her to avoid same.

Submissions for the Defendant

[23] Counsel for the Defendant made the following submissions:

(a) Ms. Julia King in her witness statement indicated that no report was made of a defective drawer. However, on cross-examination it noted that she said that she thought the drawer was defective. This is admittedly, a contradiction in her evidence

(b) The Claimant, indicated that she conducted her own investigation four days after the accident took place and saw that the desk drawer that she tripped over was taped shut. However, despite being able to recall this image with such clarity (twelve)12 years after the accident, she somehow failed to include this information in the written accident report she made of March 14, 2007, a mere six weeks after the incident took place.

(c) The issues the court will have to resolve are:

i) Whether the desk drawer was defective?

ii) If the desk drawer was defective, did it amount to negligence on the part of the agents and/or servants of the Crown or did it amount to a breach of the Occupiers Liability Act

(d) In order to establish negligence at common law, it must be shown that the agents/servants of the Crown did not discharge their duty of reasonable care. This is a question of fact for the Court to decide and the Court having heard the evidence of the Claimant and Defendant will have to decide whether enough evidence has been adduced to satisfy that the desk was defective and that at the time the accident occurred that defective desk was a danger that was known or ought to have been known to the agents and/or servants of the Crown.

[24] He further submits that:

No report was made prior to the accident taking place and that the only time the defectiveness of the drawer became an issue was after the accident took place. No evidence was adduced as to whether any other accidents occurred prior to or after the accident took place. (He relies on ***Joy Hew v Sandals Ocho Rios Limited [2013***] JMSC Civ 42 (unreported) delivered on April 5, 2013). Should the Court find that the servants and/or agents of the Crown were negligent, the court should find that the Claimant contributed to her injuries by not keeping a proper lookout. The Claimant in cross examination admitted that her pathway was unobstructed when she took the first step and yet she was unable to see the drawer when it appeared in her path. The Court should apportion liability 70:30 to the Claimant.

Discussion

[25] I examine the evidence bearing in mind that the Claimant bears the burden of proof on a balance of probability. On a careful review of the evidence I find that there has been no serious challenge to the evidence of the Claimant on this issue regarding the liability of the Defendant. The Claimant's evidence is that in the

process of dispatching files and other documents in the Records Unit in the Ministry she fell over a defective desk drawer and sustained injuries.

[26] Despite the fact that she did not give the details of the defect in her evidence in chief, the details are contained in her written report to Ms. King. This report was admitted into evidence on cross examination by counsel for the Defendant. In her report dated the 14th of May, 2007 Ms. Williams indicates that she "tripped over a drawer that apparently kept opening on its own but was never reported". The Defendant has not suggested that this drawer does not exist. Nor is there any suggestion that the Claimant did not fall over this drawer. Neither has the Defendant adduced evidence to the effect that the desk was not defective despite this averment being contained in their defence.

[27] The evidence of their only witness, Ms. King in this regard, is that she is aware of the incident. Miss Williams filed an accident report, claiming a desk drawer opened on its own and she tripped over it and she fell injuring herself. She further states that Miss Williams never identified the desk, nor were any reports ever made to the Administrative Unit or to the HRMD of the Ministry about a defective desk drawer located in the Records Unit. She went on to say there is no record of any repair work conducted on any desk drawer in the Records Unit. She later admitted on cross examination that she agrees that that there was a defective industrial desk in the registry.

[28] Despite the fact that the Defendant bears no burden of proof so far they have provided no alternative version to that of the Claimant as to how the incident occurred. There is no challenge to her evidence that there was a desk with a faulty desk drawer in the Registry of Ministry of Foreign Affairs and Foreign Trade. When Counsel for the Claimant suggests to Ms. King that on the 2nd of April, 2007, it was the defective desk in the registry that Avis Williams tripped over, her response was that she was not there.

[29] The evidence is that this desk was assigned to Mr. Thomas. The Defendant's witness states that there is a report on file from Mr. Thomas yet there is no evidence from Mr. Thomas. In this regard the Defendant was in a position to supply an explanation or an alternative version of the incident if there was one but they chose not to do so. In the case of ***Ward v Tesco Stores Ltd. [***1976] 1 All ER 219, while shopping in the Defendant's supermarket, the plaintiff slipped on some yoghurt, which had been spilt on the floor, and was injured. The plaintiff brought an action for negligence against the Defendant. There was evidence before the court that:

(a) Spillages occurred about 10 times per week and that the staff of the supermarket had been instructed that, if they saw any spillages on the floor, they were to stay where the spillage was and call someone to clean it up.

(b) The floor of the supermarket was given a "general clean-up" daily, it was polished twice per week and it was brushed five or six times per day. However, the Defendant gave no evidence as to the last time the store floor had been cleaned; whether it was a few moments before the accident, or an hour.

[30] Having been found liable by the trial court the Defendant appealed. It was argued on appeal that it had been for the plaintiff to prove that the spillage had been on the floor for an unduly long time and that there had been opportunities for the management to clean it up. At page 222, of the judgment Lawton LJ stated that:

> *"In this case the floor of this supermarket was under the management of the defendants and their servants. The accident was such as in the ordinary course of things does not happen if floors are kept clean and spillages are dealt with as soon as they occur. If an accident does happen because the floors are covered with spillage, then in my judgment some explanation should be forthcoming from the*

defendants to show that the accident did not arise from any want of care on their part; and in the absence of any explanation the judge may give judgment for the plaintiff. Such burden of proof as there is on defendants in such circumstances is evidential, not probative. The trial judge thought that prima facie this accident would not have happened had the defendants taken reasonable care. In my judgment, he was justified in taking that view because the probabilities were that the spillage had been on the floor long enough for it to have been cleaned up by a member of the staff."

[31] As I have already indicated, in the instant case, I find that there is no alternative version to the incident than the one provided by the Claimant to the court and to Ms. King. However, this does not mean that the Claimant is absolved of the responsibility of the overall burden of proof. Nonetheless,the Claimant has not been discredited on the version she presented to the court. Therefore, I accept the Claimant as a witness of truth. I find that her injuries were sustained by a defective desk drawer in the Ministry that opened on its own.

[32] The Claimant also bears the responsibility of demonstrating that the occurrence of the accident is prima facie evidence of a lack of care on the part of the Defendant in failing to provide or implement a system designed to protect the Claimant from risk of accident or injury. (See ***Hall v Holker Estate Co Ltd***, [2008] EWCA Civ 1422).

[33] Therefore, the other issue for me to address with regards to liability is foreseeability. (See, ***2 Overseas Tankship (U.K.) Ltd v. Morts Dock Engineering Co. Ltd (The Wagon Mound***) [1961] W.L.R. 126). ***Caparo Industries plc v Dickman (supra); Wheat v E Lacon & Co Ltd (supra)*** In the case of Wheat ***v E Lacon & Co Ltd*** **(supra)** the court dealt with the question. "What did the common duty of care demand of each of these occupiers towards their visitors?" The answer it gave is that each was under a duty to take such care as "*in all the circumstances of the case it is reasonable to see that the visitor will*

be reasonably safe." The court went on to say that *"the circumstances demanded that on the ground floor they should by their agents/servants take care not only of the structure of the building but also the furniture. the floors and lighting and so forth at all hours of the day or night when the premises is open."*

[34] Similarly, in the instant case I find that the Defendant, as the employer of the Claimant and the Ministry, the agent of the Defendant as occupier of the building and the department of the state to which the Claimant was assigned, bore the responsibility to ensure that the furniture and equipment and the environment in which the Claimant and other employees are required to function are properly maintained and kept reasonably safe. I find that this duty could only have been discharged if regular checks were maintained to ascertain the state or the condition of the furniture, equipment and environment. In the case of ***Wheat v E. Lacon & Co. Ltd*** (supra) the Defendants were found not be liable as the court found that the staircase was safe and the removal of the light was the act of a stranger. However in the instant case the circumstances are not the same.

[35] Relying on the authority of ***Ward v Tesco Stores Ltd.***, I find that the Defendant has provided no information of evidential value, in relation to the examination or maintenance of this desk or any other desk in the registry. That is, whether it was checked a week or weeks, or even months before the accident and whether the desk was found to be in good condition without any defect. As pointed out by Counsel for the Claimant, in the pleadings the Defendant indicated that they were relying on the Furniture Inventory Report of The Ministry of Foreign Affairs and Foreign Trade. However, no such report has been furnished by the Defendant.

[36] As part of its responsibility to maintain the furniture, and in the event that the Defendant through their agent was unable to conduct regular checks of the furniture and equipment they should have had in place a proper system of reporting of defects by employees. The Defence witness Ms. King admitted that at the time of the incident there was none. In find that instead of admitting that there is a responsibility on its part to check and maintain the furniture and equipment, the

Defendant is seeking to escape liability by relying on the absence of a previous report. I find this quite unacceptable in the absence of an implementation of a formal mechanism for the reporting and recording of defects.

[37] In fact, it should also have been in the contemplation of the Defendant that, without placing direct responsibility on employees for reporting a defect, once a situation does not affect them directly they will not feel obligated to make any report on the situation. Additionally, even where the situation affects them directly some will function with apathy. There is no evidence that the defective desk was assigned to the Claimant for there to be any presumption that she was or ought to have been aware of the defect. Furthermore, there is no evidence that her station of work, was located in the section where the defective desk was located.

[38] I find that the case of **Joy Hew v Sandals Ocho Rios Limited [2013] JMSC Civ 42 (unreported) delivered on April 5, 2013,** on which counsel for the Defendant relies is distinguishable from the instant case. In that case the Claimant sustained injuries when she fell while walking across the Defendant's driveway. At paragraph 33, of that Judgment, the following were included in the court's findings of fact:

> *(a) The tiles were level but interlocked and therefore had grooves.*
>
> *(b) The point at which the driveway tiles met the hotel lobby tiles had a slight slope and at points a very small edge.*
>
> *(c) The two (2) types of tiles were differently coloured and were different in size and shape.*
>
> *(d) The condition of the titles as described. was not dangerous nor was it hidden".*

[39] In light of those findings of fact the court was of the view, that the Defendant was not in breach of any duty neither at common Law nor under the Occupiers Liability Act. The Defendant has a duty to take reasonable care. That the Defendant's duty

was discharged by the creation of a reasonably safe driveway and lobby area. (See paragraph 34 of the Judgment)

[40] At paragraph 39 of the same judgment the Judge stated that:

> "*In the instant matter, the court has been afforded no expert evidence or opinion as to the adequacy for the purpose of, what visually appears to be ordinary and normal driveway tiles which at some point meet ordinary and normal lobby tiles. The difference in the level or the "edge" is almost imperceptible. The claimant's fall whether due to a "buck", a "hitch", or a "twist" as she walked across it, was an accident. It is not due to a failure to take care or to guard against or warn of dangers by the defendant*"

[41] It is clear in the above mentioned authority that the learned Judge found that the condition of the tiles was not dangerous and that the Claimant's fall was not occasioned by any danger in the drive way which was found to be a normal ordinary drive way.

[42] In the instant case it cannot be said that the desk was not defective or the defect was not dangerous to the Claimant. The Defendant's witness has admitted that the desk was defective and that it was the defective desk that caused the injuries to the Claimant. In the case of ***Marie Anatra v. Ciboney Hotel Ltd. et al*** C.L.A – 196/1997 unreported judgment dated 31st January 2001 a guest slipped and fell while using a staircase. The occupier was held not to have failed in its duty of care as there was "the unchallenged evidence for the Defendants that the staircase on which the Claimant was alleged to have fallen was built by reputable builders" and "received daily maintenance" (See the judgment of Reckord J) also cited in the Judgment of Justice Batts in of ***Joy Hew v Sandals Ocho Rios Limited, supra***.)

[43] There is no evidence of the Defendant maintaining the desk which was under their control. The test of foreseeability is based on the ordinary reasonable person. The evidence of the Defendant's witness Ms. King points to the general attitude

towards maintenance or lack thereof and in my opinion speaks to a lack of care. She indicates that there is an administrative unit which is responsible for maintenance and that there were no reports ever made to the Administrative Unit about the defective desk. However on cross examination, she admits that the desk was defective and that a report was made to her within an hour of the incident. Yet to date, she is unable to say whether any investigation was conducted by the Ministry as to the cause of the defect. In the circumstances of this case I find that the Claimant's injury was foreseeable by the agent of the Defendant. That is, it was reasonably foreseeable by the ordinary reasonable employer, that if furniture are not properly maintained they can become defective and cause physical injury to the user

Contributory Negligence

[44] Counsel for Defendant submits that the Claimant in cross examination admitted that her pathway was unobstructed when she took the first step and yet she was unable to see the drawer when it appeared in her path. On that premise he suggest that the Court should apportion liability 70:30 to the Claimant.

[45] However, I find that the Defendant has failed to establish contributory negligence on the part of the Claimant. The Claimant testifies that the books and documents did not obstruct her view when she was walking. It was suggested to her that she was careful with how she moved around with important documents. She agreed that she was, and that she watched where she was going. It is the Defendant's burden to prove contributory negligence (See the case of Jones ***v Livox Quarries Limited*** [1952] 2 QB 608). The Defendant then has to adduce evidence to show that:

(i) the drawer was already open when the Claimant started walking across the registry or;

(ii) that she knew that the drawer would have or usually opens on its own so as to establish that she failed to take steps to avoid injury to

herself. To my mind none of these evidential requirements has been met. Without this being satisfied, I cannot see how the court can find that the Claimant contributed to her injuries.

[46] Therefore, I find that the Defendant is completely liable for the injuries suffered by the Claimant as a result of her falling over a defective desk in the Registry Department of The Ministry of Foreign Affairs and Foreign Trade.

Damages

[47] Special Damages is agreed at. ***$ 136,168.75***

Pain and Suffering and Loss of Amenities

THE MEDICAL EVIDENCE

[48] The reports of three medical doctors with the consent of the parties were admitted into evidence. These are the reports of Doctor Neviile Ballin; Doctor Shane Dockery and Doctor Melton Douglas. I will now proceed to examine the evidence as contained in each of these reports.

Doctor Neville Ballin

[49] The medical evidence of Dr. Ballin according to his medical reports is as follows:

(i) Ms. Williams was referred to Dr. Ballin by her General Practitioner for management of chronic lower back pain associated with pain radiating down the lateral aspect of her right leg to her 5th toe. She fell injuring her right shoulder and lower back. Her family physician gave her treatment which was an injection in the shoulder to relieve pain, after which she had no further problems there. She however had intermittent pain in her lower back mainly on the right side which did not respond to treatment.

(ii) The pain progressed and became constant from about December 2007. She continued to be treated by her family physician and had neurosurgical and orthopaedic consultations in order to help in to relief of her pain.

(iii) Her medication at the time of her first visit included pregabalin, amitryptalline and paladin F, from which she got short term relief.

(iv) Miss Williams presented with a pain score of 8/10 the least in the past 24 hours being 7/10. The pain was described as being constant and she received approximately 30% pain relief from her medications. Her general activity was affected 10/10, mood 10/10, walking ability 8/10, sleep 8/10, relationship with other 8/10 and her activities of daily living 8/10. The scores were obtained using the brief pain inventory and the visual analogue scale with 0/10 being the best and 10/10 being the worse.

(v) She was able to perform her personal hygienic functions without help, but was unable to perform household duties, eg. washing, sweeping without help. Her ability to engage in sexual activity was also decreased due to pain.

(vi) Systematic enquiry revealed that she had migraine since 1992; the frequency and severity of which has increased since the accident. She also had a history of asthma triggered by seafood and chest infection. Nil else of significance was noted.

(vii) Examination of her systems was normal except for findings in her musculoskeletal system. She had pain in her lower back and there was decreased power with plantar-plantar-flexion and dorsiflexion. There was a normal sensation and muscle bulk. There was severe pain on deep palpation over the right L4/5 facet area with radiation

down her right leg. Straight leg raising was not performed due to pain.

(viii) She had normal finding in her upper limb. An initial assessment L4/5 nerve root irritation causing radicular pain was made. Treatment was also administered.

(ix) The prognosis is that Ms. Williams continues to have pain which is described as burning and shocking, associated with “pins and needles” and numbness, in her lower back and in her neck and shoulders. Despite numerous interventions and various medications, these have only provided short term relief of her pain. There has been some improvement in her ability to function, but she is unable to do any heavy activity as this will trigger her pain. The MRI finding of cervical spondylosis could explain the myofascial pain syndrome experienced in her shoulders and upper back. She will require ongoing treatment with physiotherapy for this.

(x) The lower back pain has to date proved to be unresponsive and requires ongoing therapy. This will be focused on the medical management; as invasive nerve blocks have not proven to provide lasting improvement.

Doctor Shane Dockery

[50] The medical report of the Dr. Shane Dockery is as follows: -

(i) The Medical Report of Shane Dockery dated October 20, 2017 notes that the Claimant presented on the afternoon of the 4th of April, 2007 with a presenting complaint of moderate to severely painful right hand since that pm.

(ii) She had no history of prior right wrist pain. Examination revealed a female patient with stable vitals, mild to moderate tenderness of the

lateral right wrist with mildly decreased and mild-moderately painful range of motion and small abrasions, as well as mild swelling and tenderness of the right leg and left knee were made and appropriate management started inclusive of analgesics.

(iii) She represented on the 5th of April, 2007 with moderate to severe lower back pain and tenderness of the 4th and 5th lumbar spinous processes with moderately painful decreased range of motion of the lumbro-sacral spine on examination. There was no prior history of back pain.

(iv) She presented again on the 20th of April, 8th,9th,10th, 13th and 22nd of May, 26th of June, 2nd,5th,7th and 17th of July, 4th August, 1st, 10th and 19th of September in the year 2007, as well as the 17th and 22nd of February and 7th April, in the year 2008 for further pain management.

(v) She was referred to an orthopaedic surgeon Dr. Paul Wright on the 7th of July 2007 and 22nd February 2008 for further assessment and management.

(vi) Her pain remained persistent and she was ultimately referred to the University Hospital of the West Indies on the 7th of April 2008 for continuation of care.

(vii) In order to delineate her prognosis and the extent of her functional disability, it is believed that it would be necessary that an expert report be garnered from the specialist body to whom she was referred.

Doctor Melton Douglas

[51] The medical evidence of Dr. Melton Douglas dated the 4th of November, 2015 is as follows: -

i. Ms. Williams was examined at the Kingston Public Hospital, Orthopaedic Clinic on March 30, 2015.

ii. Pain in the right side of her neck which radiates to the right side of her head triggering migraine headaches. The neck pain she elaborates is aggravated after sitting for an hour and this radiates to the right side of her head with symptoms typical to the migraine she experienced prior to the incident.

iii. Intermittent numbness of the right little finger, especially in cold weather or when she places pressure on the right elbow.

iv. Lower back pain, which radiates to right buttock, right leg and to the right little toe. This is associated with a burning sensation and numbness in the legs. Furthermore, her lower back pain is aggravated by sitting and standing for long periods exceeding thirty minutes. This pain also prohibits her from lying flat on her back and on her right side intermittently, there is shocking sensation going down the extent of her right leg and her right shoulder.

v. Her past medical history reveals that she has no chronic medical condition; there is no history of high blood pressure or diabetes. She expressed that she had no history of lower back pain prior to the accident, save and except the rare occasions of transient back pain when she twisted her back. There were episodes of migraine headaches prior to the accident but since the accident, this has been aggravated by her neck pain.

vi. Diagnosis is Mechanical neck pain from cervical spondylosis and mild posterior disc bulges of the L4/5 and L5/S1

vii. Miss Williams sustained multiple injuries from her fall in 2007. In addition to the leg and hand injuries, she sustained other injuries of

the neck and lower back. The abrasions to the lower extremity and the pain in the wrist and legs have improved; but the injuries to the cervical spine and lumbar spine remain chronic and are responsible for her chronic symptoms. With this expressed, Miss Williams has had very intense and invasive treatment under the supervision of the pain specialist. Also, she has received all the various modalities of pain management from analgesic drugs, trigger point injections to epidural injections, but these have not had any long lasting effects on her pain. She remains functionally disabled to date and she is challenged in performing normal day-to-day activities.

viii. Her impairment rating was 2% of the whole person as a result of the chronic lumbar pain.

ix. She was given an impairment rating of 2% of the whole person as a result of the chronic neck pain.

SUBMISSIONS

[52] Counsel for the Claimant submits that*:*

a) Dr. Ballin states that the Claimant has pain and impairment associated with the cervical and lumbar spondylosis as well as the chronic pain despite the multiple and various treatments administered to her. The Claimant will therefore require ongoing management and repetitive interventional procedure to treat her pain symptoms.

b) That the subjective nature of pain in the assessment of damages does not translate in a nominal award. The Court is obliged to take into account in making its assessment in the case of any particular Claimant the pain and suffering he actually suffered and will suffer. There is a shift in our jurisprudence where “pain” as a residue is not broad brushed as merely subjective. Nor does the absence of any quantifiable/reliable impairment in cases where pain element is the dominant feature determines the level of awards to be made.

The case of ***Philip Granston v The Attorney General of Jamaica Claim No. HCV 1680 of 2003***, judgment delivered August 2009 is supportive of this submission.

c) The pain component is the common feature in the case at bar and that of ***Granston***. It is this marked similarity in the main essentials of the facts of the case that renders the ***Grantson*** case an excellent base guide in determining a fair estimate of the damage. However when one examines the different modalities of treatment undergone by the Claimant in the case at bar over the last 12 years, it is found that her condition is far more grievous when compared to the Claimant in ***Granston***.

d) As it relates to the medical evidence it is the prognosis that represents the most distinguishing feature which separates the ***Granston*** case and that at bar. Fortunately for the Claimant ***Granston*** he could benefit from implantation of a pain pump. From the evidence, while the same could not be seen as a panacea, it would account for something, reducing the pain. Of note the installed pain pump would have a lifespan of 5 years. On the other hand, the Claimant's prognosis in the instant case is more than guarded. In this regard, Dr. Ballin opined "in view of the duration of her problem the results obtained, Ms. Williams will require ongoing management and repetitive interventional procedures to treat the symptoms."

e) When one examines the repetitive treatment the Claimant has undergone, and that by way of her prognosis, she is likely to undergo in the future, the Court is being asked to find that prognostically she is worse off than the Claimant in ***Granston***. Therefore any award made to the Claimant in the case at bar ought properly to be uplifted over and above that as updated in the ***Granston*** case.

f) In the case of Christopher ***Watson v Tankweld Limited, 2016 JMSC Civ 163***, following a plane crash, the resultant effect on the Claimant were Post-Traumatic Stress disorder, major depression (severe) and Psychogenic back

pains and headaches. At paragraph 47 of the judgment Batts J reviewed the medical evidence and found that the Claimant suffered a whole person impairment in consequence of all injuries and their sequelae of 10% (4% for theft lower limb and 6% for the pain he experiences). The sums of $20M was awarded for his mental condition and the chronic permanent psychogenic headaches and back pain and $5M for the other injuries namely the teeth, face, arm, knee and ankle making the award for pain and suffering and loss of amenities of $25M in total. The relevant award of $20M when updated revalues to $22,044,293.01.

g) Batts J opined that it matters not if it was a physical and psychogenic injury as the pain remains the same.

h) She concedes that there is no nexus between the injury to the neck and the accident on the 4th April, 2007 and as such the Claimant as a result of the accident has a **2%** whole person impairment in relation to her **orthopaedic injuries.**

[53] Counsel for the Defendant submits that the medical report of Dr. Ballin should be rejected on the ground that he is not qualified to assess the injuries of the Claimant. That is due to the fact that he is a clinical anaesthesiologist and not an orthopaedic surgeon. When I examine the report of Doctor Balllin I observe that he added a third component for the assignment of the PPD of the Claimant thereby increasing the overall PPD rating of 4% assigned by Doctor Douglas to 7%. That is Doctor Ballin assigned 3% whole percent impairment in relation to her pain while also including in his computation the 4% that was assigned for the orthopaedic injury by Dr. Douglas.

[54] Counsel's submission continues as follows:

(i) The Claimant's primary care doctor, Dr. Dockery, referred her to an orthopaedic surgeon, Dr. Paul Wright.;

(ii) the Claimant admits that she did attend upon Dr. Paul Wright. However, she never saw it fit to attain a medical report from him.

(iii) It was only at the request of the Defendant that the Claimant saw Dr. Melton Douglas, Consultant Orthopaedic Surgeon. The court should accept the evidence of Dr. Shane Dockery and that of Dr. Melton Douglas and reject the 7% PPD proposed by Dr. Ballin. (He refers to the case of ***Ryan Henry v Kingston Terminal Services Limited*** [2015] JMSC Civ. 154)

[55] He urges the court to make a finding of 2% impairment disability. This is in light of the impairment rating assigned by Doctor Douglas for the injuries to the lumbar spine. He further submits that there is no nexus between the injuries to the Claimant's neck and the accident. He also relies on the fact that Counsel for the Claimant in her submissions has accepted that the neck injury was not as a result of the accident. However, he further submits that If the Court finds that there is a chronic neck injury as a result of the accident, the Court should make a finding of a PPD of 4%.

ANALYSIS

[56] There are clear differences the value of the PPD assigned to the Claimant for her overall injuries by Dr. Ballin and Dr. Melton Douglas. The first medical report was from Ms. Williams' general practitioner, Dr. Shane Dockery. She was examined the day after the incident, that is April 5, 2007, and was diagnosed as having moderate to severe lower back pain and tenderness of the 4th and 5th lumbar spinous processes with moderately painful decreased range of motion of the lumbro-sacral spine. The doctor noted there was no prior history of back pain.

On an examination of the medical report of Dr. Douglas in relation to his examination of the Claimant conducted on March 30, 2015, and in particular with reference to the neck injury, he noted that she “felt pain in the right side of her neck which radiates to the right side of her head triggering migraine headaches”. However when I examine the medical reports and the evidence of the Claimant I find that there was no mention of any injury to the neck in relation to the accident. Her description of her original injuries was I was feeling pain in my wrist and lower back” Right throughout her evidence the reference to her injuries remains consistent as it relates to the absence of any reference to pain in her neck. In her evidence in chief when making reference to the current state of her injuries the Claimant states “Currently I still attend the pain clinic at KPH as I continue to experience constant pain mostly in my back but I also have pain in my wrist and shoulder” Up to August 22, 2012, when she went to Doctor Ballin there was no complaint about any pain or injury to the neck. The complaint related to the right shoulder and lower back.

[57] The medical report of Dr. Ballin dated November 20, 2012 states that the Claimant was being managed for her chronic pain after she fell injuring her “right shoulder and lower back”. The addendum report of December 22, 2012 provides a working diagnosis which was “combined myosfascial pain and neuropathic pain with active trigger points in her upper and lower back; and lumbar disc bulge of L4/5 and L5/S1 with symptoms of radiculopathy”. It was on her third visit to Dr. Ballin, that he found,” chronic neck pan with increase in the intensity and frequency of her migraine and chronic musculoskeletal pain with active and latent trigger points (Fibromyalgia Syndrome)”. Therefore, I find that the 2% PPD assigned by Doctor Douglas to the cervical spine is not as a result of the accident.

[58] Dr. Ballin in his report provides a general definition of Fibromyalgia Syndrome as being “a chronic musculoskeletal, non-inflammatory pain disorder characterized by unexplained, widespread pain throughout the body, lasting longer than 3 months... there is evidence that the pain experience of Fibromyalgia patients is partly the

result of disordered sensory processing at a central level resulting in normal sensory inputs"

[59] The Defendant relies on the case of ***Ryan Henry v Kingston Container Terminal Services Limited*** [2015] JMSC Civ. 154 where Dr. Ballin was an expert witness. The court noted that on cross examination of Dr Ballin that he admitted that he did not have the reports of other specialists except for one when he was creating his reports. The court remarked that it was unclear how he, a pain specialist, arrived at his finding of 25% whole person disability. Based on this evidence, the learned judge rejected Dr. Ballin's report as being unreliable.

[60] I take note of the fact that the Defendant did not request the attendance of Doctor Ballin in order to challenge his evidence on cross examination. However in spite of this failure, where on the face of it, the medical evidence for the Claimant, appears to be conflicting, the court has to attempt to resolve the conflict on the evidence. This may result in the court rejecting part or all of a particular medical report.

[61] Dr. Ballin's evidence is that he is a consultant anaesthetics…., specializing in critical care and pain management. There is no evidence that he has any training in orthopaedic medicine. Consequently, I find that Doctor Douglas the orthopaedic specialist would be more qualified to speak to the presence or absence of Fibromyalgia This finding was clearly absent from Doctor Douglas' report. For this reason, I will not rely on Doctor Baiilin's diagnosis of Fibromyalgia. However, I find that the medical report of Dr. Ballin is relevant for the assessment of the injuries of the Claimant in so far as it relates to the duration and intensity of the Claimant's pain. However, in light of the fact that Doctor Ballin's area of expertise is pain management and not Orthopaedic I will not accept his overall 7% PPD rating of the Claimant. I accept however his evidence in relation to treatment of the Claimant and the related cost. Therefore, I find that the PPD rating of the Claimant in relation to the injuries that are relevant to the accident is 2%.

[62] Counsel for the Claimant relies on the case of ***Phillip Granston v The Attorney General of Jamaica*** [2011] JMCA Civ 1. The facts of that case are that the Claimant was a fireman aboard a fire truck which overturned during a road accident. The respondent sustained the following injuries: failed back syndrome, fractures of the pars interarticularis at L5, bugling of the intervertebral disc at L5/S1 and chronic back pains. The Claimant's failed back syndrome began to worsen over the 10 years following the accident in 1997. Over that period of time, the pain was so severe that mere injections were not sufficient. A pump had to be installed under the skin of Mr. Granston with a tube running from the pump to the pain site. For pain and suffering and loss of amenity the court awarded $8 million.

[63] However I find that in the ***Granston*** case the injuries and associated pain were far more serious than that of the Claimant in the instant case. That is, the Claimant in that case was diagnosed with "failed back syndrome" and significant hyper-reflexion in both lower and upper extremity". That is suggestive of the fact that the pain and injuries connected to the accident were experienced in both the upper and lower back. In the instant case the pain and injuries connected to the accident flow from the lumbar spine to the lower limbs. There is no indication of pain or injuries connected to the accident as it relates to the upper back.

[64] The Claimant also relies on ***Christopher Watson v Tankweld Limited*** 2016 JMSC Civ 163. The Claimant in that case suffered the following injuries due to a plane crash: trauma to the back- lumbar strain, injury to left knee, injury to right ankle, fracture to the tolar base, facial injuries, multiple lacerations, contusion to the shoulder, injury to dentition, loss of three (3) teeth. The resultant effects were post-traumatic stress disorder, major depression (severe) and psychogenic back pains and headaches. The court awarded $20 million dollars for the Claimant's mental condition.

[65] Counsel for the Claimant has submitted that while the injuries of the Claimant in the instant case are not comparable to the injuries in the ***Watson*** case, the ruling on pain forms a common thread. She also concedes that since there is no finding

of Post-Traumatic Stress Disorder in the case at bar, the award should be discounted.

[66] However I find that the ***Watson*** case is not applicable to the case at bar. In the ***Watson*** case***,*** similar to Doctor Ballin***,*** Dr. Metalor was a consultant anaesthetist intensivist and pain management specialist. Doctor Metalor also possessed a post-doctoral fellowship in neuro-trauma and neuro-intensive care at the University of Toronto. It must also be highlighted that her assessment was supported by other psychiatrists and an orthopaedic surgeon, Dr. Cheeks, who commented that the pain had not diminished even though it was psychological. That is, Dr. Metalor 's discoveries were confirmed by specialists who gave their expert knowledge that confirmed her diagnosis. In that regard the court was able to place reliance on Dr. Metalor's statements about the pschogenic pain. In addition, Dr. Tameka Haynes-Robinson a neuropsychologist, gave similar evidence that part of the pain the Claimant felt was psychological. Psychogenic pain which is the pain described in the ***Watson*** case is described as stemming from emotional trauma. In the instant case the fibromyalgia syndrome was diagnosed on the Claimant's final visit to Dr. Ballin. There is no evidence that he referred the Claimant back to the expert in order to confirm what he suspected. Therefore the *Watson* case is clearly distinguishable from the case at bar.

[67] Counsel for the Defendant has commended the case of ***Kevin Gilbert & Romaine Grant v Adani Dixon*** [2017] JMSC Civ 89 for the court's consideration. In that case the Claimant had a PPD of 5% with injuries consisting of discogenic back pain, tenderness over lower lumbar spine and intermittent severe back pain. The court noted that the injuries affected his work life as a carpenter and farmer and marriage as it related to sexual activity. General damages in the sum of $2,300,000.00 which updates to $2,508,830.84 was awarded. However counsel for the Claimant in response suggests that the ***Kevin Gilbert*** case should be distinguished from the instant case in that Ms. Williams continues to feel pain.

[68] I must at this juncture state that I am mindful of and am always guided by the rulings of the higher courts. In the Court of Appeal decision of **Sinclair *v* *Vivolyn Taylor [2012] JMCA Civ 30*** Phillips J.A. stated that :

> "*…., although one must pay attention to the specific injuries suffered and treatment administered in each case, nonetheless, the percentage PPD is a good guide for making an award and for making comparisons in order to arrive at some uniformity in awards…It is difficult to achieve uniformity, but Judges must give an award in money and do the best that they can in all the circumstances. As indicated the severity of the pain that the respondent stated that she had to bear over an extended period, and which was continuing, weighed heavily with the trial judge"*

[69] Counsel for the Claimant in her submissions has stated that in the end, the impairment rating. albeit a good guide is not to restrict an award properly due to the Claimant. However I find that the case of ***Kevin Gilbert*** is quite applicable to the case at bar despite the differences in PPD. However, I do not agree with the submissions of counsel for the Defendant that the award should be discounted. The injuries and loss of amenities of the Claimant in the instant case are quite similar to those of Mr. Gilbert. Mr. Gilbert was unable to properly engage in sexual activity which led to the downfall of his marriage. His livelihood as a carpenter/farmer was affected. In the instant case I accept the unchallenged evidence of Ms. Williams that she is also unable to properly engage in sexual activities, has had to stop from attending her dance classes at the Cathi Levy dance centre and performances at hotels with the dance troupe. In addition, I accept that her pain persists to this very day, after 12 years. The general discomfort and severity of her pain on a daily basis coupled with the restrictions in her daily routine due to the injuries speak to a need for a commensurate award.

[70] In consonance with my earlier intimations, I find that of the cases commended to the court by the parties the case of ***Kevin Gilbert*** is the most comparable to the

instant case***.*** That is with the exception of the PPD rating of 5%. In light of the principle stated in the case of ***Vivolyn Taylor*** and having found a PPD rating of 2% for the Claimant in the instant case, this court would in normal circumstances seek to make an award that is consistent with comparable cases of the same PPD rating and similar injuries. However it is my view that in the instant case the court has to make an exception. That is**,** despite the fact that there is no basis for the court to find that the Claimant suffers from fibromyalgia, the court accepts the evidence of Doctor Ballin that as a result of the injuries, the Claimant continues to suffer constant pain which is burning and shocking; whereas the pain of the Claimant in the ***Gilbert*** case was found to be intermittent. Therefore, taking into consideration the persistence and severity of the Claimant's pain, I find that she should be awarded a sum over and above the award in the Gilbert case. Therefore, I find that an award of $3,500,000 is appropriate in all the circumstances.

FUTURE MEDICAL CARE

[71] The Claimant has pleaded in her Amended Particulars of Claim for an award of $**1,248,439.04** for the cost of future medical care. The details are outlined below:

ESTIMATED COST OF FUTURE MEDICAL CARE

(1)	Cost cervical epidural trial x3	$ 300,000.00
(2)	Cost to transforaminal injections x3	$ 270, 000.00
(3)	Intravenous lignocaine and ketamine infusions x20	$ 600,000.00
(4)	Cost to occupational therapy	$ 50, 000.00
(5)	Cost of medication	$ 28, 439.04
	Total	**$1,248,439.04**

[72] The Defendant has submitted that despite particularizing future medical care, she curiously has not pleaded it and should not recover this head of damage. However as far as I am aware the Particulars of Claim forms a part of the pleading. The

Claimant did indicate that she is claiming special damages and has particularized cost of future medical care as part of her Claim for Special Damages

[73] Additionally, Ms. Williams in her witness statemented which was ordered to stand as her evidence at paragraph 42 she states that Dr. Ballin recorded a true summary of her condition which she adopts as part of her witness statement. In the Addendum Medical Report of Dr. Ballin dated the 22nd of December 2012 he stated that future treatment may include pain interventional pain blocks including transforaminal injections. He also recommended that she visit an occupational therapist. The particulars as detailed above are also included. He further states that "it was difficult to estimate the period of time that treatment would be required but anticipates that Ms. Williams would require on going medical care due to the duration of time since the accident".

[74] In his report dated the 27th of January 2019 he details her current treatment as "intravenous lignocaine and ketamine infusions. He indicates that she gets favourable response from these but these treatments must continue. This aspect of Doctor Ballin's evidence has not been challenged. Therefore I accept this aspect of Dr. Ballin's report as a guide to whether future medical care should be awarded.

[75] Ms. Williams' evidence is that she has had to continue exercises directed by her physiotherapists and uses a TENS machine to dull the pain. However, her pain always returns. This has not been challenged. I find that the evidence of the Claimant and of Dr. Ballin has sufficiently established that the Claimant is entitled to an award for future care. I accept the estimated cost of Dr, Ballin as a specialist in pain management. However, in keeping with my findings that the neck injury, is unconnected to the accident, I deduct the cost in relation to the cervical epidural. Therefore, the total award under this head is $**948,439.04**.

HANDICAP ON THE LABOUR MARKET

[76] Counsel for the Claimant has submitted that Ms. Williams is entitled to an award for loss of earning capacity as the Claimant is no longer employed. She takes the

position that the Claimant should be considered unemployed as she was not given sick leave and left the job in frustration. She raised the point that in her evidence Ms. Julia King states that numerous sick leave certificates were presented by the Claimant after the accident, yet the authenticity of said sick leave certificates was never challenged by the Defendant. Additionally she submits that the Claimant's experience of pain and her inability to seek employment due to her pain was never challenged by the Defendant who had an opportunity to do the same at trial.

[77] She asserts that Dr. Douglas who the Claimant saw on the instructions of the Defendant states that "Miss Williams has had very intense and invasive treatment under the supervision of the pain specialist. Also she has received all the various modalities of pain management from analgesic drugs, trigger point injections to epidural injections, but these have not had any long lasting effects on her pain. **She remains functionally disabled** and she is challenged in performing normal day-to-day activities"

[78] Counsel for the Defendant submits that the Claimant has no grounds to apply under this head of the damages as it only arises when the Claimant is un employed. In his view, her employment status is not settled as she denied having "walked off the job" but has failed to explain why she never returned from her last grant of sick leave in 2012.

[79] However the cases have clearly indicated that the Claimant's employment status at the time of trial is not a bar to recovery for loss of earning capacity (See ***Moeliker v A Reyrolle & Co*** Ltd [1977] 1 All ER 9; ***Gravesandy v Moore*** (1986) 40 WIR page 222; **Patrick Thompson and Anor V Dean Thompson and Ors**. [2013] JMCA Civ. 42))

[80] Additionally, I note that there is no contention on the part of the Claimant that her services were terminated by the Defendant. The inference I draw from her evidence is this: She is contending that, her injuries, the pain that she continues

to experience and the position taken by the Ministry in relation to her continued request for sick leave lead to her frustration and her not returning to work.

[81] In her evidence she detailed that:

She was granted sick leave on many occasions up to the 12th of November, 2011.When Dr. Neil and Dr. Dawson stated that she was fit for work she was still ill and was issued sick leave for sixty-two (62) days from the 18th of August, 2011 to the 1st of November, 2011. She was granted special sick leave without pay from the 17th of April to the 15th of July, 2012. After the expiration of that sick leave she received a letter from the Ministry advising her that no further sick leave would be granted without the convening of a medical board and an updated letter from her doctor. She expressed that she waited for the reconvening of the medical board which she did not hear from. It is from this series of events that the Claimant states she “gave up in frustration.”

[82] It is not de denied by the Defendant that there were periods when the Claimant was absent from work as a result of her injuries that she was not paid. Ms King testifies that “in February 2011, the Ministry requested that the Ministry of Health convene a Medical Board to review Miss Williams’ fitness for duty on account of her continued absence from the job for extended period on medical grounds”. She further states Miss Williams was granted ninety (90) days special sick leave from March 24, 2011 up until June 21, 2011 and that the Ministry of Health approved an extension of special sick leave to Miss Williams up to August 12, 2011. The Medical Board also recommended that Miss Williams was fit to return to work with activity modification.

[83] There is no indication as to whether the recommendation of the Medical board was ever instituted. Ms king further testifies that when Ms. Williams did not resume duties, on August 15, 2011, but submitted a medical certificate for the grant of sixty-two (62) days additional sick leave up to October 18, 2011, the Ministry of Health advised that no further grant of sick leave would be considered without a detailed Medical Report and that the Salaries Section was advised to cease

payment of salary Miss Williams for the period August 13, 2011 to October 18, 2011. This period was approved as no-pay leave.

[84] Ms. King indicates that Miss Williams resumed duties in the Ministry on October 19, 2011.On her evidence Ms. Williams would again have worked from that period up until the 16th of April 2012. My impression on this evidence is that Ms. Williams was not deliberately absenting herself from work, in light of the fact that there were periods of resumption even when the sick leave was treated as no pay leave.

[85] Ms. King's evidence continued as follows:

"Ms. Williams was granted 90 days' special sick leave from April 17, 2012 to July 15, 2012. She did not report for duty in the Ministry on July 16, 2012, following the grant of sick leave due to continued ill health. Miss Williams was formally advised in writing that the Chief Medical Officer would not consider the grant of any further extension of special sick leave to her and/or the reconvening of a Medical Board without further updated information and a detailed Medical Report from her doctor".

[86] There is evidence from the Defendant that the Claimant did produce medical certificates for previous absence. However having approved previous sick leave they had now taken the position that they would not approve any more in the absence of this "detailed medical report". Therefore I find that the submission of counsel for the Defendant that the Claimant walked off the job, in light of the evidence of Ms. King that she failed to report on July 15, 2012 due to continued ill health, and the Ministry had indicated to her that they would not approve any more sick leave in the absence of a detailed medical certificate, and the reconvening of the Medical Board, unfair.

[87] Additionally, I have not seen the letter that communicated this information to the Claimant for me to determine whether the position of the ministry was clearly communicated to her. In her evidence she stated that she waited for the convening of the medical board but did not hear from them. Therefore, while Ms. King's evidence seem to be suggesting that the convening of the medical board was

contingent on the Claimant producing an updated detailed medical report, the perception of the Claimant seem to be that she had to await communication from the Medical Board before taking the next step. Consequently, having received no further communication, it is not unreasonable that she could harbour the perception that she would not be granted any more sick leave in the evident that the Ministry finds that any medical certificate that she furnishes to be unsatisfactory.

[88] Ms King also indicates that payment beyond July 16, 2012 was not authourised. Therefore, where the Claimant became ill and was absent from work as a result of the injuries, in the absence of the detailed medical certificate requested by the Ministry, it is not unreasonable that she could form the impression that her absence from work would not have been approved eventually culminating in the termination of her employment. Essentially there is basis on which this court can find that the circumstances outlined engendered frustration on the part of the Claimant culminating in her not returning to work.

[89] However it is my view that whether the Claimant's unemployment status is by a direct termination of her services by the Defendant or she left the job without a formal termination is immaterial at this stage. The important issue for consideration is not even whether it is as result of the injuries she is now unemployed. It is whether as a result of those injuries she is unlikely to gain employment, or if she does, whether it will be at a reduced pay. Her evidence is that she not worked since 2012 and this is due to the effect the injury has had on her.

[90] Brown L.J. in ***Moeliker*** laid down the two stage test that the court will have to consider under this head of damages. These are:

1. *Is there a substantial risk that a plaintiff will lose his present job at some time before the estimated end of his working life?*

2. *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.*

[91] The Defendant has not denied that the Claimant continues to experience pain as a result of her injuries. However, counsel for the Defendant submits that the medical evidence provided by the Claimant does not indicate that she is at risk of returning to the job or that she will have a difficulty performing her duties Dr. Douglas assessed the Claimant as functionally disabled and challenged in performing day-to-day activities but he makes no pronouncement as to whether this will prevent her performing her tasks at work

[92] I agree with counsel for the Defendant that there must be some medical evidence confirming the likelihood of the Claimant not being reemployed or employed at a reduced pay, where the risk of her losing her job in the future materializes. However it is my view that the evidence of Doctor Douglas is sufficient for me to arrive at such a conclusion.

[93] Dr. Douglas in his medical report dated the 2nd of November, 2015 stated that she is functionally disabled to date and she is challenged in performing day-to-day activities. She was diagnosed with lower back pain which radiates to her buttock, leg and toes and numbness in her right litter finger especially when she places pressure on her right elbow. Dr. Douglas found that her back pain is aggravated by sitting, standing for long periods exceeding thirty (30) minutes, and lying flat or on the right of her back. Even where the cervical spondylosis is rejected, the other injuries are relevant to this prognosis.

[94] The fact that, Doctor Douglas has indicated that the Claimant is challenged in performing her day to day activity and that she is functionally disabled, in my view

needs no other interpretation than that her injuries are not mild but affect her day to day function to include her daily task. Her job as a Records Clerk, would require much sitting and walking to do dispatch (based on her evidence). Furthermore, although the diagnosis of fibromyalgia syndrome or the cervical spondylosis has not been accepted, there is no challenge to the evidence that the Claimant continues to feel "shocking pain"

[95] In the case of ***Roger Mills v The Attorney General of Jamaica*** [2018] JMSC Civ.136 after Mr. Mills' accident, "he returned to work in November 2007, and worked up until June 2008, when he was sent off due to his condition. He tried to mitigate his loss by driving a bus, but the constant pain and swelling in his foot, chest and back, impeded his ability to work."

[96] Thompson-James, J in her consideration of this issue relied on the case of ***Granston.*** She made the observation that:

> *"In **Granston,** in response to the submission that that claimant could take on less physically demanding work in order to mitigate his losses, Sykes J (as he then was) was of the view that that submission 'overlooked the fact that Mr. Granston was in constant pain. The pain was so severe that a pain pump that administers the powerful drug of morphine was inserted in his body'. Although Mr. Mills did not receive a pain pump, and also that statement was made in relation to loss of future earnings, I am of a similar view and find that the claimant is entitled to compensation for loss of earning capacity." (See paragraph 71)*

[97] The learned judge found that the Mr. Mills was still entitled to loss of earning capacity in light of the effect of the pain on his capacity for employment, despite the fact that the pain was not of the same magnitude as the Claimant in ***Granston case,*** who needed a pain pump. I am inclined to adopt this same reasoning. I find that the Claimant has established that due to her injuries as a result of the fall and

the constant pain she will not be able to be employed or if employed she will not be able to perform at her pre accident level. There is no evidence from the Defendant that they are prepared to reinstate her at her pre-accident salary under ameliorated conditions, taking into account her need for continued treatment. Consequently I find that the Claimant has established that as a result of the accident her earning capacity has been significantly reduced, She is therefore entitled to an award for loss of earning capacity.

[98] The Claimant has indicated in her evidence that she was "earning approximately $80,000", per month. This certainly lacks sufficient clarity. Furthermore, she testifies that it was her intention to submit evidence of her salary whence she received it from the Accountant General. However, no such evidence has been provided and no explanation has been supplied for its absence. However this is not fatal to this aspect of her claim. It will however affect the method of calculation and the quantum of award. In the case of ***Thompson and Smith v Thompson, Gordon, Brooks and Stewart*** [2013] JMCA Civ 42 the Court of Appeal, gave guidance as to when the method of calculating damages using the multiplier/multiplicand method approach is appropriate. The Court had this to say;

> *"...once the judge decides that an award for loss of earning capacity is appropriate in a particular case, the choice of a suitable method of calculation is a matter for the court. Among the factors to be taken into account are the actual circumstances of the claimant, including the nature of his injuries.* ***Although the claimant's employment status at the time of trial is not a bar to recovery, it may have an obvious effect on the kind of information that he is able to put before the court with regard to his income and employment prospects for the future. Where there is evidence to support its use, the multiplier/multiplicand method may promote greater uniformity in approaches to the assessment of damages for loss of earning capacity.*** *This is hardly an exhaustive list and additional or different factors will obviously be of greater or lesser*

> *relevance in particular cases. Although the decided cases can offer important and helpful guidance as to the correct approach, the individual circumstances of each claimant must be taken into account. As Browne LJ observed (at page 15) in* ***Moeliker****, restating the oft-stated, "the facts of particular cases may vary almost infinitely". (See paragraph 80)*

[99] Therefore, in calculating damages to be given under this head, I find that the lump sum approach is appropriate. The cases have indicated that the more imminent the risk of employment the greater should be the sum awarded. (See, ***Archer Ebanks v. Japther McClymouth*** Claim No. 2004 HCV R172 delivered March 8, 2007 digested in Khan (5)).

[100] The fact is, the risk of the Claimant being unemployed has already materialised. Despite that fact that I have indicated that the approximation that the Claimant has provided in unreliable for me to arrive at a precise calculation for the sum to be awarded I am inclined to the view that her earnings were not too far off from that figure. This is in light of the fact that the Defendant, her employer, in its challenge has not put a contrary figure to her.

[101] For these reasons I make a lump sum award in sum of $5,000,000 to the Claimant for loss of earning capacity.

Orders

Damages are awarded to the Claimant as follows

Special Damages

as agreed is in the sum of …… $136,168.75.

Damages for future care in the sum of …… $948,439.04.

Interest of Special damages - 3% from the date of the accident to the date of Judgment

General Damages

Pain and suffering and loss of amenities is $3,500,000

Loss of Earning Capacity $5,000,000

Interest on General Damages - 3 % from the date of the service of the claim form to the date of judgment.

Cost to the Claimant to be agreed or taxed.