



[2019] JMSC CIV 154

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 04197

BETWEEN	ANATOU WRIGHT	CLAIMANT
AND	KURBITON LIMITED	1 ST DEFENDANT
AND	TOMMY LEE MCLEAN	2 ND DEFENDANT

IN OPEN COURT

Ms. Helen Coley Nicholson for the Claimant

Ms. Denise Senior Smith for the 1st Defendant

Assessment of Damages - Pain and Suffering and Loss of Amenities - Loss of Earning Capacity - Whether Claimant has adduced sufficient evidence for an Award.

HEARD: 1st May, 2019 and 24th June, 2019

THOMAS, J.

INTRODUCTION

1. This claim arose out of a collision between a bus owned by Jamaican Urban Transport Company, on which the Claimant was a passenger and a motor truck owned by the 1st Defendant and driven by the 2nd Defendant. The accident

occurred on the 16th of March 2010. On the 17th of February 2017, Judgment in Default of Acknowledgement of Service was entered against both Defendants. The matter now being heard is the Assessment of Damages. Special damages as proven are Medical Services provided by:

(a)	Dr. Mundluru Murali K	-	\$ 2,200.00
(b)	Philip D. Waite	-	\$ 60,000.00
(c)	Dr. Roger Williams	-	\$ 5,200.00
(d)	Spanish Town X-ray	-	\$ 7,220.00
(e)	Spanish Town Hospital	-	\$ 2,000.00
(f)	Neurodiagnostics Ltd.	-	\$ 60,000.00
(g)	Winchester MRI	-	<u>\$ 35,000.00</u>
	Total		\$171,620.00

General Damages

Pain and suffering and Loss of Amenities

The Evidence of the Claimant

2. In her evidence in chief the Claimant, Ms Anatou Wright states that as a result of the collision she lost her balance and fell on her back. She tried to get up but could not because she felt a sharp pain in her back. She was lifted from the bus, and taken to the Spanish Town Hospital. She was examined, given pain killers and sent home after about 2 hours. After leaving the hospital she was still feeling pain, all over her body especially her neck and back. It was painful to turn her neck and back. She had pain in her right shoulder and right hip as well. In the morning it was worse. She went to Dr. Murali, in Spanish Town that morning because she

was feeling pain after the pain killers. She did an x-ray at the Spanish Town X-ray Centre. After about two (2) or three (3) visits to Dr. Murali, she went to Dr. Williams in Spanish Town as she was still feeling the pain in her neck and back. The rest of the pain all over her body had eased but she was concerned about her neck and back. She returned to work about three (3) or four (4) days later. She had constant pain in her neck until about 2015 when she decided to change her diet and do exercise. She still feels pain but it is not as constant as it used to be. The pain has affected and continues to affect her attendance and performance at work. She is unable to sit for long periods or hold her head down to read or type documents for long periods. These are requirements to do her job as an Accounting Clerk. Currently, she has to take breaks during the day to alleviate the pain. She cannot stand for long periods at a time. She cannot wear shoes with heels for long periods as this causes and worsens her pain in the back and neck. She has pain when sitting up to read or use a computer and when sleeping with a pillow. She used to play business house netball for JUTC. She can't anymore because she's afraid of making the pain worse.

3. On Cross examination she testified that:

Occasionally, she works on weekends. She can't say if in March 2010 she was working on weekends. After she saw the doctor in 2010, she only got analgesics. In 2013, she can't recall if she visited any doctor. She agrees there is nowhere in her witness statement which says she visited a doctor in 2015. She was an Accountant Clerk in 2008 and is still an Accountant Clerk. Her salary has increased since 2008, she agrees that based on her understanding of her injuries she did not sustain a fracture of her bones.

The Medical Evidence

4. Two medical doctors gave evidence in this case. Each report was permitted to stand as each doctor's evidence in chief.

Dr. Jacqueline Bisasor-McKenzie

- (i) In her Medical Report dated the 14th of February 2012 Dr. Jacqueline Bisasor-McKenzie stated that she examined the Claimant on the 16th of March 2010. She states that the Claimant complained of pain to her lower back, neck and right shoulder. On examination, the doctor found that the Claimant had tenderness to the right hip, right shoulder and complained of pain on turning her neck. She was assessed with soft tissue injuries and discharge on Analgesia.

Dr. Philip D. Waite

5. In his medical report dated the 14th of May 2014, Doctor Waite states that on the 14th of January 2014 the Claimant complained to him of occasional neck pain which occurred with prolonged flexion of the neck as with rising; and occasional low back pain which occurred with prolonged sitting. This occurred approximately once per week. There were no radicular symptoms.

On examination, he found that there was mild to moderate tenderness to the cervical spine, to both scalenus muscles. In regards to the musculoskeletal system, there is full power, sensation was impaired on the right and the reflexes were generally brisk.

Investigations by way of x-ray of the cervical spine showed there was a loss of the normal cervical lordosis. There was evidence of degenerative disc disease at C5/6.

Assessment

- (A) On assessment Doctor Waite states that MRI of the cervical spine was done on the 24th of January 2014 at the Winchester MRI Ltd

and reported on by Marian Allison-Vaughan, Consultant Radiologist. This revealed that there was:

- (i) loss of the normal lordosis; disc desiccation at C4-5 and C5-6. At C5-6; a mild left paracentral disc herniation with borderline spinal stenosis; lateral recess or exit foraminal narrowing. At C6-7, there is a mild left paracentral disc herniation with no spinal stenosis, lateral recess or exit foraminal narrowing. The other disc levels appear normal. The impression formed were: C5-6 mild left paracentral disc hibernation with borderline spinal stenosis; No lateral recess or exit foraminal narrowing; The other disc levels appear normal. C6-7 mild left paracentral disc herniation. Nerve conduction study was done on the 24th of February 2014 at the Neurodiagnostics Centre for Electrodiagnosis Disorder and reported on by Daniel Graham, Electromyographer. Normal electro physiologic data, to right upper extremity was found. Specifically, there is no electro physiologic evidence in support of the clinical suspicion of right cervical C5/6/7) radiculopathy. He found that there is a chronic disco genic neck pain with subjective right cervical radiculopathy and subjective back pain. These are consistent with mechanism of the accident as described.

He further found that the Claimant had a **Two (2) % whole person impairment**

Prognosis

- (B) Doctor Waite states that there will be periods of remission and exacerbations of the neck pains; the timing and extent of which cannot be predicted. The conditions can also worsen; the timing and extent of which cannot be predicted. These may affect or continue to affect activities of daily living and work especially with activities that involve flexion and loading of the neck; such as reading, using a computer, sleeping with a pillow and prolonged sitting.

SUBMISSIONS

On behalf of the Claimant

6. In relation to the Claim for pain and suffering and loss of amenities the Claimant relies on the following cases:
- (i) ***Dalton Barrett v Poncianna Brown and Another*** - Claim No. HCV 01358 cited at Khan Vol. 6 page 104.
 - (ii) ***Wilford Williams v Nedzin Gill and Anor*** Suit No. C.L. 1999 W 169 cited at Khan Col. 5 page 148.
 - (iii) ***St. Helen Gordon and Anor. v Roland McKenzie*** reported at page 152 of Kahn's Recent Personal Injury Awards Volume 5.
7. Ms. Coley Nicholson submits that Ms. Wright's injuries are more severe than those suffered by the claimant's in all the foregoing cases. She opines that the injuries suffered by the Claimant in the case at bar are, to some extent, similar to that of the Claimant in the case of ***St. Helen Gordon and Anor. v Roland McKenzie*** but more serious because:

- (i). Ms. Wright suffers from injuries to the neck as well as the lower back.
 - (ii). Dr. Waite's prognosis is that there will be periods of remission and exacerbations of the neck pains, the timing and extent of which cannot be predicted. The conditions can also worsen; the timing and extent which cannot be predicted.
8. She takes the position that it would be appropriate to award the Claimant a sum greater than that awarded to Ms. Gordon which should be no less than \$2,500,000.00.

On Behalf of the Defendant

9. Counsel for the Defendant put forward the following submissions:
- (i) Dr. Bisasor-McKenzie did not find any tenderness to the Claimant's neck. It was the Claimant that complained of tenderness and pain on turning the neck. It is the evidence of the Claimant that after two hours she was sent home from the hospital. She said she was still feeling pain and visited a private doctor. We have no medical reports from the private doctor that her visit was as a result of any pain she was feeling but there are receipts evidencing that those visits were paid for. The visits to the private doctor do not substantiate the pain that the Claimant was feeling as we have no independent or medical evidence to substantiate this. It was incumbent on the Claimant to provide the Court with a Medical Report.
 - (ii) The evidence of the Claimant that she had constant pain up until 2015 is in stark contrast to the evidence of Doctor Waite. His evidence is that she had occasional neck pain which occurred with prolonged flexion of the neck as with rising; and occasional low back pain which occurred with prolonged

standing. The court should disregard this evidence of the Claimant as being untruthful. Doctor Waite does not associate his finding of loss of the normal cervical lordosis and evidence of degenerative disc disease to the accident.

- (iii) The injuries suffered are less severe than those suffered by the Claimants in the cases relied on by the Claimant. More recent cases should be used to assist with a current award. (She refers to ***Roger McCarthy v. Peter Calloo*** 2018 JMCA Civ)

10. Ms. Senior-Smith further submits that the under-mentioned cases will provide greater assistance to the court. These are:

- (a) ***Anthony Gordon v. Chris Meikle & Another*** Vol. 5 of Khan page 142;
- (b) ***Sasha Gay Downer, (b.n.f) Myrna Buchanan v. Anthon Williams & Another*** Vol. 6 of Khan's page 124,
- (c) ***Racquel Bailey. v. Peter Shaw*** JMCA 2014 Civ. 2

11. She expresses the view that the injuries suffered by the Claimant in the instant case are less severe than those suffered by the Claimants in the afore-mentioned cases. Therefore, the court should make an award for general damages for less than two million dollars.

Analysis

12. Having carefully reviewed the evidence and the submissions of both counsel, it is my view that the evidence of Doctors Waite and Bisasor-Mckenzie as contained in their medical reports remains unchallenged. Consequently, I accept their evidence contained in the medical reports. I find that on the 16th of March 2010 when she was examined by Doctor Bisasor-McKenzie, the Claimant was found to be

suffering from tenderness to the right hip, right shoulder and complained of pain on turning her neck. She had soft tissue injuries and was discharge on Analgesia. Additionally, I find that when she was examined by Doctor Waite on the 14th of January 2014, the Claimant complained of occasional neck pain with prolonged flexion of the neck, occurring approximately once per week as with writing and typing and occasional lower back pain which occurred with prolonged standing. I find that on subsequent examination by Doctor Waite on the 24th of February 2014, Ms. Wright was found to be suffering from chronic discogenic neck pain with subjective right cervical radiculopathy and subjective back pain. I accept his evidence that at that time she had a PPD of 2 %. I accept Doctor Waites' prognosis that:

- (a) there will be periods of remission and exacerbations of the neck pains; the timing and extent of which cannot be predicted.
- (b) The conditions can also worsen; the timing and extent of which cannot be predicted.
- (c) These may affect or continue to affect activities of daily living and work especially with activities that involve flexion and loading of the neck; such as reading, using a computer, sleeping with a pillow and prolonged sitting.

- 13.** I accept the evidence of the Claimant that as a result of the accident after leaving the hospital she was still feeling pain, all over her neck, back, right shoulder and right hip and that it was painful to turn her neck and back. I accept her evidence that the pain felt worse the following morning. She was not challenged on cross-examination regarding this aspect of her evidence. It was never suggested to her that she was not feeling pain, the morning after the accident. I am mindful of the fact that Doctor Waite who examined her approximately four years after this date found that the pain persists, albeit occasionally. I am of the view that the severity

of any pain is more likely to be felt at the time of, and shortly after the occurrence of the injury. The fact that the Claimant was still feeling pain four years later, a situation that the doctor says may worsen, is an indication to me that it is highly probable that the pain would have been more severe the morning after receiving the injuries than four years later. Therefore, I accept this aspect of the Claimant's evidence despite the absence of a medical report from the doctor that she visited the morning after the accident. I accept the evidence that she did visit the doctor based on the receipts she produced.

- 14.** Counsel for the Defendant has raised the point that, Dr. Bisasor-McKenzie did not find any tenderness to the Claimant's neck; and that it was the Claimant that complained of tenderness and pain on turning the neck. However, it is common knowledge that it is the patient who expresses to the medical practitioner, any discomfort that he or she is feeling when certain examinations are done. That is, pain is always subjective. It is a feeling, that may sometimes be expressed by facial expression or verbal utterances. I also note that Doctor Waite did find mild to moderate tenderness to the cervical spine. However, I agree with counsel's submission that when one examines the Claimant's evidence in light of the evidence given by Doctor Waite, it is, unlikely that she would have had continuous pain up until 2015. When Doctor Waite examined her in 2014 her indication to him was that the pain was felt occasionally. Therefore even before 2015, and at least by the time of Doctor Waite's examination in 2014 there is evidence on the Claimant's case that the pain was not constant but intermittent. Therefore, I do not accept the evidence of Ms. Wright that the pain in her neck was constant up until about 2015. I find that she still felt pain but that it was not constant. However, I accept her evidence that she used to play business house netball for JUTC and that she cannot do that anymore. This evidence was not challenged.
- 15.** In relation to the submission of counsel for the Defendant that Doctor Waite does not associate his finding of loss of the normal cervical lordosis and degenerative disc disease to the accident, I note that Doctor Waite did say that there is a chronic discogenic neck pain with subjective right cervical radiculopathy and

subjective back pain. He further asserts that these are consistent with mechanism of the accident as described. I have no doubt that it was as a result of fore-mentioned findings that he assessed the Claimant as having a two percent (2%) whole person impairment. Therefore, I accept Doctor Waite's evidence, that the pain to the Claimant's neck and back are symptoms of injuries associated with the accident.

16. In comparing these cases presented for consideration by the Claimant, I agree with counsel for the Claimant that the injuries suffered by the Claimant in the instant case are more serious than those suffered by the Claimant in the cases of ***Dalton Barrett v Poncianna Brown and Another*** (supra) and ***Wilford Williams v Nedzin Gill and Anor*** (supra). In the case of ***Dalton Barrett v Poncianna Brown and Another*** the Claimant was diagnosed with lower back pains and a mild cervical strain as well as pain to his left shoulder and left wrist. He received an award of \$750,000.00 in November 2006. When this is updated it equates to a sum of \$1,933,734. In the case of ***Wilford Williams v Nedzin Gill and Anor***, the Claimant was awarded \$350,000.00 in November 2000 for a whiplash injury. This figure when updated equates to \$1,599,288.26.

The Claimant in the case of ***Wilford Williams v Nedzin Gill and Anor*** seem to have suffered only one main injury. That is a whiplash injury. In the instant case, the initial complaint of the Claimant to Dr. Jacqueline Bisasor-McKenzie was pain to the her lower back, neck and right shoulder. However, by the time she was examined by Dr Waite on the on the 14th of January 2014 the pain to the shoulder seemed to have been dissipated. She only complained of occasional neck pain which occurred with prolonged flexion of the neck as with rising, and occasional lower back pain which occurred with prolonged sitting. Therefore, numerically the injuries in the case of ***Dalton Barrett v Poncianna Brown and Another*** seem to be more than in the instant case. That is lower back pains, mild cervical strain, pain to his left shoulder and left wrist. I also note that in both of these cases the Claimants suffered no partial permanent disability, whereas the Claimant in the instant case suffers a PPD of 2%.

17. Additionally, there is evidence which I have accepted that her pain persists, though, occasionally, to date. In this regard, I am guided by the Jamaican Court of Appeal case of **Sinclair (Richard) v Taylor (Vivolyn)** [2012] JMCA Civ 30, in which it was 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” (as per Phillip JA at paragraph 31).

I also bear in mind the principle stated in the case of **Roger McCarthy v. Peter Calloo** 2018 JMCA Civ 7 where at paragraph 28, Brooks JA stated that:

*"It may also be noted that Lord Carswell in **Seepersad v Persad and Another** (2004) 64 WIR 378, at page 388, at paragraph 15, sounded a cautionary note about reliance on older cases dealing with the award of damages. He said: "The Board entertained some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms"*

18. I find that of the cases presented by the Claimant **St. Helen Gordon and Anor v Roland McKenzie**, (Supra) is the most comparable to the instant case. In the case of **St. Helen Gordon and Anor v Roland McKenzie**, Ms. Gordon, a Bank Officer, suffered whiplash injury with pain centered around the neck and shoulder.

The medical evidence indicated that the whiplash injury was taking a long time to resolve although it was likely to improve with time but slowly. Ms. Gordon's injury affected her ability to lift the children in her care, do chores, use her right hand, drive a car and sleep on her right side. She was assessed as suffering a 3% whole person disability. She was awarded general damages of \$400,000.00 in the July 1998. That sum would today be valued \$2,124,169.

19. However, it is my view that the injuries in the above-mentioned cases are a bit more severe than these in the instant case. I note that the PPD in that case was 3%. That is 1% higher than in the instant case. Additionally, whereas in the instant case Doctor Waite's report speaks about occasional pain, in the ***St. Helen Gordon*** case the doctor found that the whiplash injury was taking a long time to resolve although it was likely to improve with time but slowly. Therefore, the inference I draw from that case is that at the last assessment by the doctor the injuries had not yet began to improve though there was a likelihood that it would. In the instant case by 2014 there was some improvement in Claimant's pain in her neck. The pain was now being felt occasionally. In the ***St Helen Gordon*** case, the Claimant experienced difficulties using her right hand and driving a car. There is no such complaint in the instant case. I am also mindful of the fact I should be careful in placing reliance on the ***St. Helen Gordon and Anor v Roland McKenzie*** case in light of the fact that it was decided in 1998.

20. I will now *examine the cases presented by the Defendant.*

(i) Sasha Gay Downer v Anthony Williams & Another

In the case of ***Sasha Gay Downer v Anthony Williams & Another***, the injuries sustained are as follows: -

- (a) Head injury with transit loss of consciousness
- (b) Whiplash injury
- (c) Lumbar spasms

- (d) Tender swelling to anterior aspect of left thigh Tenderness with swelling to left hip
- (e) In December 2003, the Consultant Orthopaedic Surgeon, noted the following complaints:
 - (i) Intermittent neck pains precipitates by; holding the neck in a fixed position; while writing; sudden neck movements and turning neck in bed.
 - (ii) Intermittent lower back pains precipitated by; prolonged standing; bending or washing clothes.
 - (iii) Radiation of pains from left side of lower back unto left groin and medial aspect of left thigh. Running also precipitated lower back pains.
 - (iv) Marked tenderness along both para cervical and both trapezius muscles
 - (v) Restriction of motion of cervical spine
 - (vi) Marked tenderness on palpitation of the midline as well as both erector spinal muscles.
 - (vii) Marked tenderness of left groin and adductor muscles
 - (viii) Mild tenderness in the abdomen
 - (ix) X-rays revealed loss of normal cervical lordis
- (f) The Claimant was diagnosed with:
 - (i) Cervical strain

- (ii) Mechanical lower back pains
- (iii) Strained abductor muscles of left thigh

(g) After physiotherapy she reported significant reduction in the neck and lower back symptoms but that standing for fifteen (15) minutes continued to precipitate lower back pains. She also complained of pain performing physical education and bending. She was diagnosed as having a PPD of 5%.

The award for General Damages was, \$1,005,150, which when updated values, \$2,910,062.23.

Racquel Bailey v Peter Shaw

In the case of ***Racquel Bailey v Peter Shaw*** there were some muscle spasm. After physiotherapy, there was some improvement. Three months later, there was complaint of pain on forward flexion, right lateral flexion and rotation of the spine. Examination showed:

- (a) Tenderness in the lower lumbar region
- (b) Mild muscular spasm
- (c) Ranges of movement were normal despite the pain
- (d) By the time of trial the Claimant had reached maximum medical improvement and suffered 5% permanent whole person disability. The doctor noted that the injury would restrict her daily life. She would be able to continue her job as an accountant clerk and that she would benefit from ongoing physical therapy during periods of

aggravation. Up to the time of trial, she was experiencing discomfort for sitting for long periods and bending forward, both of which her work requires her to do.

The Court of Appeal found that an appropriate award for pain and suffering was \$1,000,000. This is updated to \$2,895,152.19.

Anthony Gordon v Chris Meikle & Another

In the case of ***Anthony Gordon v Chris Meikle & Another***, the personal injuries, treatment and resulting disability are as follows:

- (a) Pain in lower back, left knee and left side of chest
- (b) Multiple bruises to right hand and left calf
- (c) Tenderness of left hip on movement
- (d) He was seen at the Mandeville Hospital where he was treated and discharged but continued to complain of pain.
- (e) On the 11th of December 1997 he was examined by Dr. Rose who diagnosed him with:
 - (i) Moderate tenderness on palpation of the midline of the whole of the lumbar spine
 - (ii) Cervical Strain
 - (iii) Contusion to the left knee
 - (iv) Lumbar sacral strain

(f) He was assessed with a permanent partial disability of 5% of the whole person. The award for General Damages was \$220,000.00. This is updated to \$1,168,020.80.

21. In reviewing the cases presented by the Defendant I find that the case of ***Racquel Bailey v. Peter Shaw*** offers the best guide for the assessment of the Claimant's damages. The effect of injuries and complaints in both cases appear to be somewhat similar. The other authorities do not offer much assistance. In the case of ***Anthony Gordon v Chris Meikle & Another*** the injuries suffered by the Claimant are somewhat different from those suffered by the Claimant in the instant case. In the case of ***Anthony Gordon v Chris Meikle & Another*** there were injuries to the left knee and left side of the chest, as also multiple bruises to right hand and left calf. In the case of ***Sasha Gay Downer (b.n.f.) Myrna Buchanan v. Anthon Williams & Another***, with the exception of the whiplash, the nature of the injuries suffered differs from those of the Claimant in the instant case. That is, the plaintiff also suffered head injury, lumbar spasms, tender swelling of the left thigh and left hip. In relation to her diagnosis, in addition to cervical strain and mechanical lower back pains the plaintiff was also diagnosed with strained abductor muscles of left thigh.

22. However, in the case of ***Racquel Bailey. v. Peter Shaw***, despite the fact that the main injury was to the lower lumbar region (lower back) the symptoms are similar to those of the Claimant in the instant case. In the ***Racquel Bailey*** case, after three months the Claimant was still found to be suffering from the effects of the accident. She had tenderness in the lower lumbar region.

She complained of pain on forward flexion, right lateral flexion and rotation of the spine. The complaints in the instant case were occasional neck pain which occurred with prolonged flexion of the neck as with rising; and occasional pain in the lower back (lumbar spine). Similar to the claimant in the instant case Ms. Bailey encountered discomfort while sitting for long periods. In the case of ***Racquel***

Bailey v. Peter Shaw, the doctor found that she that will be able to continue as an accountant clerk but would be restricted in her daily life as a result of the injury.

23. In the instant case, Dr. Waite found that the injuries may affect or continue to affect activities of daily living and work, especially with activities that involve flexion and loading of the neck; such as reading, using a computer, sleeping with a pillow and prolonged sitting. In the ***Racquel Bailey. v. Peter Shaw***, the doctor spoke about periods of aggravation which can be compared with Doctor Waite's prognosis that the Claimant's pain in the instant case may have a period of exacerbation. Therefore, I am more persuaded to rely on the case of ***Racquel Bailey v. Peter Shaw*** in making the award in the instant case. However, I will have to make the necessary adjustment in light of the differences between both cases. I note that the Claimant Racquel Bailey had reached maximal improvement at a PPD of 5% while the Claimant in the instant case has a PPD of 2%.

Consequently, it is my view that the Claimant's award should be less than the award to Ms. Bailey. In making this award, I take into consideration the fact that the Claimant still feels pain in her neck and back, albeit, occasionally. I also take into account, the fact that she is no longer able to play net ball. In all the circumstances, I believe an award of 1.9M is appropriate for pain and suffering and loss of amenities.

LOSS OF EARNING CAPACITY OR HANDICAP ON THE LABOUR MARKET

Submissions

On behalf of the Claimant

24. In summary, the submissions by Ms. Coley Nicholson for the claim for an award under this head of damages are as follows:

The Claimant, now 43 years of age, has another 17 years before age 60 which is the end of her estimated working life. It is public knowledge, through media reports, that her employers, the JUTC, regularly retrenches workers due to massive continuing operational losses. The risk of her losing her present job before the end of her working life is, in all circumstances, not a fanciful one. Should the risk materialize, the medical evidence is that her competitiveness on the labour market is likely to be affected during periods of remission and exacerbations of the neck pains; the timing and extent of which cannot be predicted. Also, the neck and back conditions detailed in Dr. Waite's medical report can worsen; the timing and extent of which cannot be predicted. These may continue to affect activities of daily living and work especially with activities that involved flexion and loading of the neck; such as reading, using a computer and prolonged sitting. The Claimant chances of getting a job or an equally well paid job are likely to be affected. As the risk is neither fanciful nor slight, the Claimant's award for his head of damage should not be too low or too high. A sum of \$1 million is therefore recommended as appropriate. She relies on the, authorities of the ***Attorney General v Ann Davis*** Supreme Court Civil Appeal N0. 114 of 2004 and ***Moeliker v A Reyrolle Co. Ltd*** [1977] 1 All ER 9.

On behalf of the Defendant

25. Counsel for the Defendant submits that:

There is no evidence, medical or otherwise that the Claimant will lose her job, be thrust onto the job market and be disadvantaged, physically or financially. At the date of the accident, she was an accounting clerk receiving a salary of \$58,473.37. Since the accident her salary has increased to \$66,000. She is still in the same employment after nine years. There is no evidence that she was financially disadvantaged from not attending work. There is no evidence that her duties were changed to accommodate her injuries. There must be some evidence to show that she is at risk of losing her employment at some future time during her working life and then will suffer some financial loss because of her disadvantage on the labour

market. (She refers to the case of **Attorney General v Ann Davis** Supreme Court Civil Appeal NO. 114 of 2004).

Analysis

26. The bases on which an award for loss of earning capacity should be made was succinctly stated in the English Court of Appeal case of **Moeliker v A Reyrolle Co. Ltd** (supra). At page 16 Browne, L.J. stated that:

*"But what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market...Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job be thrown on the labour market? I think the question is whether this is a 'substantial' risk or is it a 'speculative' or 'fanciful' risk. ...Scarman, L.J. in **Smith v. Manchester Corpn.** (1974) 17 KIR 1 referred to a 'real' risk, which I think is the same test. In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with the facts of particular cases."*

At page 17, he further stated that

"The consideration of this head of damages should be made in two stages:

1. *Is there a 'substantial' or "real? 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 the financial damage which the plaintiff will suffer if that risk materializes, having regard to the degree of the risk the time when it may materialize, and the a 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."*

27. Therefore, in order to qualify for an award, the Claimant must satisfy both conditions stated above. If she fails to satisfy the first condition, there is no need to go on to consider whether she has satisfied the second condition. Her claim under this head would have failed.
28. Ms. Wright testifies that she is 33 years old. The pain has affected and continues to affect her attendance and performance at work. She is unable to sit for long periods or hold her head down to read or type documents for long periods. These are requirements to do her job as an accounting clerk. Currently, she has to take breaks during the work day in order to alleviate the pain. She went back to work within three (3) to four (4) days. She further admitted that she was an accountant clerk in 2008 and is still an accountant clerk and that her salary has increased since 2008.
29. In light of the evidence given by Ms Wright, it is apparent that not only has she retained the position she held previous to the accident but her salary has also increased. Therefore, despite the presence of her injuries up to the time of trial she was not placed at a disadvantage on the labour market. That is her earning capacity has improved. Additionally, she has presented no evidence of a substantial or real risk that she will lose her present job at some time before the end of her working life. Ms Coley Nicholson in her submission points to JUTC having laid off persons in the past. However, I am duty bound to examine the evidence and the circumstances as it relates to the Claimant herself. After 9 years she has still retained her position in the Company with a salary increase. Counsel's submission in the absence of any supporting evidence is no basis for me to conclude that JUTC is likely to lay off the Claimant because the Company had previously laid off other persons. In any event, the Claimant has furnished no evidence of any impending lay off in relation to JUTC.
30. In fact, in the case of **Godfrey McLean v the Attorney General** (SCCA 46/98), the Claimant who was a fireman was assessed as having a permanent partial disability of 15% to 20% of his right lower limb. This caused him to walk with a

limp. However, despite having this disability he was promoted after the accident. In his evidence, the court was told that he was afraid that his physical disability would render him being placed on early retirement. This Court, in denying the Claimant this portion of his claim for an award for handicap on the labour market, said *that*:

"An award cannot be made in respect of a baseless fear". (See pages 10 to 11)

31. In the case of **Wayne Ann Holdings Limited (T/A Super Plus Food Stores) and Sandra Morgan**, [2011] JMCA Civ 44 at paragraph 51 the court stated that:

"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."

32. However, in that case the court further stated that:

"in order to succeed there must be evidence of a substantial risk as opposed to a minimal risk that a claimant will be placed on the job market. In its appraisal, the court must first consider the prospect of a substantial risk of a claimant being thrown on the job market. If such a risk is found, the court should then assess and quantify it."
(See Paragraph 52).

33. In the case of **Dawnette Walker v Hensley Pink** JM 2003 CA 27, [2003] 6 JJC 1203, the Claimant a police officer, for a period of about one year and four months after the accident was sick and was granted leave for the said period. When she resumed duties, she was given light duties in the investigation unit, the same unit to which she had been assigned prior to the accident. This assignment of duties was based on medical advice. The duties involved the investigation of sexual

offences; matters relating to children; driving motor vehicles and lecturing. These duties, entailed numerous writing of statements. Due to her injuries, these caused her pain. Consequently, after one month, she was assigned to the Mediation Unit. Due to her illness, she was summoned by a medical board of doctors in September 2000 and the said board confirmed the recommendation of light duties. In March 2000 she had applied for re-enlistment. She was granted one year instead of the usual five years. In March 2001, she again applied and was granted the additional four years. At the date of the accident, she was a constable. By the date of the hearing in December 2001, she had been promoted to the rank of Corporal. The Court of Appeal found that she should not have been granted an award for handicap on the labour market.

34. In its reasons for its decision the court was influenced by the fact that:

- (a) The Claimant had retained her previous employment;
- (b) Any injury or pain she was feeling had not affected her employment to the extent that she is underpaid. To the extent that she felt that she may lose her job or further upward mobility; the court reinforced the point that the award is not based simply on a feeling or a fear but real or substantial risk. (See the Judgement of Panton JA.)

35. The court further stated that the Claimant had not satisfied the first stage.

“There is no evidence that she is at any risk at all that she will lose her job before the end of her estimated working life. There is no necessity therefore to proceed to the second stage. There should not have been any award for handicap on the labour market”. (See the judgment of Harris JA)

36. In light of the above mentioned authorities, and my assessment of the evidence, I find that the Claimant has failed to establish any real or substantial risk that she will lose her job before the end of her estimated working life. Therefore, she is not

entitled to an award for loss of earning capacity. I take the view that despite the fact that the Claimant states that she continues to experience pain, this can be and has been adequately addressed in the award for pain and suffering and loss of amenities. (See **Dawnette Walker v Hensley Pink** (Supra). Therefore I made no award for loss of earning capacity.

Orders

Special Damages

Award: \$171,620.

Interest on Special Damages at a rate of 3% per annum from the date of the accident to the date of judgment.

General Damages

Loss of Amenities and Pain and Suffering:

Award: \$ 1,900,000.

Interest at rate of 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.