

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2004 HCV1061

BETWEEN ANGELETA BROWN CLAIMANT

AND PETROLEUM COMPANY FIRST DEFENDANT
 OF JAMAICA LIMITED

AND JUICI BEEF LIMITED SECOND DEFENDANT

Mr. Richard Reitzin instructed by Reitzen & Hernandez for the claimant.

Ms. Christine Mae Hudson instructed by K. Churchill Neita & Co. for the first defendant (appearance limited to the issue of costs).

Second defendant not represented.

March 22 & April 27, 2007

McDONALD-BISHOP, J. (Ag.)

1. Miss Angeleta Brown, the claimant, is now 29 years old. She is employed as a counter clerk at the second defendant's company. On May 13, 2002, while being employed in the same capacity, she was at work wrapping knives and spoons in a section at the back of the second defendant's building at its Lane Plaza Branch, Liguanea, St. Andrew. She was in the company of two of her co-workers.

2. Whilst there engaged in the execution of her task, an employee of the first defendant's company was in the process of refilling a commercial LPG cylinder in close proximity to where the claimant and her colleagues were working. The claimant started to smell escaped fumes of gas and spoke to the first defendant's

employee about it. Shortly after speaking to him, she heard an explosion and immediately she started to feel burning sensation all over her body but in particular to her hands and feet. She sustained extreme burn injuries to her body and was hospitalized for one month and two days.

3. Consequently, by claim form filed on May 4, 2004, she initiated proceedings against both defendants in negligence for damages for the injuries, losses and damages that she has suffered and continues to suffer as a result of the explosion. The defendants both failed to file a defence within the prescribed time and so interlocutory judgment in default of defence was entered against them for damages to be assessed. The defendants have both failed in their efforts to have this judgment set aside and so now the case falls for assessment of damages before me.

4. I will seek to assess general damages in accordance with the claim for damages under the orthodox heads: pain and suffering; loss of amenity and loss of future earnings or loss of earning capacity. In approaching that task, I will adopt the useful guidelines formulated by Wooding, C.J. in the Trinidad and Tobago case of **Cornilliac v St. Louis (1965) 7 WIR, 491** and will therefore take into account, in assessing general damages, the following:

- the nature and extent of the injuries sustained;
- the nature and gravity of the resulting physical disability;
- the pain and suffering which had to be endured;
- the loss of amenities suffered; and
- the extent to which, as a result, the plaintiff's pecuniary prospects have been materially affected.

PAIN AND SUFFERING

5. The aim of an award of damages under this head is to compensate the claimant for the pain and suffering which has been suffered in the past, that is, immediately following on the agony of the explosion itself and in its immediate aftermath and also for the pain suffered consequent on medical and surgical treatments. It is well established too that compensation should take into account

mental suffering and matters personal to the claimant that may increase the suffering. It may also take into account other less specific factors such as embarrassment, for instance, consequent upon facial scarring. The claimant's age and life expectancy may also be relevant if there is to be a substantial continuing period of pain and suffering (see: **Craig Osborne, Civil Litigation, Legal Practice Course Guides 2005-2006, p.12 (Oxford University Press).**

The nature and extent of the injuries sustained

6. The claimant's testimony that upon the explosion she felt burning to her body, in particular her hands and feet, has been confirmed by credible medical evidence from doctors attached to the University Hospital of the West Indies (UHWI) at which the claimant was admitted.

7. Dr. Rajeev Venugopal, plastic surgeon, in his report of May, 20, 2003 (exhibit 2) has certified to my satisfaction that on the day of the incident, the claimant presented at the Accident and Emergency Unit of the hospital with burns to her skin. He reported the nature and extent of the claimant's injuries as follows:

- superficial partial thickness burns to anterior head and neck of 4% Total Body Surface Area (TBSA);
- a combination of superficial and partial thickness burns of both upper limbs involving the distal arm, forearm and hands. The estimated TBSA involved of this region was 10%;
- deep and superficial thickness burns to the legs with 10% of TBSA involvement;
- assessment was of 24% total burnt area; and
- inhalation injury.

8. Dr. Derek Mitchell, consultant general surgeon at the UHWI, has also confirmed and certified, to my satisfaction, that the claimant, on the day of the incident, presented with flame burns to her face and limbs. He reported that there were partial thickness burns to the face (including both eyelids and ear lobes), neck, both upper and both lower limbs with an estimated 20-24% body surface area. It can

be accepted then, that the TBSA involvement was estimated at somewhere between 20-24%.

9. Upon admission to the hospital, the claimant received treatment that is summarized by Dr. Venugopal as 'acute burn care management'. That involved pain relief with narcotics, tetanus prophylaxis, fluid resuscitation, burn wound care with jet debridement and topical antibiotics and gastric prophylaxis with Rantidine. She was closely monitored for the initial 72 hours for any deterioration of her respiratory status and for adequate fluid retention. The wounds were managed with a closed dressing system with topical antibiotics and had daily dressings.

10. The claimant also testified that the joints in her elbow and hand became stiff and that she was unable to stretch her limbs. This necessitated physiotherapy. The medical reports do confirm that she was referred for physiotherapy for improving the joint range of motion and to prevent contractures. This was carried out on a daily basis.

11. The reports indicated that she made slow but steady progress which was uncomplicated. She was given dressing to improve the healing rate. She was also referred to the reconstructive surgeon for skin grafting. On June 4, 2002, split skin grafts harvested from her right thigh was applied to her right elbow and right ankle. The elbow was splinted following the procedure. She, reportedly, recovered well from the surgery and was discharged from hospital on or around June 15, 2002.

12. She continued to receive outpatient dressings and physiotherapy on a daily basis. Pressure garments were ordered for the limbs, as the risk of hypertrophic scars and keloid formation was high.

13. Photographs taken of the claimant while in hospital (exhibits 11A & 11B) revealed in a clear and indisputable manner the nature of the injuries sustained by the claimant. Extensive stripping of the outer layer of the skin (epidermis) in the

region of the face and limbs are duly noted. It does not present a pleasant sight. This supports her contention that her skin started falling off from her face and hands after the explosion.

14. Upon her discharge, she was reviewed by Dr. Derek Mitchell on June 26, 2003. By that time, he found her to be in general good health. She complained of pain to the right leg on prolonged standing. She also had keloid scars on her earlobes, forearms, hands and lower legs. Her face had healed and re-coloured to normal. This doctor opined then that he did not believe that there would be any further improvement in her physical appearance without reconstructive surgery. She was then referred for further reconstructive surgery.

15. The claimant, upon her discharge from hospital, was seen and treated on several occasions by Dr. Venugopal the reconstructive surgeon. He has documented her course of treatment and her progress over a five year period. It is seen that she had repeated infections in the keloid scars located on her hands and she had to undergo several corrective surgeries. She continued treatment at the plastic surgery clinic following on these operations.

16. The claimant was also treated by Dr. Yap, a consultant dermatologist, for further management of her skin injuries. In her report dated November 18, 2003 (exhibit 4) Dr. Yap reported, and I do accept it, that the claimant was seen by her on ten visits between November 6, 2002 and November 12, 2003. She documented the dermatological injuries as follows:

- superficial burn to the face and neck with post inflammatory hyperpigmentation;
- keloid formation along the helix of both ears;
- second and third degree burn to both upper and lower limbs with loss of epidermis and partial loss of the dermis. This resulted in keloid formation on the both hands, the forearms, the front section of the legs and along the helix of both ears.

The nature and gravity of the resulting physical disability

17. The claimant now has scars at the sites of injuries on her hands, feet and ears. Her face is, fortunately for her, back to normal and is showing no significant residual signs of her ordeal. Dr. Yap has reported that the hyper-pigmentation resulting from the burns to her face has resolved with treatment with no cosmetic disfigurement.

18. Dr. Yap found that the injury to the deeper tissues in her legs has impaired the blood circulation in her legs and so she will be required to wear supportive stockings for the rest of her life in order to improve circulation and to help to prevent leg oedema, which can cause the formation of leg ulcers. She also opined that the loss of pigmentation and an increase in pigmentation in some areas of the legs are permanent. The cosmetic disfigurement is assessed at 100% disfigurement for her legs. She will need to wear sunblock in the area where there is no pigment to protect her underlying skin in order to avoid skin cancer development from daily sun exposure.

19. When the claimant was reviewed by Dr. Venugopal in April, 2006 following on several surgical and non-surgical therapies, her complaints, apart from the appearance of the scars, were of pain in both ankles and an occasional "clicking" in her right elbow. Up to the date of trial, she still complained of pain in her ankle particularly after prolonged standing or walking.

20. Based on the final report of Dr. Venugopal dated May 14, 2006, (exhibit 16) in respect of his review of the claimant in April, 2006, and based on my own observations of the claimant, it is accepted that she is left with permanent unsightly scars that are secondary to the burn injuries and several reconstructive surgeries. There has been an overall improvement in her appearance but, according to the plastic surgeon, no further significant improvement will be expected. The scarring now remaining is permanent. This is significantly concentrated on her right forearm, left arm and on the dorsum of her left hand, both ankles, and at the donor sites for the skin graft-abdomen, groin and thigh.

21. In relation to the complaints of her joint pains to her elbows and ankle, the claimant was referred by Dr. Venugopal to the orthopaedic surgeon. She was seen by Dr. Phillip Waite, consultant orthopaedic surgeon, on January 31, 2007. Dr. Waite in his report dated January 31, 2007 (exhibit 22) indicated that the claimant complained of pain to both ankles and "cricking" to the elbows which was worse on the right. On examination she was assessed with early post traumatic osteoarthritis of both ankles and mild instability of both elbows.

22. She was treated then with steroid injections to both ankles and given analgesics. Despite the injections, she continues to have pain to the ankles. Dr. Waite opined, and I so accept, that these conditions are permanent and are expected to worsen with time, the timing and extent of which cannot be predicted. She was assessed by him as having whole person impairment in respect of the ankles at 12% disability and 2% in respect of the right elbow. Her total whole person impairment is assessed at 14% based on the American Medical Association's Guides to Evaluation of Permanent Impairment, Fourth Edition.

The pain and suffering which had to be endured

23. The claimant testified that following on finding herself burning, she was feeling pain all over her body. She was not able to get out the building immediately for medical attention as her path was blocked by crates of juices. She had to wait for the crates to be removed and for a taxi to arrive to take her to the hospital and during all that time she was in pain all over and her skin was falling off. While at the hospital, the pain continued and remained throughout her treatment.

24. The intensity of the pain and suffering of the claimant immediately following on the explosion and her time in hospital is also captured from the report of Dr. Mitchell, dated June 26, 2003 (exhibit 3) wherein he stated that "*in keeping with the partial thickness nature of the burns Ms. Brown was in severe pain and distress.*" Then, in highlighting the treatment administered, he continued:

“After tetanus prophylaxis and parenteral narcotic analgesia were administered she was admitted to the Tony Thwaites Wing of the University Hospital of the West Indies. Standard fluid resuscitation and burn wound care were instituted. The latter comprised twice daily water jet debridement and topical Flammazine® ointment to the wounds, except the face where topical tetracycline cream was used. Wound debridement and dressings comprised a large portion of each day (about five hours in total) and were associated with significant distressing pain. Intramuscular narcotic analgesia was required about forty minutes to each session.”(Emphasis mine).

25. Dr. Venugopal’s report dated May 20, 2003 (exhibit 2) also indicates that when the claimant was taken into the hospital on the day of the accident, *physical examination revealed a young female in painful distress.*”

26. This serves to confirm the claimant’s testimony as to the pain she endured during the cleaning and dressing of her wound and from the various treatment procedures, including injections, administered while in hospital. She also had to endure pain and discomfort during her convalescence following on surgical procedures. She has had at least three corrective surgical procedures that I accept were attendant with pain in their aftermath. She also had several episodes of repeated infections in the keloid located in her left arm and at the donor sites. She had to receive multiple intra-lesional injections at the keloid sites.

27. In speaking of the pain she had to endure while in hospital, the claimant said she has never felt pain like that before. She said she has never felt so much pain giving birth to her child by normal delivery. She spent over a month or so in hospital and she endured pain for all that time. Upon her discharge, the pain continued during her convalescence. She is still having pain, particularly in her ankles, and is still being treated by the orthopedic surgeon. Given the prognosis of the orthopaedic surgeon, this pain is likely to continue for the rest of her life given the degenerative nature of the osteoarthritis with which she has been diagnosed.

Psychological and mental suffering

28. The claimant testified that she became depressed after the incident. She felt terrible when she was unable to be with her child to celebrate her child's third birthday. She said she was terrified by the injuries in particular to her face. She had difficulty sleeping at nights both during her admission at hospital and upon her discharge. She frequently wakes up early in the morning. She reported having recurring recollections of the events which were frequently so for about two years after the incident. She is affected by the sight of a gas truck and becomes easily agitated and frightened on hearing explosions or on smelling gas. She avoids any activity, place or events that might remind her of the incident such as cooking.

29. She does not feel good about her skin. After been discharged from hospital, she was afraid to walk on the road and was afraid persons would see her. She has been troubled by the fact that her skin will not be any better. She was scorned once by a customer at her place of work who said she did not want her to serve her. She felt bad about that. People would also stare at her a lot and she had difficulties dealing with that. In the aftermath of the incident, she would cry frequently and although she is not doing this frequently now, she does so occasionally.

30. In March 2004, she attended for psychiatric therapy at the UHWI and was seen by Dr. Wendel Able, consultant psychiatrist. He certifies his examination and treatment of the claimant and gave his diagnosis of her condition by expert report dated March 23, 2004 (exhibit 5). He asserted that based on his interview with the claimant and after a review of medical notes on her condition and a review of the Diagnostic and Statistical Manual of Mental Disorders (DSM IV), he concluded that the claimant was suffering from 'Major Depression-Moderate and Post Traumatic Stress Disorder' that she had developed after the accident.

31. Dr. Able opined that the claimant has made some improvements to the extent that she is able to function on the job but that the incident has impacted on her ability to undertake some role functions such as cooking. He also found that the

degree of disfigurement to her nostrils and to her upper and lower limbs has affected her body image and is a source of emotional distress. She was treated with antidepressant and referred for psychotherapy to deal with the depression and Post Traumatic Stress Disorder.

LOSS OF AMENITY

32. An award for loss of amenity is to compensate the claimant for the loss of quality or reduced enjoyment of life. It is indisputable that the claimant has a residual disability and cosmetic disfigurement. She also stated that she is unable to stand or walk for prolonged period. At work, she sits for the performance of her duties. At home, she is unable to do all she used to do prior to her injuries. She cannot wash with her hands anymore as her skin at the finger tips strips and burns her. She is not able to run anymore due to the pain in her ankle and she cannot manage to lift things because of her elbow.

33. She enjoyed going to the beach and wearing her bikini and she stopped doing so for a while and is now trying. She is however not comfortable when she goes to the beach because of the unsightly scars on her thighs and abdomen (donor sites for the skin graft) and on her forearm, in particular. The injuries have clearly affected her enjoyment of life. This is loss of a good thing in itself for which she must be compensated.

THE EXTENT TO WHICH THE CLAIMANT'S PECUNIARY PROSPECTS HAVE BEEN MATERIALLY AFFECTED

34. The claimant is entitled to an award for any prospective pecuniary losses that are reasonably likely to flow from the injuries sustained. Under this head, the claimant has claimed for loss of earning capacity.

35. At present, the claimant is a counter clerk earning an average net income of \$18,531.00 per month. She has achieved a secondary education but was not able to sit any examinations on completion due to impecuniosity. She has had no formal

academic qualification or vocational training. She was working with the second defendant's company for six months prior to the explosion. Before that she worked with Mother's at Liguanea for about three months then at a garment factory for about three to four months and with a telemarketing firm at Kingston Freeze Zone that eventually closed down. It was after leaving the telemarketing firm that she went to her current employment. She admitted that she is not qualified to do any other job than that which she is currently doing.

36. The claimant has not been given any assurances by the second defendant as to any long term employment there. She is having difficulties working now due to the problem with her ankles. Sometimes she has to take time off due to the injury to her ankle. In a nutshell, the claimant's injuries are affecting her ability to function on the job, even now. In fact, Dr. Waite's prognosis is that she will suffer from osteoarthritis which clearly will have a debilitating impact on her daily life. She has stated that due to problems with her ankles, she would sometimes take sick days without pay when she exceeded her leave limit. The doctor has, however, not gone as far as to say that it will prevent her from working or impair her capacity to work, at all.

37. In considering an award for loss of earning capacity as claimed, I will follow the lead afforded by Lord Scarman in **Smith v Manchester City Council (1974) 17 KIR,1**. In so doing, I will seek to examine the claimant's case within the framework of the first component identified by Lord Scarman and that is whether as a result of the accident the claimant can no longer earn or is no longer earning her pre-accident rate of earnings. In other words: is there an existing reduction in her earning capacity which can be calculated as an annual sum?

38. The claimant has been retained in her pre-accident position although she was assigned different duties upon her resumption. There is no evidence that she has suffered an alteration in her income upon resumption as a result of the accident. The employer has tried to make her job more comfortable by allowing her to sit while acting in the execution of her duties. This should substantially alleviate the pain and

suffering attendant on prolonged standing. I see no proven existing diminution in her rate of earnings as a result of the injuries. There is thus no existing reduction in her income that is clearly indicative of a loss of income for the future.

39. This takes me to consider the claimant's situation within the context of the second element advanced by Scarman L.J in **Smith** (supra) where he stated:

"The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market?"

40. This principle forms the core of the principles later enunciated in **Moeliker v A. Reyrolle & Co Ltd [1977] 1 W.L.R. 132** and which have been followed within this jurisdiction. I am so guided by those principles that the court can only make an award for loss of earning capacity or handicap on the labour market if there is a substantial or real and not merely a fanciful risk that the claimant will lose her present employment at some time before the estimated end of her working life.

41. In **Tyne v Wear County Council [1986] 1 All ER 567**, Lloyd, LJ stated that the risks that a judge would have to assess in examining the question of loss of earning capacity are of two kinds: first the court will have to consider whether the claimant would be more likely to lose her present job on account of her disability; and second, whether the claimant would be less likely to get another job on account of her disability should she lose her present job for whatever reason.

42. Based on the evidence of the level of qualification and the work history of the claimant, I am persuaded to the view that even though she is currently employed, there is no guarantee that she will be employed for the rest of her working life with the second defendant. There is, indeed, nothing pointing to security of tenure in her current employ as Mr. Reitzin has pointed out. I also conclude that due to the residual effects of her injuries, there is a real and substantial risk that she might not be able to continue to work in her present employment at sometime in the future on account of her disability.

43. There is also a real and substantial risk –as opposed to a fanciful one- that she might one day, before the end of her working life and for whatever reason, lose her present employment and will be thrown on the job market to compete among other unscarred, healthy and pain- free women of similar standing. There is a real and substantial risk that if this were to happen, she would be placed at a disadvantage due to her impairment. I would hold that the claimant is entitled to an award of damages for loss of future earning capacity or handicap on the labour market.

QUANTIFICATION OF THE AWARD

44. In quantifying the awards, I must say that once again the court is called upon to ‘measure the immeasurable’ and to ‘calculate the incalculable’. It is not an easy task when it is an absolute impossibility to measure pain and suffering in terms of money and to award money for the uncertainties of the future. Yet, the best I can do is to attempt to compensate the claimant by way of money. In so doing, I would heed the words of Lord Blackburn in **Livingstone v Rawyards Coal Co. (1880) 5 App. Cas. 25 at 39:**

“Where an injury is to be compensated by damages, in settling the sum of money to be given... you should as nearly as possible get at that sum of money which put the person who has been injured... in the same position he would have been in if he had not sustained the wrong.”

45. How I do this is another issue. Lord Denning, M.R. in **Ward v James [1966] 1 Q.B. 273 at 275**, said:

“...the award of damages in personal injuries cases is basically a conventional figure derived from experience and from awards in comparable cases.”

Lord Diplock in **Wright v British Railways Board [1983] 2 All ER 698 at 699** stated:

“Any figure at which the assessor of damages arrives can be nothing but artificial and if the aim is that justice meted out to all litigants should be even-handed instead of depending on the idiosyncrasies of the assessor, whether jury or judge, the figure must be “basically a conventional figure derived from experience and from awards in comparable cases.”

46. I am, therefore, mindful that I have to aim to do the best I can with comparable awards as my yardstick while of course bearing in mind that no two victims are alike or will be affected in identical ways by the experiences in their lives. There is, indeed, no precedent for the award of damages in personal injury cases.

Award for Pain and Suffering / Loss of Amenities

47. Mr. Reitzin has submitted that the burn injuries are 'particularly horrendous and in and of themselves are unspeakably agonizing.' He also submitted that the treatment of the wounds caused 'further excruciating and distressing pain.' After indicating the treatment to which the claimant was subjected and the psychological trauma she recounted in evidence, he submitted that there are no reported cases in which the victim suffered quite as the claimant did in this case.

48. He directed my attention to three cases that in his view present the best insight into comparable awards for injuries of this nature. It is to an examination of these cases that I will now turn. Before doing so, however, I must pause to commend Mr. Reitzin for his assistance to the court in furnishing a glossary of the medical terms that are used in the medical reports on which he sought to rely. I believe that it could be of great assistance to the court, and, I am sure, to all concern in the deliberation of these matters, if a glossary of medical terms is submitted with the medical reports, particularly, when the parties do not intend to call the doctors at trial. In my view, it would serve to promote better understanding of the injuries sustained and would also facilitate ease of comparison among cases.

49. I will now examine the cases cited. In **Shernette Williams (infant by mother and next friend Pamela Gabbidon) v Oscar Mills** reported in **Khan's, Recent Personal Injuries Awards, vol. 5, p. 212** (assessed November 1998), the claimant was 7 years old and was injured on December 11, 1989 when a cooking gas cylinder exploded. She sustained extensive flame burns to her head, neck, chest, both upper and both lower limbs. Her TBSA involvement was assessed at 35- 40% and were of

mixed partial and deep partial thickness. She spent a month in hospital and her management consisted of resuscitation with intravenous crystalloids, whole blood and fresh plasma, intravenous antibiotic, local care and dressing of the wounds and general supportive care. Her injuries were considered serious.

50. She was left with hypertrophic scars on her face and areas of hyper-pigmentation and hypo-pigmentation to the other burnt areas. She was referred to the plastic surgeon for continued management. The surgeon reportedly saw her in 1990- within a year or so of the injuries- where he noted scarring of her entire face including the ears. Most of the scars were superficial and should improve with time. She suffered scarring to the complete surface of her upper limbs which were mostly superficial. The burns to the right hand were deep and affected the entire dorsum of the hand and fingers. Both lower limbs were scarred from just above the knees to the top of the foot.

51. The doctor opined that the plaintiff could benefit from reconstructive surgery to improve her appearance but despite such intervention, she would always be left with tell tale signs of her unfortunate accident. Surgery would involve skin grafting and tissue expansion. Tissue expansion would have required two operational procedures which would have been expensive. He gave an estimation of surgical costs. There is no evidence that she had corrective surgery up to the date of trial.

She was awarded \$950,000.00 for pain and suffering and loss of amenities. When updated with the current CPI of March 2007 at 2449.4, this translates into an award of \$1,983,404.36.

52. It is seen that **Shernette Williams** was younger than the instant claimant at the time of the accident. It is noted, though, that her assessment took place almost nine years or so after the accident. She would have been around 16 years old at the date of assessment. Given her age, she would have had an expected longer time to live with the residual effects of her injuries than this claimant. This would justify a higher award in **Williams'** case on this ground.

53. In addition, **Williams** evidently had more extensive burns than the claimant given her TBSA involvement. This again, without more, could be a justification for giving this claimant a lower award. However, given the paucity of the information reported, all we know is that **Williams'** attending specialist had indicated that she could have benefited from reconstructive surgery. There is no indication that she was subject to any reconstructive and corrective procedures following on her treatment in hospital. There is clear evidence in the case at bar that the claimant has had several such procedures and therapies which would involve additional pain and suffering over and above that sustained as a result of the initial 'core injuries'.

54. Given that **Shernette Williams** got burnt to a greater area of her body surface, I will accept that her initial pain and suffering in the immediate aftermath of the accident could have been greater than the claimant's. She was a child whose threshold for pain and discomfort could have been lower. It is not clear though whether at date of assessment she complained of residual pain as in the case of this claimant. In fact, it would seem that the court only had one major report from a plastic surgeon while in this case the claimant had received intensive and extensive treatment from several specialists.

55. The claimant in this case seemed to have sought almost every possible available treatment option to remedy the injuries sustained. By the date of assessment, being almost 5 years after the incident, she has practically attained maximum medical improvement. The full extent of her injuries, treatment and resultant disability are thus available before the court for consideration. In the absence of evidence, it is hard to say if this was the situation in the case of **Shernette Williams**. It would appear that no updated medical report was before the court at the time of her assessment.

56. This claimant is also suffering from orthopaedic complications which left her with a whole person disability of 14%. Again, the residual disability of **Williams**, if any, apart from scarring, is not reported and so this is an additional component

available to be taken into account in the assessment of the injuries in this case that seems not to have been present in **Williams**.

57. This claimant has also been formally assessed as having psychological suffering due to the accident. This factor seemed to have been absent in the assessment of **Williams**. I am not able to say, on what is reported about that case, that any evidence of psychological effect was led and whether the award had such a component. The absence of what was the evidence before the court in **Williams'** case is a serious draw back for a proper comparison to be undertaken. The claimant in this case must be compensated for this additional element of her mental suffering that flowed from the injuries.

58. I cannot simply use the mere fact that **Williams** was younger and had a higher TBSA involvement, without more, to say that her pain and suffering and loss of amenity would be much greater than the claimant's. The terseness of the report as to the evidence in **Williams** has served to militate against a proper comparison between the two cases. This claimant is shown, on the evidence before me, to have suffered and is likely to suffer, more than **Williams** in the circumstances as documented in relation to **Williams**. I have to act on the evidence that is available in this case to arrive at a reasonable award. I will, nevertheless, use the award in that case as a guide.

59. In **Alfred Thomas v Pastry Specialist reported in Harrison's, Assessment of Damages for Personal Injuries, pg. 227** (damages assessed July 22, 1992), the claimant sustained injuries on December 19, 1989 after an oven exploded at the defendant's pastry establishment. He sustained superficial burns to his face and upper limbs estimated at 35% of his TBSA. He was admitted in intensive care for three weeks at the UHWI and continued as an outpatient at the Comprehensive Health Clinic for ten months.

60. He had permanent disfigurement by scarring along his face and upper limbs to about 35% of his body surface area. It was thought that corrective surgery could have provided partial improvement in some areas. It was also thought that he would have one operation and would be in hospital for a week. He would need pressure garments for six months. There is no evidence that at the time of assessment he had undergone any corrective surgery. He was awarded a sum for future treatment which would suggest that treatment would be done after assessment. His award of \$275,000.00 for pain and suffering and loss of amenities is updated to an award today of \$1,685,226.42 using the relevant consumer price indices.

61. By way of comparison, the TBSA involvement in **Thomas**, like in **Williams**, is greater but the wounds were noted to be primarily superficial unlike in this case where they were deeper. This claimant's period of treatment was longer and course of treatment far more extensive. She is required to wear pressure garments for the rest of her life while **Thomas** needed it for only six months. This claimant has 100% cosmetic disfigurement to her leg which, I believe, would affect her as a woman more than it would a man. She has resultant orthopaedic complications in relation to her elbows and ankles. This has left her with a combined 14% whole person impairment. **Thomas** had no reported functional disability.

62. There is also evidence that the claimant suffers psychologically resulting in her diagnosis with Post Traumatic Stress Disorder. This added component is absent from the reported circumstances in **Thomas**. I would say, in sum, that when all the variables are considered and compared, this claimant seems to have been exposed to greater pain and suffering and has suffered greater loss of amenity than **Thomas**. Her losses would be more extensive than **Thomas'**. In my view, given the quality of the evidence in this case, there is enough to justify an award at a higher end of the scale.

63. The latest reported decision in respect of injuries of this nature is that of the claimant's co-worker, **Vanura Lee v Petroleum Co. of Jamaica Ltd. & Juici Beef Limited 2003 HCV1517, delivered December 16, 2004 (unreported judgment of**

Straw, J. She was injured in the same explosion as the claimant. **Vanura Lee** suffered partial thickness burns to an estimated 27% of her body. She was administered the same treatment as this claimant in the immediate aftermath of the explosion. She, however, responded very well to treatment. She spent three weeks in hospital and Dr. Mitchell (same doctor as in this case) reported that she made excellent progress and her wounds healed well.

64. **Vanura Lee**, from all indications, seems to have fared better than the claimant whose progress was, reportedly, slower. The claimant had to receive treatment to accelerate her rate of healing. Her scars also became infected on several occasions. There is no evidence that **Vanura Lee** had to undergo any reconstructive surgery although at the date of trial raised scar formations were noted on both arms. She was referred to a plastic surgeon, Dr. Arscott, who, it is reported, might have been able to improve her physical appearance. Up to the date of trial, she had not gone to see the plastic surgeon and she made no claim for future treatment. In not undergoing reconstructive treatment, she would have been spared the pain and suffering and resulting scars (from donor sites) attendant on such treatment as experienced by this claimant.

65. **Vanura Lee's** assessment was done in 2004 just over two years after the accident. She was not exposed to the various treatment options like the claimant to improve her condition. She suffered from similar pains in her ankle and had to sit at work like the claimant but she was not attended to by an orthopaedic surgeon as the claimant in this case. Perhaps, had she been assessed today, her treatment history might have been different. The fact is, however, that I have to take this claimant as I find her and that is with all the treatments she has undergone and with all the pain and suffering that flowed from them. She has to be compensated for her subjective as well as her objective pain and suffering.

66. In addition, **Vanura Lee** was not formally assessed as having whole person impairment as in the case of this claimant. She, however, had complaints about pain

to her ankle, like the claimant, which would suggest some residual functional disability.

67. Both **Vanura Lee** and the claimant suffered psychologically. It seems, however, that the psychological effect on **Vanura** was a bit greater than on the claimant. **Vanura** is reported to have had suicidal thoughts. She was diagnosed by Dr. Ruth Doorbar, a consultant psychiatrist, with associated memory impairment which was absent in the case of the claimant. Dr. Able who also saw the claimant assessed **Vanura** in May, 2004- one year later- as having Post Traumatic Stress Disorder and Major Depressive Disorder as a result of the accident. He stated that the accident had impacted significantly on her personal and professional life and is a source of considerable emotional anguish.

68. **Vanura Lee** was awarded, in December 16, 2004, \$ 1,450,000.00 for pain and suffering and loss of amenity which, when updated, would translate to \$1,750,000. She was also awarded and \$300,000.00 for post traumatic stress disorder. This award updated would today stand at approximately \$361,000.00. That is a global sum of roughly \$2,100,000.00.

69. After a comparison of the reported circumstances of both cases, I am satisfied that the claimant has sustained injuries and endured pain and suffering greater than in the case of **Vanura Lee**. This claimant has had more extensive treatment and surgical interventions that have added to her pain and suffering and loss of amenity. She has also been proved to be left with a residual disability of 14% her whole person. Apart from her scars, which have permanently marred her cosmetic appearance like **Vanura's**, the claimant, is diagnosed with osteoarthritis which I accept to be a permanent condition that will not only subject her to present and future pain and suffering but will also affect her enjoyment of life itself. There is no report to suggest that **Vanura** has been so formally diagnosed and that she had problems with her elbow.

70. A fundamental point that seems to flow from a comparison of these cases is that, perhaps, had **Shernette Williams, Vanura Lee and Alfred Thomas** been subjected to all corrective procedures necessary for them to reach maximum medical improvement, the damages that flow from their injury might have been assessed higher than they have been. I cannot ignore the additional features of this claimant's case that are absent in the other cases. I have to act on the available evidence before me and this is particularly so given that the extent and nature of the evidence in the other cases selected as guides remain virtually undisclosed in the reports. At the end of the day, each case will have to turn on the available evidence and on its own peculiar circumstances.

71. Mr. Reitzin has submitted that the claimant should be awarded at least 50% more than **Vanura Lee** for pain and suffering putting it at an award of \$2,621,645.10 for pain and suffering and loss of amenities. The same consideration, he said, should apply to Post Traumatic Stress Disorder thereby making it an award of 542,409.33. It is my view that a sensible and fair award for pain and suffering and loss of amenities in the circumstances of this case, after using the comparable awards as my guide, would be **\$2,450,000**. This, I believe, is not only 'fair and sensible' but 'neither mean nor extravagant.'

72. I do not believe, however, that the psychological suffering of the claimant was greater than that of **Vanura Lee** as submitted by Mr. Reitzin. Again, looking at the report of Dr. Able who had seen them both, I formed the view that this claimant seemed to have fared better in coping mentally with her predicament. I will, therefore, award **\$340,000.00** for the Post traumatic Stress Disorder. The total award for pain and suffering and loss of amenities would, therefore, be **\$2,790,000.00**.

Loss of earning capacity

73. Mr. Reitzin has submitted that the claimant should be awarded \$3,335,693.40 under this head applying the multiplier/ multiplicand approach. He is claiming that there is a real risk that within two years or so the claimant might not be able to work

due to her disability. He asked that I use her average net salary of \$18, 531.00 as the multiplicand and 15 years as the multiplier. I see no medical ground on which to accept Mr. Reitzin's submission in this regard. The claimant has said she had to stop from work due to illness but there is no independent confirmation of that from her employers or a doctor so as to ground a finding that she is in a substantial and real risk of ceasing to work within two years.

74. Having examined the circumstances of this case and the relevant authorities on this point as they have been so ably explored and analysed by Sykes, J in **Ebanks v McClymont, Claim No. 2004HCV2127**, delivered March 8, 2007 and which I do not propose to repeat here, I see no reason to depart from the view of Straw, J in **Vanura Lee** that a lump sum global award is more appropriate in the circumstances of this case.

75. The question then becomes: by what should I be guided to determine this lump sum award? The practice in our jurisdiction has been to select a figure that appears to be a fair estimate of the claimant's prospective loss and a reasonable one to the particular assessor. The English approach, as indicated by Craig Osborne in **Civil Litigation** (supra), p. 17, is to award a sum equivalent to somewhere in the region of one year to one year and a half salary. This would be in an attempt to arrive at a fair lump sum award.

76. However, the question as to how the court should arrive at a lump sum award was dealt with in **Foster v Tyne and Wear** (supra). In that case, the plaintiff sustained personal injuries. The trial judge awarded him a figure that represented five times his salary for loss of earning capacity. On appeal against the award, it was argued that the sum awarded was far in excess of what was normal in cases of that kind and that it should not have exceeded twice the plaintiff's annual salary or a figure of that order.

77. The court rejected that argument that the figure was too high and that there is a normal maximum of two years loss of salary. Lloyd LJ, with whom the other judges agreed, stated at page 569 of the report in addressing this argument:

“I can deal with the second argument straight away because it seems to be contrary to one of the few principles which have so far been clearly established in this field by cases such as *Moeliker v Reyrolle* and *Herbert v Ward* (23 July, 1982) *unreported*.... That principle is that when it comes to establishing loss of earning capacity, there is no such thing as a conventional approach; there is no rule of thumb which can be applied. It would be so much easier if there were. But there is not. In each case the trial judge has to do his best to assess the plaintiff's handicap, as an existing disability, by reference to what may happen in the future. As has been said so often, that is necessarily a matter of speculation; it is necessarily a matter of weighing up risks and chances in all the circumstances of a particular case. The very fact that the approach must necessarily be so speculative means, of course, that the occasion on which the court will feel justified in interfering with a judge's assessment will be few and far between, for there is no established range or standard against which to measure the judge's award.”

78. It is clear, on the strength of this authority, that there is no conventional approach. I am here dealing with the future and the risks inherent in it. I cannot help but speculate. As difficult as it is, I will just have to weigh up the risks and chances in the particular circumstances of this case in order to arrive at a reasonable award. In looking at the substantial risk of the claimant losing her job or ceasing to work due to disability or for any other reason coupled with the real risk of her having to compete on the labour market with her impairment, I would award \$700,000.00 for loss of future earning capacity.

SPECIAL DAMAGES

79. The claimant has also claimed for special damages. It has long been established that special damages consist of those expenses and losses incurred by the claimant as a result of the defendant's breach and which are ascertainable and capable of specific proof. It has also been established by long standing authorities that the claimant can only recover under this head those expenses which have been specially pleaded and strictly proved as having been incurred as a result of the tort committed by the defendants. What constitutes special damages in regard to personal

injury cases is set out by Lord Goddard in **British Transport Commission v Gourley** [1956] A.C. 185 at 206 where he stated in laying down the distinction between general and special damages:

“In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future.”

80. The law as it relates to claim for special damages is so well settled that it is now trite. However, I have considered it necessary to restate the basic principles applicable to an award for special damages in order to explain my refusal of Mr. Reitzin's application to amend the particulars of special damages to include hospital expenses that have already been paid by the second defendant prior to the commencement of proceedings. These expenses have not been incurred by the claimant that would fall as out-of-pocket expenses. The claimant has suffered no loss in providing for her medical attention at the hospital immediately following on the explosion. As such, there has been no loss incurred by the claimant or anyone on her behalf other than the defendants who are the parties liable to meet such expenses. The claimant has not reimbursed the second defendant and cannot be asked to do so. I can see no basis in law or in fact to allow the claimant to recover the sum already paid for her hospital expenses by one of the defendants. To allow damages in that amount would certainly be double payment by the defendants which would be unjust enrichment of the claimant. For these reasons, the amendment to include such expenses was disallowed.

81. An amendment was allowed to the particulars of special damages in relation to expenses that were pleaded as continuing at the date of filing of the claim. This relates to payment for additional medical attention at the orthopaedic surgeon and costs of additional medical reports. The defendants were duly served with proper

notices to adduce the documentary proof of such expenses and so I see where they would not be prejudiced in any way by the amendment in this regard. Service of the amendment was thus dispensed with.

82. An amendment was also allowed for the claimant to plead transportation costs. This I accept as a reasonable incidence of her treatment and so the amendment was necessary to deal justly with the case. So, despite absence of documentary proof of her traveling costs, I accept on her evidence that she incurred the sum of \$7,000.00 by taking taxi to obtain medical treatment and physiotherapy following on her discharge from the hospital. The claim for \$15,000.00 is not substantiated by the evidence. It is, therefore, denied.

83. There is also claim under the head of special damages for the costs of stamp duty on claim form in the sum of \$2,000.00 and service fees for \$2,000.00. These have not been allowed as proper items for such an award. These would fall to be dealt with on settling the claimant's costs in the proceedings.

84. In the end, the claimant has pleaded and proved, to my satisfaction, the following items of special damages:

Medical expenses:	\$19,500.00
Transportation Expenses:	\$ 7,000.00
Costs of medical reports:	\$70,000.00

85. **DAMAGES ARE HEREBY ASSESSED AS FOLLOWS:**

Special Damages : **\$96,500.00**

Interest thereon at 6% p.a. from May 13, 2002 to June 21, 2006 and at 3% from June 22, 2006 to April 27, 2007.

General Damages:

Pain and suffering/loss of amenities:	\$2,450,000.00
Post Traumatic Stress Disorder:	<u>\$ 340,000.00</u>
	\$2,790,000.00

Loss of earning capacity: \$ 700,000.00

TOTAL: **\$3,490,000.00**

Interest on the sum of \$2, 790,000.00 at 6% p.a. from May 17, 2004 to June 21, 2006 and 3% p.a. from June 22, 2006 to April 27, 2006.

86. Costs to the claimant to be agreed or taxed.