



[2016] JMSC Civ. 79

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 06173

BETWEEN	JHAMIELLAH GORDON	CLAIMANT
A N D	JEVON PAUL DEVERE CHEVANNES	DEFENDANT

Richard Reitzin instructed by Reitzin & Hernandez for the Claimant.

Mrs. Camille Wignall-Davis instructed by Nunes Scholefield DeLeon and Company for the Defenant.

Heard: January 16, 23 & 28, 2013 & May 12, 2016

Assessment of Damages – Personal Injury – Proof of special damages – Self-employed, part-time worker - Whiplash – Mid and lower back – 2% permanent partial disability – Loss of earnings – Loss of earning capacity - or handicap on labour market – Method of quantification of damages – Lump sum multiplier/multiplicand.

Daye, J.

[1] The claimant, a hairstylist, filed a claim on the 4th October, 2011 to recover damages for personal injuries and loss for negligence arising from a motor vehicle accident.

[2] The accident occurred on the evening of the 11th November 2010 along Upper Mark Way, Cherry Gardens, St. Andrew. The claimant was a passenger in a taxi, where she was seated in the left rear seat. The defendant who was the driver of a white Honda motor car drove into the rear of this taxi when it was stationary. The defendant was at the time of the accident trying to pick up a cell phone that had dropped from him to the floor of the car.

[3] The defendant admitted liability in these circumstances. However the defendant disputed the claims for damages for personal injury and any loss to the claimant. In other words, the claimant was put to strict proof of damages. Further, the claimant must prove the alleged damages and/or loss to the standard of reasonable certainty.

[4] Phillips, J.A. in **Jamaica (Clarendon Alumina Works) v Lunette Dennie [2014] JMCA Civ 29** at para. [57] adopted the dictum of Bowen L.J. in **Racliffe v Evans (1892) 2 Q.B.** 524 at page 533 regarding standard of proof for claims for damages, viz:

“.....the character of the acts themselves which produce the damages and the circumstances under which these acts were done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularly must be insisted on, both in pleading any proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage was done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry”.

In other words, claims for damages must be strictly proved. This standard requires the claimant to produce evidence such as documentary evidence to support a claim before the Court will find the claim proved. In some cases, the court has allowed a flexible approach, rather than the strict one in proof of damages. The rationale for this course is that the circumstances of the particular case warranted acceptance of the claimant's

evidence without additional documentary evidence. This is a live issue between the defendant and the claimant in relation to each item of assessment of damages.

[5] In her evidence in chief, the claimant seeks a “fair and reasonable award of damages” on the following head of damages.

- (i) General Damages
- (ii) Interest on general damages from the date of service of the claim (22nd October, 2011) to the date of judgment at the rate of three (3%) percent per annum.
- (iii) Special Damages
- (iv) Interest on Special Damages from the date of the accident (11th November, 2010) to date of judgment at the rate of three (3%) percent per annum.
- (v) Costs (para. 81 Witness Statement, 8th January, 2013)

Pleadings
General Damages

[6] In her Amended Particulars of Claim to support her claim for general damages the claimant itemized (a) the injuries she sustained (b) the pain and suffering she experienced (c) her loss of amenities and (d) loss of earnings and (e) her disabilities.

Special Damages
Particulars of Special Damages

[7] She lists the damages as follows:

- (i) Medical expenses.....\$16,500.00
- (ii) X-rays.....\$6,100.00
- (iii) Physiotherapy.....\$42,000.00
- (iv) Pre-accident loss of net earnings..... \$3,060,363.47

The defendant accepted the first three items which were proved by documentary evidence. However he disputed the fact that there was any proof of the fourth item, pre-accident loss of net earnings.

Loss of Earnings

Rowe P in **Central Soya Jamaica Ltd. v Junior Freeman (1985) 22 JLR 152** indicated of loss of earnings among other things:

“In casual work cases, it is always difficult for the legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence”.

[8] The dictum confirms that loss of earnings is an item of special damages subject to strict proof taking into account the consideration identified.

[9] In this assessment of damages the particulars of the claimant’s loss of earnings were specified in her evidence in chief (para. 68-74 – of witness statement dated 8th January 2013).

[10] This is her evidence on loss of earnings which the defendant put to strict proof:

“68 At the time of the accident, I was employed as a domestic helper earning \$5,000.00 per week. I worked Monday to Friday from 9:00 a.m to 4:00 p.m.

69. I also used to do cosmetology – mostly hair styling by doing house calls. I was earning on average \$30,000.00 per week net cash in hand doing hair. Sometimes it was more, sometimes less depending on the amount of clients I had for the week and the service the customer required.

70. Prior to the accident, I was doing hair for five – ten (5-10) customers per week. For some customers, I would do grooming of locks, for which I would charge \$3,500.00 up to \$6,000.00 depending on the amount of growth since the last locking service. For other customers, I would do various chemical services, including relaxing, colouring and bleaching for

which I would charge an amount of \$2,000.00 up to \$3,000.00. For still other customers, I would sew in extensions for which I would charge \$2,500.00 or up to \$3,000.00 for “full house” extensions.

71. I used to buy supplies mostly from the wholesalers at Clock Tower Plaza. I would buy relaxers, hair colouring, hair treatment, sewing needles, threads, gloves and capes and so on.
72. After the accident, I had to stop the domestic work and I had to reduce the number of hairdressing calls altogether. I just couldn't manage the work anymore with my back being so painful the way it was and with all the travelling up and down.
73. On December 2010, I secured part-time temporary contractual employment with the Heart Trust/NTA as a Salon Operator. My pay for the month ending on 31 January, 2011 to 30th September, 2011 amounted to \$20,766.08 per month net.
74. From October 2011, I secured full time temporary contractual employment with the Heart Trust/NTA as a Salon Operator. My pay for the fortnight ending on 14th October, 2011 to 7th December, 2011 averaged \$16,464.25 net.”

[11] As for special damages, Lord Goddard showed that this consists of out of pocket expenses and loss of earnings up to the date of trial and loss of earning power in the future **British Transport Commission v Gourley [1956] A.C. 185 at 206.)**

[12] Alongside this evidence of lost earnings, there is the claimant's pleadings on the Amended Particulars of Claim. She alleges that her earnings went from an average of \$35,000.00 per week net prior to the accident to earning an average of \$20,766.00 per month from 10th December, 2010 to the 10th October, 2011 and then to \$16,464.25 per fortnight net from 10th October, 2011 to 7th December, 2012. [She] alleges she is currently losing an average of \$26,767.87 per week net ($\$35,000.00 - \$16,464.25 \div 2$).

Proof of Special Damages

[13] Cooke J.A. in **The Attorney General v Tanya Clarke (nee Tyrell) S.C.C.A. 109 of 2002** delivered December 20, 2004 summarized the principles that ought to guide a

court in its determination whether the claimant has satisfied the standard of proof in such damages.

[14] The learned judge, after examining the cases concluded (at p. 8. para. 3):

“From the authorities reviewed, I extract the following consideration:

- (1) Special Damages must be strictly proved **Murphy v Mills, Boham-Carter v Hyde Parke Hotel Ltd.** (supra)
- (2) The Court should be wary to relax this principle.
- (3) What amounts to strict proof is to be determined by the Court in particular circumstances of each case: **Walters v Mitchell; Great Grant v Montilel Moonow Ltd and Another** (supra)
- (4) In the consideration of (3) (supra), there was the concept of reasonableness:
 - (a) What is reasonable to ask of the plaintiff in strict proof in the particular circumstances: **Walters v Mitchell, Grant v Montilel Moonow Ltd and Another** (supra) and:
 - (b) What is reasonable as an award is determined by the experience of the Court: **Central Soya of Jamaica Ltd. V Junior Freeman**. See also **Hepburn Harris v Carlton Walker S.C.C.A. No. 40/900** (unreported)
- (5) Although not specifically stated, the Court strives to reach a conclusion which is in harmony with the justice of the situation. See, specifically **Ashcroft v Curtin; Boham-Carter v Hayde Parke Hotel** (supra).”

Submissions

[15] Counsel for the defendant relied on **Tanya Clarke** (supra) in her submission and bundle of authorities of twenty nine (29) cases. She submitted that the claim did not satisfy any of the principles of proof of special damages. She said that as far as loss of earnings and loss of earning capacity the claimant failed to:

- (1) Adduce objective evidence – from her expert witness that she would suffer permanent disability as a result of her injuries. The expert she says, merely rehearsed what was told by the Claimant.
- (2) to produce with any evidence or otherwise that she was employed as a domestic worker.
- (3) to produce documentary evidence or otherwise that she was earning \$5,000.00 per week as a domestic worker.
- (4) to produce documentary evidence or otherwise that she was a hairstylist/cosmetologist.
- (5) to produce documentary evidence or otherwise that she was earning \$30,000.00 per week as a hairstylist/cosmetologist.
- (6) to produce documentary evidence or otherwise that she was earning \$35,000.00 per week and a pre-accident earning of \$3,060,363.47. Counsel for the defendant contends there should be no award of damages sum for this.

[16] Counsel for the claimant in his written submission in reply dated July 28, 2013 rebutted the Defendant's Counsel's reliance on **Tanya Clarke**. He submitted that Cooke JA made an award for medical visits even though there was no documentary proof because he held such expense was incurred though difficult to prove.

[17] Counsel for the claimant went on to refer to over 30 cases to rebut the Defendant's submission. Over half of these cases were from the jurisdiction of Australia. Some of these cases from Australia were reported on a legal website – www.australia.edu.au. The Court will return to these submissions.

[18] The Court of Appeal, per Harris J.A. in **Cherry Dixon- Hall v Jamaica Grande Ltd. S.C.C.A.** No. 26/2007 delivered November 21, 2008 found that the doctor's evidence i.e. the expert, did not prove the victim's "lupus" condition was caused by accident. **Tanya Clarke's** case was clarified by Phillips J.A. in response to a submission that a judge could extrapolate a sum that is reasonable in all the circumstances for

special damages once there was a basis of the claim – **Jamalco (Clarendon Alumina Works)** (supra). She said at para. [43]:

“where there is no evidence as in that case in respect of “in vitro fertilization” that regardless of the empathy or sincere regret of the Court, relative to the condition of the Claimant due to the obvious negligence of the servant and or agents of the defendants, no award could be made in the absence of evidence which was ‘easily’ available.”

[19] Then Phillips J.A. went to summarize at para. [60] – the consideration that govern general damages for pecuniary loss for breach of contract. They were:

- (1) A person claiming damages must be prepared to prove their damages.
- (2) If the damages sustained is clear and substantiated, but the assessment of the same is difficult, the Court must do the best it can in the circumstances.”

[20] The judgment referred with approval to **Ashcroft v Curtin** in [1971] 3 All ER 208, for a negligence case where a judge gives an award for loss of earnings to the plaintiff even though proof of the loss is unreliable. On appeal the award was reduced by the Appellate judge who said he ran the risk of plucking a figure from the air.

[21] The Privy Council in **Angela Inniss v St. Christopher and Nevis** P.C. App. 29 of 2007 delivered July 30, 2008 approved the approach (para 19) that a lump sum award be made for special damages for breach of a contract of employment in circumstances where the opposing parties computed different sums for the award.

Quantification of award for Special Damages for loss of earning capacity

[22] There are different methods for computing and assessing the quantum of special damages for loss of earnings or income or handicap on the labour market. The defendant takes issue with the claimant’s method of computing loss of earnings, resulting in a claim of the sum of \$19,023,034.86. The claimant used the multiplier/multiplicand method. This means that the loss of earnings is measured by annual net earnings times a factor, the multiplier, to value the loss.

[23] The seminal case of **Moeliker v A. Reynolle & Co. Ltd. [1977] 1 All ER 9** established the principles applicable for loss of earnings. The Court held that there must be substantial and not merely fanciful risk that the claimant will lose her present employment before the end of her working life and be thrown into the labour market, in a less competitive position, before such an award may be made. The Court in **Smith v Manchester City Council (1974) 17 K. I. R.**, identified two aspects of this risk. First the claimant would be entitled to compensation for impairment to her earning capacity, if she was no longer earning or is no longer earning at her pre-accident rate of employment but if a job is found, the job is very likely to be less well paying than the pre-accident job if any.

[24] Second, if the person has not held a job, but there is evidence showing that the person is unlikely to work because of the injuries, then the lump sum method is used.

[25] Sykes J. summarised the different methods for quantifying loss of earning capacity in **Archer Ebanks v. Japther McClymouth** Claim No. 2004 HCV R172 delivered March 8, 2007 digested in Khan (5) They are:-

- i) “If the claimant is working at the time of the trial and the risk of loosing the job is low or remote then the lump sum method is more appropriate and the award should be low.
- ii) If the claimant is working at the time of the trial and if there is a real serious risk of loosing the job and there is evidence that if the current job is lost there is a high probability and the claimant will have difficulty finding an equally paying or better paying job then the lump sum method may be appropriate depending on when the loss is seen as likely to occur. The size of the award may be influenced by the time at which the risk may materialize.

- iii) If the claimant is a high income earner the multiplier/multiplicand method may be more appropriate.
- vi) The lump sum is not arrived by reference to any comparison with previous cases.
- v) If the claimant is not working at the time of the trial and the unemployment is a result of the loss of earning capacity then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment”.

[26] Counsel for the claimant sought to justify the multiplier/multiplicand method he used to claim nineteen million (\$19M) for the claimant’s loss of earning capacity. He discussed a range of cases in his written submission in reply to the claimant’s submissions (paras. 74 to 87). They confirm the principle that if there is a substantial loss of the claimant’s earnings even though there is no specific evidence of it the court ought to award a reasonable sum and not a nominal sum. Also that the claimant can suffer a loss in earning capacity arising from reduction of income as a result of an accident. Then the cases show that the court has a duty to evaluate the value of the risk or chance of the claimant losing his earnings before the end of his or her working life. These principles are not inconsistent with those of the English cases on loss of earning capacity. The Australian cases show how the principle can be applied to different types of claims.

Nature of Injury

[27] In all of this it is necessary to start by determining what is the nature of the injury of the claimant. The first medical report of Dr. Christopher Rose, Consultant orthopaedic surgeon who evaluated the claimant on November 28, 2012 prior to trial in December 2012 included the following:

1. He evaluated her after she underwent fourteen (14) sessions of supervised physical therapy.

2. She reported symptoms of pain in the region of her lower back and mid to upper back. Her pain was aggravated by standing stationary while attending to her clients, performing household chores – cleaning, cooking, bending to wash clothes and sexual activities.
3. Her income has fallen because she had to discontinue visiting client's home to clean their homes.
4. She showed no obvious painful distress.
5. There was no localized tenderness along the midline or para spiral muscles after examination of the cervical spine.
6. There was mild tenderness on palpation of the midline after examination of the dorsal spine.
7. There was no localized tenderness of the lumbo-sacral spine after examination.
8. Lumbo-sacral spine was normal after review of radiograph.
9. Impression 1. mild mechanical lower back pain, 2. mild dorsal spine strain.
10. Diagnosis is consistent with sprain/strain type injury.
11. Permanent, partial impairment rating is 2% of the whole person.

[28] The consultant's opinion was that though there were objective findings, such as limitation of range of motion on his examination it does not mean the patient's quality of life would not be affected by back pains. Doctor Charmaine Webb who examined the claimant on 11th November 2010 was of the opinion that the extent or permanence of this type of injury was difficult to predict. She explained that spinal injury may settle and the patient becomes asymptomatic but chronic back pain later in life can be a result of such injuries.

[29] The complainant reported to her she was a hairstylist and the occupation required her to stand for long hours. She had to discontinue her part time job because

of the bending and lifting. The part time job presumably was domestic work. When she was first seen by Dr Webb as an outpatient of Andrews Memorial Hospital she was diagnosed with a whiplash injury after the x-ray was done to her neck. She was treated with pain killers and a muscle relaxant. She complained of severe headaches and severe mid and lower back pain.

[30] The Particulars of Injuries and particulars of disabilities detail the various pains the claimant experienced daily. She claimed the pain affected her normal daily routine and occupation as she had to work with pain. Counsel for the defendant submitted that the medical expert testimony does not support the fact that she had any serious injury as a result of this accident nor does it prove she will suffer any real or substantial handicap or risk of losing her job as a hairstylist. In fact counsel submitted right after the accident she started a part time and then a full time job at HEART/NTA as a salon operator. This she said does not indicate any disability that will reduce her earning capacity. The claimant's counsel says her income has fallen and her case is one of reduction or depreciation of her earning capacity. What the court has to access is the value of the risk of her being thrown out the labour market and being at a disadvantage in the future.

Occupation

[31] There is some internal inconsistency in the claimant's case as to what is her true occupation. Her true occupation is critical to her claim for loss of earnings (\$3,060,363.47) and loss of earning capacity (\$19 million) and her claim for general damages for pain and suffering and loss of amenities (\$1.9 million). She reported to each doctor that her job at the time of the accident was a hairstylist (cosmetologist). But in her witness statement she testified that she was a domestic worker earning \$5,000.00 net per week. She also stated she worked as a hairstylist and earned an average of \$30,000 net per week. On one of her visits to Dr. Rose she said that she had to give up her part time job that demands lifting and bending. There is merit in defendant's counsel submission that this inconsistency affects her credit. In my view it affects the probative value of her evidence as to what forms the basis of her claim for special damages and general damages.

Findings

[32] In spite of this I find that at the time of the accident the claimant was working as a domestic helper and received \$5,000 per week. She also had a skill as a hairstylist and earned additional income from clients she had. I am unable to find she earned an average additional \$30,000.00 net per week from this job. Her evidence was insufficient in this area. She could have provided, which she did not, other evidence apart from documentary evidence which was readily available. I am not persuaded that she was self-employed mainly as a hairstylist and worked part-time as a domestic helper only. She stated in her witness statement she worked from 9 a.m. to 4 p.m. each day of the working week as a domestic helper. This is a full time job. I accept she supplemented her weekly income from doing jobs as a hairstylist. There would be a reduction in this income. The average income of \$30,000.00 net per week cash in hand is six times her weekly income from domestic work seems over valued in the absence of proof.

[33] I find the injury, though not severe, was painful and is aggravated by long standing. Though I think she could adopt and adjust at HEART/NTA to do her job without long standing. Nevertheless, she would have suffered some disability. This disability would result in a diminution in her income both from work as a domestic helper and hairstylist.

[34] This is a case where I have to make an assessment of her income doing the best I can on the evidence. In my view I find she was earning \$5,000.00 per week from domestic work and another estimated \$10,000.00, which is reduced to \$7,000.00 per week, from her skill as a hairstylist. She would suffer a reduction in income of domestic work of \$2,500.00 per week and \$7,000.00 per week from hairstyling. Reduced income would be \$9,500.00 per week or \$38,000.00 per month or \$456,000.00 net per annum. To my mind that would be her pre accident earning loss of earnings per annum and not \$3,060,365.40 as claimed or \$26,767,87.00 per week net.

[35] This finding would affect her claim for loss of earning capacity. Should the court use the multiplier/multiplicand method used by counsel? The difficulty of assessing loss or earnings due to inadequate and unreliable evidence lends itself to the application of

the lump sum method assessment of this head damage. This was the approach of the court in **Ashton v Curtin** (supra). The fact that the Consultant Orthopaedic Surgeon said she had not reached her maximum recovery also leads to some imprecision as to when she might be thrown on the labour market. It seems later rather than earlier. This is just another factor that warrants application of the lump sum method.

[36] Now taking into account what she presently earned as an hairstylist and she started this job just after the accident in December 2010 and she was still in the job at the time of trial and she was assessed at a 2% permanent partial disability of the whole person in my view the sum of \$1.4 million and not \$19 million is a fair reasonable amount for loss of earning capacity.

General Damages Pain and Suffering and Loss of Amenities

[37] The sum of money to be awarded for general damages for personal injury suffered by a claimant ought to be a sum as “nearly as possible” which put the [claimant] in the same position he would have been in if he had not sustained the wrong” (per Lord Blackburn in **Livingstone v Rawyards Coal Co. (1880) 5. A.C. 25 at 39.**

[38] This is basically a conventional figure derived from experience and from awards in comparable cases (per Lord Denning M.R. in **Ward v James [1966] 1 Q to 273 at 275.)**

[39] The Claimant requests an award of damages under this head in the sum of \$1,900,000.00. On the other hand, the defendant contend that a reasonable and fair award under this sum is \$1,200,000.00.

[40] Both Counsel submitted the different sums they requested for general damages for pain and suffering were based on local comparable cases. Counsel for the claimant relied on seven cases in his submission to support the request of the award of \$1,900,000.00. The defendant’s Counsel distinguished these cases on the grounds

that the injuries in those cases dealt with neck and back injuries whereas the claimant's injury was a minor lower back injury on the present medical evidence. Counsel in turn relied on seven other cases to support her submission that an award of \$1,200,000.00 was a reasonable award.

[41] It is rare and difficult to find a previous recorded case of injury to a party to be on all fours with the instant injury of a claimant at trial. The Court can only do its best and strive to make an assessment on closely comparable cases where the injuries are of the same nature and type. On the evidence of the claimant and her supporting medical reports, I accept the doctor's evaluation hereunder:

- (i) The claimant did experience pain to her head, neck and back and lower back on the day of the accident.
- (ii) The pain increased and continued to her neck, back and shoulders some four (4) days after the accident.
- (iii) She did not have any lacerations, abrasions or broken bones of the neck based on the x-ray results.
- (iv) She was treated with oral pain killers and ointment and this treatment was increased a few days after the accident.
- (v) The pain affected her normal daily household chores such as cleaning, cooking, washing and taking care of her five (5) year old child as well as also her sexual activity with her partner.
- (vi) The pain would be aggravated by long sitting, standing and bending and lifting of objects.
- (vii) The pain had an impact on her job as a domestic worker, though not to prevent her from doing domestic work completely.
- (viii) The pain had an impact on her job as a hairstylist/cosmetologist, though not to prevent her from travelling to do house calls and ceasing to attend to clients completely.

- (ix) Her pain improved with physiotherapy. At the time of trial, she had not reached her maximum recovery. So there is still scope for improvement of her pain and the resultant discomfort, disability and decrease in earning power.
- (x) The nature of the injury is of such that the pain can be aggravated by strenuous physical activity

[42] Briefly Counsel for the defendant relied on:

1. An updated award of \$1,276,041.00 for general damage in **Iris Smith v McPherson and Donald Oldfield** decided in June 2000 (Khan 5, 246). The injuries involved trauma to lower back and right side of the neck and lower back pain, lumbar sacral pain – spasm of neck and low back, post accident pain for 2 ½ years of lower back - 5% disability of whole person.
2. Updated general damages – pain and suffering of \$1,414,175.20 in **Patricia Steinot v Caribbean Products Ltd.** (Khan 5, 245) assessed in April 1992 - the injuries were - contusions of lower 1/3 of right leg. Contusions and muscle sprain over lumbar spine and over adjacent muscle to the right of spine, chronic lumbar sacral strain – sacro spinalis and restriction of forward flexion – therapy for lumbar strain for several years. Unable to stand or sit for long periods or to sleep on back or belly.
3. Updated general award damage for pain and suffering \$11,261,440.30 in **Barbara Brady- Barlia Investment Co. Ltd. v Vincent Loshusan and Sons Ltd.** (Khan 5, 252) assessed November 1998. The injuries were, among others, - severe lower back pains, marked tenderness along lumbo sacral

spine as well as both sacral joints – lower back pain aggravated by sitting for more than 1½ hours, bending and prolonged walking – again post accident complaint with radicular symptoms to both thighs – acute mechanical type lower back pains. 5% PPD of whole person.

4. Updated general damages, pain and suffering \$840,960.22 in **Cordella Watson v Keith James and Errol Ragbeen** (Khan 5, 256) assessed November 1997. Injuries were: – severe lower back pain – 3 years post accident had discomfort on left lateral rotation and flexion of the lumbar spine – blunting of sensation along the left lateral thigh and leg and mild tenderness of the lumbar spine – chronic mechanical back pains – lower back pain aggravated by prolonged lifting, bending and sitting – PPD 5% of whole persons.
5. Updated general damages, pain and suffering \$875,540.77 in **Anthony Gordon v Chris Meikle and Esrick Nathan** (Khan 5, 142) assessed in July 1998. The injuries were pain in lower back, left knee and left side chest – tenderness of left hip movement – 3 years post accident - moderate tenderness midline of whole of the lumbar spine – cervical strain, contusions to the left knee and lumbar sacral strain PPD 5% of the whole persons.
6. Updated general damages – pain and suffering \$1,145.1 in **Ronald Edwards v The Attorney General** assessed December 2010. The injuries were soft tissue injury to lower back, tenderness of the lumbar vertebrae region of the back and the erector spinal muscles of the back – PPD 5 % of the whole persons.

7. Updated general damages pain and suffering \$1,062,362.00 in **Velma Richards, Knel McDermott and Others v George Burnett** assessed March 2012. Injuries were injury to head and right leg – painful movement of the neck to his right – soft tissue injuries to chest and upper back – lower back pain – cervical strain and lumbar sacral strain PPD 2%.

[43] The injuries in these cases are mainly lower back injuries. They were moderate to severe. The PPD for the injuries were 5% of the whole person. These injuries would be more serious than the present claimant's claims and ought not to be for in excess of these updated awards. The one absent injury in most of the cases was pain to the neck. The claimant did have a whiplash injury caused by the accident and she did experience severe pains after the accident. At the time of her last medical examination by Dr. Rose this injury was not operative. However, account has to be taken of the pain caused by this injury.

[44] Briefly, the cases relied on by Counsel for the Claimant did cover neck and back injuries. They were:

- (1) Updated present value of general damages, pain and suffering \$2.8 million **Thomas Travis v. M. Shaw and Others** (Khan, 61) assessment July 1999. The injuries were: Student aged 11, damage to foot exposing tendons and bone – surgery de-bridge foot – admitted to hospital – skin draft – PPD 2% of whole person – foot scarred – limited in playing games, and running. I agree this injury in this case was more serious than the present claimant's.
- (2) Updated present value of general damages, pain and suffering \$2.4million **Marlene Wilson v. Edgar Cousins** (Khan 5, 162) assessed November 1996. The injuries were: injury to neck and back – tenderness over lower cervical and mid dorsal region of the spine – cervical spondylosis –C3- 6

but not abnormality in dorsal spine – pain radiating down to right shoulder – PPD not exceeding 10%. In this case also, the injuries and effect are more serious than the present claimant's and is therefore not a useful guide for this quantum of damages.

- (3) Updated present value of general damages and pain and suffering \$1.9 million in **Stacey Mitchell v. Carlton Davis and Others** (Khan 5, 146) assessed May 2000 injuries were: Student 19 – severe tenderness in back of head and neck – lacerations to the back of head – marked tenderness and stiffness of lower spine – pain around back and neck and waist – swollen and painful left arm causing difficulty in lifting weight. Assessed as having moderate whiplash – pain for four (4) months with partial disability and decreasing but intermittent pain for five (5) months. This injury is a whiplash. The instant claimant's whiplash injury played no part in the final evaluation of the claimant. This case was not a reliable case for quantum of damages.
- (4) Updated present value of general damages and pain and suffering \$2.3 million in **Cheston Campbell v Omar Lawrence** – Suit HCV 135 of 2002 assessed February 28, 2003. Injuries were: Correctional Officer aged 20 – motor vehicle accident – trauma to chest – severe pains – difficulty in breathing – trauma to back – severe pain and swelling – difficulty in walking for three (3) weeks – pain on moving neck and back – whiplash to neck – unable to walk for too long – stopped playing football and cricket. No PPD assessed. Whiplash injury is common with the instant claimant's injury to neck and effect on social activity. However, the case does not give a considered opinion as to the future effect on the employment of the victim. To that extent, the case is not a useful guide to quantum of damages.

- (5) Another case – **St. Helen Garden v Royland McKenzie** (Khan 5, 152)
Motor vehicle accident assessed in October 1998 for \$400,000.00.
Updated general damages and pain and suffering \$1.5 million and the
injuries were: Whiplash of back and neck. Pain around neck and
shoulders – x-ray showed no fracture. Assessed at 3% disability.
Household activity curtailed. Case fairly similar.

Having regard to all the cases cited and taking into account the present diagnosis on
instant claimant, I hold a reasonable award for damages for pain and suffering and loss
of amenities is \$1.4 million.

[45] **Conclusion**

Damages assessed as follows:

Special Damages –

Medical expenses - Agreed	\$75,199.00
Loss of Earnings	\$456,000.00
Loss of Earning Capacity or Handicap on Labour Market	\$1,400,000.00

Interest on Special Damages from date of accident Nov. 11, 2010 at rate of 3% per
annum to date of judgment

General Damages -

Pain and suffering, loss of amenities \$1,400,000.00

Interest on General Damages from date of service of the claim - October 27, 2012 to
date of judgment at the rate of 3% per annum.

Cost to the Claimant to be agreed or taxed.