[2020] JMSC Civ 75

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV03184

BETWEEN	**DONNA WATSON**	**CLAIMANT**
AND	**COUPLES OCHO RIOS LIMITED T/A COUPLES TOWER ISLE**	**DEFENDANT**

IN OPEN COURT

Mr Sean Kinghorn & Mrs Myoka Hudson-Buchanan instructed by Kinghorn & Kinghorn for the Claimant

Ms Roydine Graham instructed by Samuda & Johnson for the Defendant

Heard: January 7, (14 and 21, submissions) and May 15, 2020.

Negligence – Employer's Liability – Occupier's Liability – Contributory negligence – Safe system of Work – Credibility of witness – Damages – Assessment – Personal Injury – Handicap on the labour Market

LINDO, J.

[1] The Claimant, Donna Watson, (Ms Watson) was a Room Attendant employed to the Defendant, Couples Ocho Rios Limited trading as Couple Tower Isle, (Couples) a limited liability company duly incorporated under the laws of Jamaica and having its registered office at Tower Isle, in the parish of Saint Mary. (Couples)

[2] Ms Watson claims that on June 23, 2014, she was assigned to work in the staff canteen and while walking towards the kitchen with a tray of utensils, she fell and sustained bodily injuries and suffered loss and damage.

[3] On June 24, 2015, she filed a Claim and Particulars of Claim seeking damages against Couples for the injuries she sustained. By her Amended Particulars of Claim filed on September 10, 2015, she itemizes the particulars of negligence as follows:

> *"(i) Failing to provide a safe place of work*
>
> *(ii) Failing to provide a safe system of work*
>
> *(iii) Failing to provide the requisite warning, notices and/or special instructions to the Claimant and its other employees in the execution of its operations so as to prevent the Claimant being injured*
>
> *(iv) Failing to modify, remedy and/or improve a system of work which was manifestly unsafe and likely at all material times to cause serious injury to the Claimant*
>
> *(v) Inviting or allowing the Claimant as an invitee of the said premises and failed to put a caution sign when floor is wet*
>
> *(vi) Failing to take such care as in all the circumstances was reasonable to see that the Claimant would be reasonably safe in using the premises for the purpose for which she was invited or permitted by the Defendant to be on the said premises"*

[4] She claims further or in the alternative to recover damages for breach of the Occupiers' Liability Act or for breach of contract.

[5] In her Particulars of Special damages, she pleads the following:

"(i) Medical expenses (and cont.)	
Dr Denton Barnes	*$25,000.00*
Palms Medical Complex	*$53,000.00*
Optical Solutions	*$110.00 US*
(ii) Transportation Expenses	
(and cont.)	*$10,000.00"*

The Defence

[6] On October 27, 2015, the Defendant filed a Defence in which it admits that Ms Watson accidentally fell, but denies being negligent and claims that the accident was caused and/or contributed to by her own negligence.

[7] In the Particulars of Negligence of the Claimant, the Defendant states as follows:

> *"The Claimant was negligent in that she:*
>
> *(a) failed to take any or any sufficient care/precautions for her own safety while negotiating the steps from the staff canteen to the kitchen*
>
> *(b) missed her step and/or slipped while negotiating the said step*
>
> *(c) carried a tray in a manner which impaired her vision while she attempted to negotiate a step down from the canteen to the kitchen while she was negotiating same*
>
> *(d) failed to pay any or any attention to the step down from the canteen to the kitchen while she was negotiating the same"*

[8] The Defendant also claims that it took such care as was reasonable to see that the Claimant was reasonably safe in using the premises for the purposes of her employment and denied the breach of contract alleged.

The Trial

[9] At the trial which took place on January 7, 2020, the Claimant gave evidence on her own behalf in support of her claim and she called no witnesses. The Defendant called one witness, Mr Bryan Duncan.

[10] Documents Numbered 1 – 16 on the Claimant's Notice of Intention to Tender Hearsay Evidence filed on August 2, 2019 were agreed by the parties and admitted in evidence.

The Claimant's Case

[11] Ms Watson's witness statement filed on August 8, 2019 stood as her evidence in chief after she was sworn and it was identified by her. She states that she would sometimes work in the staff canteen and that on June 23, 2014 at about 2:30 pm

she was walking towards the kitchen door with a tray of utensils and she slipped and fell in some liquid that was on the floor. She says one part of her body was inside the canteen and the other part was in the kitchen, that she hit her head, left ankle and back and was unconscious for a while. She adds that when she regained consciousness she found herself sitting in a chair, and an ice pack was placed on the back of her head by a secretary who walked with her to the Nurse's station, and she was then taken to Dr Francis.

[12] She states further that she was sent to get medication and to do a scan and was sent to Dr Denton Barnes who treated her with injections for the pain and sent her to do an MRI as well as physiotherapy. She was sent on sick leave which was extended as she was unable to work due to the pains in her back, head and ankle. She could not see clearly so she went to an eye specialist, and as she was still in pain, she went to Dr Micas Campbell.

[13] Her evidence also is that she was unable to go back to work so she resigned and had to stay home and that she went overseas and was "seen by a chiropractic (sic)" and she also did physiotherapy. She also says she got a job in Kingston in March 2018, but kept it for only one year, because she was unable to manage as she could not bear the pains and could not concentrate on what she was doing. Ms Watson states further that she cannot sit down for long, her back would pain and sometimes her ankle would pain her and "cramp up".

[14] When cross examined, she said at the time she was working at Couples for 4 years and that she was not wearing the non-slip shoes. She agreed that it was not the first time she was assigned to issue utensils in the staff canteen and that she was familiar with the physical layout of the canteen and the kitchen area. She added that during the lunch period, which lasted from 12 noon to about 2:30 pm, she would have entered and exited the kitchen on more than one occasion.

[15] She explained that she held the tray with two hands "not above my eyes, where I can see where I am going" and that she was looking going towards the door and

did not see any liquid and when she slipped and fell she said she did not know if it was juice or water, but that she fell in liquid on the floor. When shown her amended particulars of claim where she said she slipped in a puddle of water, she insisted that she did not know if it was water or juice. She stated that before she fell her feet were in the canteen, and when she fell, she was "a little distance from the kitchen door" and "my foot go through the door and my head and back were inside the canteen".

[16] She agreed that more than one employee was assigned to clear tables, as well as clean up and clean the floor, and indicated that sometimes the canteen is wet as "is not all the time they go at it the same time to clean" and she maintained that there was liquid on the floor.

[17] Ms Watson said after she fell she was unconscious and she went to the nurse and to Dr Francis, who referred her to Dr Barnes. She said she could not recall the number of times she went to Dr Barnes and that he advised her to do physiotherapy which she did, twice overseas, and once in Jamaica. She indicated that she had issues with her eyes and had an assessment done, but said she did not remember if the specialist said anything was wrong with her eyes. She also said as a result of the incident she had headaches from time to time "until this very moment" and had difficulty remembering things.

[18] She agreed that none of the doctors recommended that she should stop working or that she wouldn't be able to continue her job as a room attendant. She said she did not work between 2014 and 2018 but she got a job as a caretaker in March 2018. She said she was in pain while giving her evidence, standing, in the witness box.

[19] When re-examined, Ms Watson said every year the company gives new shoes, but she has to be in water, her shoes got torn and she reported it to Mr Duncan. She also said her sister paid for the physiotherapy she did overseas.

[20] In response to the court, Ms Watson said the tray she was carrying was a deep plastic tray measuring 2½ feet by 1 foot, and that it was full of utensils and heavy. She said when she slipped, her foot pushed the kitchen door, where there was a step down. She said she had been wearing her personal shoes which is a "rubber bottom" for about a month or two, and that she worked 5 or 6 days per week.

The Defendant's Case

[21] The Defendant's evidence is contained in the Witness Statement of Bryan Duncan, Team Leader of the Defendant, filed on November 5, 2019 and as elicited on cross examination.

[22] He states that he is responsible for the supervision of team members who work in the staff canteen and for assigning tasks to them and that on June 23, 2015 he assigned the Claimant the task of issuing utensils to staff members entering the canteen and that at about 2:30 pm he heard a commotion near the kitchen and saw the Claimant on the floor, went over and helped her up and assisted her to the nurse. He adds that in the 11 years he has been working in the staff canteen, "as far as [he] can recall", there have been no incidents of team members slipping and falling near the kitchen area.

[23] He indicates that there is a system in place to ensure team members are safe as all team members working in the kitchen are required to wear non-slip shoes provided by the company, one member is assigned to monitor the floor to ensure it is kept in a clean and dry state and team members "will also assist the floor monitor by indicating if there are any slips or debris on the floor".

[24] He also states that on the day in question a team member was assigned to monitor the cleanliness of the floor and that the company has in place a health and safety policy and procedures and it conducts training sessions which are mandatory for all team members. He adds that at these sessions, team members are educated on ensuring that they wear their protective equipment and clothing such as non-slip shoes, ensure that they keep their workspace in a clean and tidy manner to

avoid trips and falls, adhering to correct procedures to carry out tasks as well as reporting all potential hazards.

[25] In amplifying his evidence in chief he said that if a spill is identified a ‘wet floor’ sign is put up and it cannot be moved until the place is completely dry.

[26] When cross examined, he said Couples had in place a safety procedure that if there was a spill on the ground it would be identified immediately and that he was responsible for assigning team members to monitor the cleanliness of the floor.

[27] He said it was part of his responsibility to investigate what would have caused Ms Watson to fall, he did not consult the roster to see who were the team members assigned to monitor the cleanliness of the floor and when incidents occur, statements are taken from potential witnesses but he was unable to say if statements were taken in relation to Ms Watson’s fall. He admitted that he did not see when she fell, or what caused her to fall.

[28] Mr Bryan said he was aware that Ms Watson was wearing her personal shoes, and he admitted that she had reported to him that the shoes she got were damaged. He explained that the company policy is that an employee is entitled to one pair of shoes for the entire year and when asked if despite the report made to him Couples did not replace Ms Watson’s shoes up to the time of the incident, he replied, “not that I can recall”. He admitted that it was part of his responsibility, as Ms Watson’s supervisor, to see that she is wearing a non-slip shoes when working in the canteen, and when asked if he fulfilled his responsibility to ensure she was wearing safety shoes, he said, “I can’t recall on that day in question”.

[29] He said that it was not all the time that he met with the staff prior to the start of their duties, that it was not unusual for the floor to get wet and that the type of tile on the floor is such that if liquid is on in it can get slippery.

[30] In re-examination, Mr Bryan said he could not speak to whether there was any witness, and when he says it is not unusual for the floor to get wet, it is due to the

number of persons that traverse the area during the lunch period and that is the reason they have a monitor.

The Submissions

[31] In written submission filed on January 3, 2020, on behalf of the Claimant, Counsel set out the undisputed facts and identified as the sole issue to be determined, whether the Claimant sustained injury as a result of the negligence of the Defendant. On behalf of the Defendant, written closing submissions were filed on January 16, 2020. Counsel for the Defendant indicated that the Defendant also relied on the skeletal submissions filed on December 2, 2019.

[32] Both Counsel set out legal principles relating to Employer's Liability, Occupiers' Liability and Contributory Negligence and Counsel for the Claimant concluded that the Claimant has made out a case that she slipped and fell while executing her duties on the premises of the Defendant. Counsel for the Defendant urged the court to find that the Claimant has not made out her case on a balance of probabilities.

The Issues

[33] On the statements of case and the evidence presented, it fails to be determined whether the Defendant owed a duty of care to the Claimant and if so, whether it breached that duty of care resulting in damages to the Claimant, and whether this was foreseeable. The court also needs to consider whether the Defendant is in breach of its statutory duty of care under the Occupiers' Liability Act and whether the Claimant was contributorily negligent, and, based on the findings, examine the nature and extent of the Claimant's injuries and assess the quantum of damages, if any, to be awarded to her.

The Law

[34] It is well established that an employer has a duty at common law to take reasonable care for the safety of its employees. (See **Davie v New Merton Board Mills Ltd**.,

[1959] 1 All ER 340.) This duty includes provision of a competent staff, adequate plant and equipment, a safe place, a safe system of work and adequate supervision. A failure to fulfil this duty may amount to negligence on the part of the employer.

[35] A safe system of work includes the manner in which it is intended that the work is to be carried out, the giving of adequate instructions and the taking of precautions for the safety of workers. Where there is a duty to provide a safe system of work, the duty is not discharged by merely providing it. The employer must take reasonable steps to ensure it is carried out and this involves providing instructions in the system as well as some measure of supervision.

[36] The case of **Speed v Thomas & Swift Co. Limited** [1943] KB 557 provides support for the proposition that part of an employer's duty in providing a safe system of work is to provide supervision. At page 567 of the judgment, Lord Greene said:

> *"...the duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless to their own safety"*

[37] Under the **Occupiers' Liability Act**, an occupier of premises owes a common duty of care to all his visitors. Section 3(2) provides as follows:

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

This duty extends to an employee who enters the employer's premises under a contract of employment.

[38] Ms Watson has the burden to prove on a balance of probabilities that Couples owed her a duty of care, breached its duty and the breach resulted in damage to her.

[39] There is no dispute that the Ms Watson was employed to Couples and that at the time of the incident giving rise to this claim, she was carrying out assigned duties. She is therefore a visitor within the meaning of the Occupiers' Liability Act and as such Couples owed her a duty of care. Additionally, as her employer, they had a duty to have reasonable care for her safety and this includes providing a competent staff, adequate plant and equipment and provision of a safe place and a safe system of work as well as adequate supervision.

[40] A safe system of work includes the way in which it is intended that the work is to be carried out, the giving of adequate instructions and the taking of precautions for the safety of the workers. A Defendant will be said to have breached his duty of care if his conduct falls below the standard required by law and this standard is said to be that of a reasonable prudent man. (See **Blythe v Birmingham Waterworks Ltd.** (1856) 11 Ex. Ch. 151)

[41] The essence of the duty owed by an employer to employee is that the operations are not carried out in a way which would subject the employee to unnecessary risks. The employer, Couples, was therefore under an obligation to ensure that the workplace was safe.

[42] In support of the submission that Couples discharged its duty to provide a safe system of work, Counsel relied on the case of **Latimer v A.E.C. Ltd**. [1953] AC 643, where the court held that the Defendant acted reasonably and did all that could be done to ensure the safety of its employees in a situation where in an effort to alleviate the slippery nature of the floor after it was flooded and an oily film remained after the flood receded, saw dust was put on it and an employee slipped and fell on a part that was not covered with saw dust. The court in that case had also looked at the fact that no other employee slipped and fell or complained about the slippery nature of the floor.

[43] On behalf of Ms Watson, it was submitted that Couples presented no evidence which attempts to establish that it discharged its statutory duty and neither was

there any evidence presented to support the allegation that Ms Watson either caused or contributed to the accident resulting in her injuries.

[44] The witness for Couples, Mr Bryan Duncan, gave evidence of general procedures which are to be followed to ensure that an employee had a safe system of work. He failed, however, to give any specific details of what obtained on the day of the incident. There was no evidence led to show that Couples discharged its statutory duty and neither was any evidence presented to support their assertion that Ms Watson's accident was because she "missed her step".

[45] What is clear on the evidence is that Couples failed to ensure that Ms Watson wore the proper shoes in carrying out her assigned duties although on the evidence of Mr Duncan there is a system in place to ensure safety, as team members are required to wear non-slip shoes, provided by the company. Additionally, it is the evidence of the Defendant that the floor is tiled, and the type of tile is such that if liquid is on it, it could be slippery. It is also the evidence of Mr Duncan that it is not unusual for the floor to get wet due to the number of persons that traverse the area during the lunch period. The Defendant's evidence does not take its defence to a level of a complete denial of the particular averments made by the Claimant. It provided no evidence to counter what the Claimant said took place on the day in question and could not be relied on by the court as a basis to determine the crucial issue of how the Claimant sustained the injuries she alleged.

[46] I find the Claimant to be a witness of truth. She remained consistent and no evidence was presented to rebut her evidence. The one area of apparent inconsistency in her case where she pleaded that she fell in a puddle of water but in cross examination admitted that she did not know if it was water or juice, in my view is not material to affect her credibility. She maintained that there was liquid on the floor and I find that it is more likely than not that there was liquid on the floor. I therefore find on a balance of probabilities that she slipped and fell in liquid on the floor, near to the door of the kitchen and thereby part of her body was in the

canteen while her feet, which I believe in fact pushed the kitchen door, and part of her lower body ended up in the kitchen.

[47] It is my view that whatever safety policies were in place at the Defendant's premises they were not adhered to, monitored, controlled or even insisted upon by the Defendant and were not in place on the day in question. Although the Defendant's witness indicated that someone was assigned to monitor the area, I find that this may be the general practice, but there is no evidence that it was in place at the material time and therefore find that these failings by the Defendant would also amount to a breach of its duty to provide a safe system of work and thereby exposed the Claimant to the risk of injury.

[48] I therefore find that Couples breached its duty of care to Ms Watson by not ensuring that she wore the proper shoes, which should have been provided by them. In allowing her to continue to wear her own shoes for "at least a month or two", and not ensuring that she was provided with non-slip shoes, Couples failed to discharge its duty to provide safety equipment for the Claimant to carry out her duties. Additionally, I find that Couples failed to discharge its duty of providing a safe place of work and a safe system of work as there is no evidence on which I can find on a balance of probabilities that the system Mr Bryan claimed to have in place for the cleaning up of spills, was adhered to or was even in operation on the day of the incident.

[49] In view of the foregoing, I find the defendant liable for the injuries sustained by the claimant.

Contributory negligence

[50] The Defendant has specifically pleaded contributory negligence on the part of the Claimant and therefore has a duty to provide evidence from which the court can find on a balance of probabilities that the injuries complained of by the Claimant resulted from the particular risk which she exposed herself to by her own negligence. To establish this defence, the Defendant has to show that the Claimant

did not in her own interest take reasonable care and contributed, by her want of care to her own injury. (See **Nance v British Columbia Railway Co. Ltd**. [1951] AC 601)

[51] Mr Bryan Duncan, the sole witness for the Defendant, was not able to factually oppose the claim of Ms Watson that she slipped in liquid and fell in the manner as stated by her. He admits that he did not see her fall and when he assisted her off the floor, "[he] did not notice that the floor was wet". No evidence was presented by the Defendant to show that the Claimant by her want of care contributed to the injuries she sustained or that she did not in her own interest take reasonable care and as such contributed to her injuries.

[52] On the other hand, evidence elicited from the Defendant's witness on cross examination revealed that the Defendant did not provide a competent staff and did not make provisions to ensure that the workplace was safe. Mr Duncan was Ms Watson's supervisor and he allowed her to carry out her duties wearing incorrect shoes with full knowledge that the tiles on the floor in the area she was assigned to work could become slippery when wet and are likely to be wet at that time because of the number of persons traversing the area during the lunch period. In leaving the Claimant to take her own precautions against what is clearly an obvious danger, the Defendant failed to discharge its duty to provide a safe system of work.

[53] The Defendant did not present one scintilla of evidence from which the court could find on a balance of probabilities that the Claimant's injuries resulted from any particular risk to which she exposed herself by virtue of her own negligence.

[54] I therefore find that the Claimant slipped and fell in the manner outlined by her and also find that it is hardly likely that she would have been in the act of stepping down in the kitchen, as I accept that the upper part of her body was on the canteen floor and it was from the canteen floor she was picked up by Mr Duncan.

[55] I find that although Ms Watson also had a duty to act reasonably to avoid any foreseeable risk of injury to herself, the failure of the Defendant to provide a safe

system of work, including the failure to provide the non-slip shoes, and the failure to monitor the area where she was assigned to work to ensure that there was no liquid on the ground was the cause of the incident leading to the injuries sustained by her. The injuries she suffered are as a result of the failure of the Defendant to provide and maintain a safe system of work and not the result of any negligence on the part of the Claimant.

[56] There shall therefore be judgment for the Claimant.

[57] I will now assess the damages to which she is entitled.

Damages – Assessment

Special Damages

[58] In her particulars of special damages, Ms Watson claims the sum of JD$81,500.00 (and cont.) and US$110.00 as medical expenses, and $10,000.00 (and cont.) as transportation expenses.

[59] Special damages must be specifically pleaded and proved. (See **Ilkiw v Samuels** [1963] 2 All ER 879. The authorities however show that the court has some discretion in relaxing the rule in the interest of fairness and justice based on the circumstances (See **Julius Roy v Audrey Jolly** [2012] JMCA Civ. 53). If evidence is led in relation to special damages that are not pleaded, however, and there is no amendment to the particulars of special damages, the court cannot take account of that evidence and award the sum proved in evidence. This was emphasised in **Thomas v Arscott & Anor** (1986) 23 JLR 144, where, Rowe P., at page 151 i – 152 a, said:

> *"In my opinion special damages must both be pleaded and proved. The addition of the term 'and continuing' in a claim...is to give advance warning to the Defendant that the sum claimed is not a final sum. When, however, evidence is led which established the extra amount of the claim, it is the duty of the plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum"*

[60] Additionally, there is the principle that a judgment may not be entered for more than the sum claimed. Harris JA, in **Lyndel Laing & Anor. v Lucille Rodney & Anor** [2013] JMCA Civ. 27, relying on the reasoning in **Chattell v Daily Mail Publishing Company (Limited)** (1901-1902) 18 TLR 165 (CA), where the Court of Appeal ruled that a judgment entered for a sum greater than that which had been claimed, was bad, emphasised the principle. The learned Judge of Appeal said, in part, at paragraph [25]:

> *"...as a matter of law, a claimant cannot recover by a judgment, more than that which has been pleaded..."*

[61] Counsel for the Claimant in his skeletal submission had submitted that the Claimant is entitled to recover the sum of JM$158,909.89 as well as US$110.00, as special damages while it was submitted on behalf of the Defendant that the sum of JM$108,909.89 and US$110.00 are supported by receipts. Additionally, Counsel for the Defendant had submitted that the claim for transportation in the sum of $10,000.00 was reasonable in the circumstances.

[62] Ms Watson has provided receipts showing payment in respect of her medical expenses totalling $105,519.89 and US$110.00. In relation to her transportation expenses, I find that, in the circumstances, the sum claimed is reasonable as there is no doubt that she incurred expenses for travelling as a result of the injuries she sustained.

[63] In keeping with the principles stated at paragraphs [59] and [60] above, the Claimant, not having sought nor having been granted an amendment to her pleadings, the sum awarded as special damages is JM$91,500.00 and US $110.00.

General Damages

[64] Counsel for the Claimant submitted that the Claimant should be awarded the sum of $7,500,000.00 for pain and suffering and loss of amenities as a result of the incident. He referred the court to the unchallenged medical evidence of Drs

Campbell and Barnes pointing out that it could not reasonably be argued that the Claimant did not sustain serious and debilitating injuries.

[65] Counsel cited the cases of **Mobrey Lewis v Everod Lewis**, Claim No. 2006HCV02643, unreported, delivered November 19, 2007, (CPI 114), in which the Claimant had severe strain of the lower thoracic and lumbar area and whiplash, was assessed as having 7% whole person impairment and was awarded $2,000,000.00 which updates to $4,724,561.40 and **Marie Jackson v Glenroy Charlton and George Stewart**, Khan Vol. 5, page 167 where the Claimant sustained severe pains to neck and lower back was assessed as having 8% PPD and was awarded $1.8 in May 2001, (CPI 57.39) , which updates to $8,452,692.10

[66] Mr Kinghorn submitted that Ms Watson's injuries were more severe than the Claimants in the cases referred to, as none of them suffered a head injury. He also referred the court to the cases of **Henry Bryan v Noel Hoshue**, Khan, Vol. 5, page 177 where the Claimant was awarded $350,000.00 in September 1997 (CPI 45.13) and **Bernice Clarke v Clive Lewis and Lyneire Ashman,** Suit No**.** CL2001/C234**,** unreported**,** delivered April 11, 2003, (CPI 65.7), in which the Claimant was awarded $550,000.00. In both cases the Claimants sustained head injuries.

[67] In the skeletal submissions filed on behalf of the Defendant on December 2, 2019, it was submitted that the sum of $1,200,000.00 would be a reasonable award for this Claimant for pain and suffering. In determining the award, Counsel expressed the view that the following cases are instructive:

i. **Richard Henry v Marjoblac Limited** [2017] JMSC Civ. 42 in which the Claimant suffered lumbar disc prolapse, was assessed with a whole person impairment of 7% and the court made an award of $1,036,244.54 on March 17, 2017 (CPI 238.7)

ii. **Anthony Gordon v Chris Meikle and Esrick Nathan,** Khan, Vol. 5, page 142, where the court, in July 1998, (CPI 48.37) awarded $220,000.00 to the Claimant who was diagnosed with lumbo sacral strain and assessed with a PPD rating of 5%

iii. **Michael Baugh v Juliet Ostemeyer & Ors.** [2014] JMSC Civ. 4 in which the court on February 4, 2014, (CPI 211.9), awarded the claimant the sum of $1,200,000.00 as general damages. This Claimant suffered, inter alia, cervical strain, permanent lumbar spondylosis and was assessed as having 4% PPD.

[68] Ms Watson was seen by Dr Francis on the day of the incident and was later seen by Dr Barnes, an Orthopaedic Surgeon. Dr Barnes' report dated January 16, 2015, states that on examination on July 8, 2014, "there were severe tenderness in the neck muscles with the decrease range of moment (sic) due to pain and spasms. There were severe spasms in the lumbar region with decrease range of movement ...". She was reviewed by Dr Barnes on July 11, 22 and 25, 2014, and on August 8, 2014. Dr Barnes also indicated that she has desiccation of the L 3 4 intervertebral disc and "overall ...has 7% impairment of the whole person from the injuries"

[69] The medical report of Dr Micas Campbell dated March 18, 2015, indicates that he examined the Claimant on August 4, 2014. He made a provisional diagnosis of whiplash injury with whiplash associated disorder (Diagnosed clinically resolving) and traumatic brain injury.

[70] Having considered the submissions of Counsel as well as the authorities cited for comparison, and having examined the medical reports, I also bear in mind that an award for pain and suffering and loss of amenities cannot be precisely calculated but all that can be done is to award a sum which is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the Claimant's general damages.

[71] It is my view that the injuries sustained by Ms Watson are closer to those of the Claimant in the case of **Mobrey Lewis** although there was no evidence of head injury to him. Additionally, the evidence of Ms Watson is that she cannot sit for long as her back would pain her. I have also taken into consideration that she has been assessed with a whole person disability of 7%.

[72] While I agree that in the case of Mobrey Lewis the Claimant suffered no head injury, I take note of the fact that the medical report of Dr Barnes, an orthopaedic surgeon, refers to "possible cerebral concussion" and "possible eye injury" and the report of Dr Campbell, who appears to be a general practitioner, provides a "provisional diagnosis". There has been no final assessment and prognosis of the Claimant in relation to those findings by any of the doctors who examined her.

[73] I have therefore considered the similarities and distinguishing features of the cases to which was referred, and I am of the view that using the case of **Mobrey Lewis** as the preferred guide, and adjusting for the fact that Ms Watson received head injuries which were not present in Mobrey Lewis' case, the sum of $4,850,000.00 would be adequate compensation for pain and suffering, and I so award.

Handicap on the labour Market

[74] Under this head of damages, the court is being asked to assess the Claimant's reduced eligibility for employment or the risk of future financial loss.

[75] Mr Kinghorn indicated that the medical evidence of both doctors speak to the serious level of disability suffered by the Claimant and pointed out that the Claimant's evidence is that she had to resign her job because she could not work and that she got a job in March 2018 and kept it for a year "because she was unable to manage'.

[76] He submitted that the Claimant's injuries are such that she has a distinct disadvantage on the labour market and as such would be entitled to an award under this head. He concluded that in view of the circumstances of the case and the trend of the authorities cited, (having cited **Icilda Osbourne v George Barnes,** Claim No**.** 2005HCV00294, (unreported), delivered February 17, 2006, in which the court discussed the method of calculation of an award for handicap on the labour market and awarded a global sum of $500,000.00; **Carline Daley v Management Control Systems,** Claim No. 2008HCV00291, (unreported), delivered May 4, 2012, where an award of $1,200,000.00 was made, and **Robert**

Minott v SERHA [2017] JMSC Civ 218, (unreported), delivered October 20, 2017, in which the court awarded $2,000,000.00,) the sum of $3,000,000.00 is a reasonable sum.

[77] On behalf of the Defendant, Counsel, Ms Graham, submitted that no award should be made to the Claimant under this head, highlighting that although Dr Barnes stated among other things, that the presence of continued back pain is significant, he indicated that "she is not a candidate for further surgical intervention and she will require prolong conversed management to deviate her symptoms..."

[78] Ms Watson has shown that she is unable to work as a result of her injuries. She was able to get a job in 2018 and keep it for one year. She has also travelled overseas and was able to have therapy done for which she paid a total of US$110 in September and November, 2014.

[79] The prognosis of Dr Barnes is that "... the presence of continued back pain is significant as she continues to have back pain which increases with her activities..." The medical evidence presented in my view supports a claim in respect of reduced eligibility for employment as it clearly suggests that she is now unable to compete on the labour market due to pain.

[80] The Court of Appeal in **George Edwards and Moses Morris v Dovan Pommells and Fitzritzson Gordon,** SCCA 38/90, (unreported), delivered March 22, 1991, indicated that there are three methods of calculating damages under the head of handicap on the labour market. These are the multiplier/multiplicand method, the lump sum method or the method of increasing the award for pain, suffering and loss of amenities, to include an unspecified sum for handicap on the labour market.

[81] While partial disability may not affect a Claimant's income immediately, it may do so at some time in the future. I therefore find that the Claimant's whole person impairment is a factor which would determine her level of employment, and it is clear that a disability places a Claimant at a disadvantage in the labour market, as opposed to a fit person.

[82] I am persuaded by the case of **Foster v Tyne & Wear County Council** [1986] 1 All E R 567, where the court said:

> *" ... when it comes to establishing loss of earning capacity, ... there is no rule of thumb that can be applied. ... In each case the trial judge has to do his best to assess the plaintiff's handicap in the future ... the approach must necessarily be ... speculative ... ".*

[83] No evidence was presented as it relates to the Claimant's pre or post- accident income. As such, an application of the multiplier/multiplicand method would be rendered nugatory. I therefore find that the lump sum approach would be appropriate in the circumstances and believe an award of $800,000.00 would be a reasonable award for loss of earning capacity.

Disposition

[84] Judgment for the Claimant with damages assessed and awarded as follows:

Special damages awarded in the sum of JM$91,500.00 and US $110.00 with interest at 3% from June 23, 2014 to date of judgment

General damages for pain and suffering awarded in the sum of $4,850,000.00 with interest at 3% from September 15, 2015, the date of service of the Claim form, to date of judgment

Handicap on the labour market, an award of $800,000.00 (no interest)

Costs to the Claimant to be taxed if not agreed