[2020] JMSC Civ 232

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014/HCV01972

BETWEEN	**BELINDA BLAIR**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

IN OPEN COURT

Ms. Christine Mae Hudson instructed by K. Churchill Neita and Co for the Claimant.

Ms. Kristen Fletcher instructed by the Director of State Proceedings for the Defendant.

Heard: 28th September 2020, 27th November 2020

Assessment of Damages - Pain and Suffering and loss of Amenities - Loss of Earning - Loss of Future Earning - Future Care.

THOMAS, J.

INTRODUCTION

[1] This claim was brought by Ms Belinda Blair against the Defendant, the Attorney General of Jamaica, for injuries she sustained while performing her duties at the Norman Manley International Airport. Ms. Blair was employed to the Ministry of Water, Land, Environment and Climate Change as a sanitization worker and assigned to the Meteorological Department at the Norman Manley International Airport.

[2] The circumstances which led to Ms. Blair's injuries as related by her are that ever since she started working at the Meteorological Centre she noticed that when it rained, especially when there was a heavy downpour, the roof would leak and cause the work area to become wet. On the 7th of June 2011, she was at work when it started to rain. As a result, the floor got wet. While she was mopping up the water in the Air Station in the hallway, she slipped and fell on her back resulting in her injuries.

[3] Judgment on Admission was entered on the 1st of September 2016. By an application dated and filed on the 28th of January 2019, the Claimant sought and obtained interim payment in the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00), by order of the Court on the 2nd of April 2019. The claim has now come up for assessment of damages.

[4] During the present proceedings, the Claimant's Attorney-at Law withdrew the claim for a sum of $5,308.10 for sick leave between 2012 and 2013. The parties have agreed the total sum of $2,237,091.28 for Special damages. These are itemized as follows:

i. Medical Expenses	$898,906.25
ii. Travelling Expenses	$317,100.00
iii. Extra Help	$798,000.00
iv. Loss of Earnings	$223,085.03

[5] The Damages that are in dispute are: general damages, loss of earnings after the Claimant's resignation; Loss of future Earning Capacity and the cost of future medical care.

GENERAL DAMAGES

Pain and suffering and Loss of Amenities

[6] The evidence of the Claimant is that after she slipped and fell on her back, she could hardly stand up due to the severe pain she was feeling in her back. She did not sleep that entire night as she was in constant pain. The following morning, she was attended to by Doctor Nicholson who gave her pain injection. He also sent her to do an x-ray and referred her to a bone doctor.

[7] Doctor Nicholson placed her on 11 days sick leave. She went back to work at the end of the 11 days but could not work as a result of the pain. Doctor Nicholson, thereafter placed her on an additional 8 days sick leave. At the end of this leave she returned to work but could not function well because of pain. At no time was she placed on light duties, so she continued to work in pain.

[8] She was treated at the Kingston Public Hospital (KPH) with pain killers and antibiotics, but the pain killers did not help. She was placed on a further 21 days sick leave as she was experiencing massive pain in her back that would go down to the left foot causing swelling. She had many sleepless nights. At end of the 21 days, she went back to work, but the pain got worse as soon as she tried to do her duties. She was then referred to the bone clinic at KPH. She received different medications from KPH but she was still in a lot of pain as the medication only numbed the pain for a while.

[9] She was referred to physiotherapy in 2012 to 2013 as she was still having pain in her back and lower limb. While at work she had to take breaks as a means of coping. Because of the pain and inactivity, she gained on a lot of weight. This made the pain worse. Medication only numbed the pain for a few hours, but the pain would get heavier and more intense, especially when it radiates down the left leg. Then she could not move the entire leg for up 15 - 20 minutes.

[10] Whenever she sat in an upright position even for short periods her left foot would get cramped. She used exercise bands to stretch the leg, but that only gave her temporary relief from the pain. She says she felt old and she was less active as she could not go out as before and she could not engage in sexual activity as the back pain was persistent. Sometime in March 2015, she woke up and found that she could not move. There was intense pain in her left leg. It felt weak and numb and it could not move.

[11] She had to stay home for three (3) days as she was experiencing a lot of pain despite taking her medication. At the end of the three days there was no improvement, so she again sought treatment at the KPH where she was admitted for 3 days. She did an MRI and surgery was recommended. Consequently, she had to be on sick leave for another two (2) months. During that period, she was bed ridden for two (2) to three (3) weeks, unable to move her left foot as it was "lifeless". She was also feeling pain in that foot, and could not walk or stand up and had to be assisted to the bathroom.

[12] She used a foot brace and crutches for two (2) weeks during that period. However, after the foot brace was removed she was still in pain. She did therapy between May to December 2015. The therapy along with the medication "Lyric" eased the pain for a while and sensations came back in the left leg although not fully and the left leg was still heavy; After the brace was removed she had to drag the left leg to move it. She had to learn to walk again and had to use crutches.

[13] When she returned to work in late June 2016, there was some improvement but she was still feeling significant pain in her back and leg and she was still visiting the KPH for pain management. In December 2016, she had a serious flare up in the pain in her back and leg. She went to the Pain Management Clinic at KPH and got an epidural injection in her back. This helped. It was the first time since the accident that she felt pain free.

[14] However, after a month, the pain began creeping back. In January 2017, she received a 2nd epidural injection. She continued to visit the Pain Clinic where she would receive medication and trigger point injections, depending on the severity of her pain which ranged between 3 and 6.

[15] She says she continued to have pain every day and the medication only soothed the pain for a few hours. Some days were worse than others. She could not hand wash or walk fast. She could not put pressure on the left foot. When she walked or stood in an upright position she experienced "spasm" or "muscle contract" in the leg. She had to hold on to something quickly for support to prevent herself from falling. Sometimes she actually fell. She could not move the toes on her left foot. Her toes could not stay flat on the ground. She could not tip on her toes. It took her three (3) hours to do what she would usually do in one hour or less. She lost energy and felt tired and old.

[16] She had to stop going to parties as she was afraid of bumping into crowds. Her partner had to assist her to go to the bath tub and her injuries has affected her sexual activity.

[17] She further states that in June 2017 while she was at work and was getting up from a seated position, she was unable to move her left leg. She felt excruciating pain to her left side which she rates as 10 out of 10. She was rushed to KPH where she was admitted for 3 days. On July 15, 2017, she did a surgery on her back. After the surgery, she had to do therapy to help her to walk as her back and entire left side were weak. She remained in bed for three (3) weeks. Her pain fluctuated; sometimes it was 10 out of 10 and sometimes it was a 4 out of 10. It got more intense when she was in an upright position. She did physiotherapy up to December 2017 which resulted in her seeing some improvement and getting a little stronger.

[18] After the 2nd surgery she was placed on sick leave from July 2017 to the 23rd of January 2018. She had requested a transfer to the head office at Half Way Tree

because she knew the difficulty she would face when the elevator at work was not functioning and she would have to take the stairs. This transfer was not granted. She returned to work on the 24th of January, 2018, and found that the elevator was not functioning. Climbing the stairs was painful. She felt massive pain in her back and numbness in her left leg. It was only with the assistance of her co-workers that she was prevented from falling.

[19] After the pain subsided she was rushed to the KPH, where she was admitted for three days. She was given pain killers and placed on sick leave for three (3) months, for which she received no pay. The pain medication only brought relief for up to three (3) hours. She returned to work in April of that year where she was assigned to the Head office but given the same duties. She still had to climb the stairs but they were not as long as those at the Airport. She was not 100% better but she worked through the pain. She had difficulty standing for long periods, general weakness on her left side which was made worse by the foot drop with which she was diagnosed.

[20] One day in June 2018, she was at work. While climbing the stairs she felt a "stabbing pain" in the left side of her back where the surgery was done which felt as if her back was reopening. Her foot also felt numb and she could not move. She had to lay down for three (3) hours. At home, the pain was excruciating. She was unable to cope due to the pain and challenges in carrying out her duties. Based on discussions with her doctor, she resigned her job on the 8th of June 2018.

[21] At home she continued to have challenges. She felt fatigued and had difficulty moving around. As the foot drop and back pain persisted, she was readmitted to the KPH on the 21st of April 2019. She underwent a third surgery on the 30th of April 2019, and remained in the hospital for a week.

[22] After she was discharged, she was bedridden at home for one (1) month. She had to use a walker and did physiotherapy for seven (7) months. After that, she was

almost pain free. In December 2019, she was attended to by Doctor Douglas who encouraged her to purchase foot drop splints for the foot drop that was still present. The purpose of the splints was to improve her walking.

[23] Despite improvements she is still having issues. She continues to experience numbness in her foot. She has difficulty standing for more than 20 minutes as doing so still brings on back pains, but she admits that the pain is not a as severe as in the previous years. She unable to walk fast or to run. She can only wear flat shoes. She has difficulty getting up from seated positions as she has to hold on to something for support. The weight which she has gained has affected her self-esteem. She feels insecure and less attractive as a woman. She continues to have pain before and after sexual intercourse.

The medical evidence

[24] The medical evidence is contained in the reports of four medical doctors which were admitted into evidence.

The Evidence of Doctor V. Y Nicholson

[25] In a report dated the 4th of October 2011, Doctor V.Y. Nicholson, General Practitioner, indicates that on June 8, 2011, the Claimant presented with pain in her left leg. She was treated with medication and given 14 days' sick leave. At the end of the 14 days she had to be given 5 more days' sick leave and the treatment repeated, as she was still experiencing severe pain. On the 4th of October 2011, the Claimant complained of pain that radiated down to the left thigh especially when she climbed the stairs or completed a days' work. An X-ray showed avulsion of a small fragment of bone on the superior lip of the left acetabulum. Doctor Nicholson diagnosed the Claimant with Sciatica.

The evidence of Doctor N Singh

[26] Examination of the Claimant was conducted by Doctor Singh at the Kingston Public Hospital on the 4th of February 2012. He states that his examination revealed:

(i) Tenderness of the L5 –SI midline

(ii) Mild Sensation

(iii) Reduced power of the leht4/5 lower limb.

[27] Doctor Singh's diagnosis was left back pain and questionable L5-SI spondylosis. She was treated with analgesic and physiotherapy.

The evidence of Doctor S. Prince

[28] In a medical report dated October 12, 2015, Doctor Prince states that the Claimant was admitted to the orthopaedic ward at the Kingston Public Hospital on the 27th of March 2015, with a three-day history of lower back and left hip pain. She had difficulty ambulating due to the pain she was experiencing as well as numbness to her left leg and foot. She was placed on analgesic and bed rest and an MRI was ordered. The MRI revealed disc bulge at L1 L5 with compression of Thecal sac.

[29] He states that she was discharged April 2, 2015, as her symptoms were improving. She was readmitted on April 15, 2015 to have elective decompression of her lumbar spine. On the 21st of April 2015, she underwent a partial L4/L5 discectomy. Postoperatively, she had weakness in her right ankle and toe dorsiflexion. She was discharged on April 24, 2015 on analgesic, a prescription for foot drop splint and was told to return to the Orthopaedic Department in two weeks.

[30] He also noted that she was followed up in Orthopaedic Outpatient Department at regular intervals where she was noted to have improvement in her symptoms. She was last seen in the Orthopaedic Department on September 28, 2015, where it was noted that she had improved neurology. She still had weakness in her great toe extension. She had been discharged from physiotherapy but continued her

home exercise programme. She was diagnosed with Post Partial discectomy L1 L5. He was unable to give a disability rating as she was still receiving treatment.

The evidence of Doctor Melton Douglas, Consultant Orthopaedic Surgeon

[31] In his report dated the 19th of October 2016 Doctor Douglas indicates that on the 19th of October 2015 the Claimant had the following complaints:

(i) Pain to the back of the left thigh which then radiate to the back of the leg down to her toes.

(ii) Difficulty climbing stairs and standing for long periods. Cannot lift heavy objects and has a permanent limp.

(iii) She can perform aspects of her domestic chores, but cannot manage hand washing and has had to seek a helper for that purpose.

(iv) Numbness of the toes.

[32] On physical examination of the Claimant Dr. Douglas reported the following:

"(i) She walks with an antalgic gait and she is unable to tip toe walk to the left side.

(ii) The experience of pain in the lower back and leg.

(iii) Her reflexes of the knee and ankle were equally diminished and the straight leg raise test was positive on the left. The power of the left ankle dorsiflexion was grade4/5 as well as plantar flexion.

(iv) Sensation in the left leg L.5 dermatome was diminished.

(v) Lateral flexion and rotation was full and pain free. There was a midline scar in the lumbo sacral region that measured 8.cm"

[33] As a result of the findings of the MRI of the lumbar spine, Doctor Douglas diagnosed the Claimant with Lumbar Disc Prolapse with Radiculopathy.

His prognosis at the time, was that:

> "*Her experience of pain has been uncontrollable. Treatment, to include physiotherapy, did not offer any resolution to her symptoms. Surgery was performed but her pain persists. Her prognosis is suggestive of long term pain and functional compromise. There is no further conservative and or invasive treatment that can be recommended to remedy her radiculopathy and alleviate her painful symptoms. Ms. Bair would have to live with her pain and impairment. He then assessed her impairment as 15% of the whole person.*"

Doctor Melton Douglas' Review of the Claimant on January 31, 2018.

[34] In his review of the Claimant on January 31, 2018, Dr. Douglas referred to the surgery that was performed on the Claimant on the 23rd of July 2017 at the KPH, a procedure which involved the removal of three disc in the Lumbar spine.

[35] He recorded her complaints as:

(i) Foot drop on the left and no motion in the left big toe
(ii) Difficulty in walking
(iii) Numbness in the dorm of the left foot
(iv) Assistance getting in the shower
(v) Inability to stand for long periods

[36] On physical examination he found that:

"(i) She had a high stepping gate and a 9cm midline surgical scar.

(ii) She had full range of motion in the lumbar spine and sensation normal to touch in the leg foot and toes

(iii) The measure of power in the leg revealed:

(a) Dorsiflexion of the left ankle --- 0/5 power

(b) Plantar flexion of the ankle ----4/power

(c) Dorsiflexion of the great toe----0/5power

(d) Dorsiflexion of the lesser toes 2/5 power".

[37] He diagnosed her with Left Foot Drop secondary to a L.5 radiculopathy. In his prognosis he stated that:

> "*Ms. Blair benefitted from the 2nd surgery in that there was significant reduction of her pain following the 2nd surgery. Though beneficial the 2nd surgery was the result of an injury to the left L.5 nerve root which caused a foot drop otherwise called a paralysis of the anterior and peroneal muscle of the left leg. Six (6) months following the surgery the failure of the nerve to recovery is suggestive of permanent damage, of the nerve and therefore unlikely recovery over the long term) She will have to rely on the foot drop splint to aid and improve her walking. She will be able to return to work in her splint but will experience some early fatigue especially after long periods of standing and walking. Also her function will be greatly diminished in comparison to her preinjury level*".

[38] On this occasion she was assessed with a whole person impairment rating of 19%.

Doctor Melton Douglas' Review of the Claimant on 6th of December 2019

[39] In his report dated the 23rd of April 2020, Doctor Douglas stated that he reviewed Ms Blair on the 6th of December 2019. She reported having spinal surgery on April 30th 2019. Following surgery, she reported to him that she was experiencing the following:

(i) Severe back pain had improved from 10/10 to 0/10

(ii) Normal sensation in left leg but there are intermittent episodes of numbness

(iii) She is unable to stand for 20 minutes because of the development of the lower back pain.

(iv) She can walk for 10 minutes but then has to stop and sit down and rest before she can continue her journey.

(v) She cannot perform the lifting of any heavy objects.

Doctor Melton Douglas' Review of the Claimant on the 17th of April 2020

[40] When she was reviewed by Doctor Douglas on the 17th of April 2020, the Claimant reported that she was experiencing mild pain in the lower back and left foot drop. She also reported that she could not walk a mile because of the foot drop. ***She also complained that she cannot stand for more than 30 minutes, sit for long periods, or lift heavy objects***.

[41] On examination Doctor Douglas found that:

> "*She had obvious left foot drop affecting her gait making it a high stepping slapping gait. She had no pain on forward and lateral flexion of the lumbar spine. There was mild pain on rotation to the left side She had grade 0/5 power with ankle dorsiflexion of the left and grade 4/5 power in the plantar flexion. The sensation over the anterior left leg was diminished."*

[42] He diagnosed her with Multiple Lumbar Discectomy and Spinal Fusion and Left Foot Drop from Injury to the L.5 nerve. His assessment and prognosis are as follows:

> "*Ms. Blair's symptoms of back pain is not as severe after the last surgery making the surgery a success She had a complication of the surgery resulting from injury to the spinal nerve causing the foot drop on the left side. It will not recover and the wearing of a foot drop splint is mandatory in order to improve her gait.* ***Her function has improved significantly following her last surgery and is***

challenged mainly by the functional loss from the foot *drop. Her whole body impairment of 19 % remains unchanged*".

The Evidence of Robert McDonald, Sports and Exercise Medicine Physiotherapist

[43] It is noted that Mr. Robert McDonald was not certified as an expert witness by the court. However, his reports dated the 24th January 2018 and the 10th October 2018 were admitted into evidence with no objections from the defence. In his report dated the 24th of January 2018, Mr. McDonald stated that he attended to the Claimant on the 25th October 2017. He found that she had:

(i) "Grade 0 muscle strength of the toe extensors and ankle dorsiflexors on the left

(ii) Grade 4 muscle strength to the knee extensors on the left

(iii) Grade 3 plus muscle strength to the knee flexors on the left

(iii) Decreased sensation to the left leg"

[44] In his progress report he states: "*that strength and sensation was improving but at a slow pace".* His impression was that the return of normal strength and sensation following injuries of this nature may be delayed up to one year. He also stated that "a prognosis was best obtained from her consultant surgeon."

[45] On reassessment of the Claimant on the 29th of November 2018, he stated that active movement of the toes improved at varying degrees. He also stated that the Claimant would not regain full power and range of motion of the left ankle and toes by conservative measures alone.

[46] I find that the relevance of this evidence is that up to 2018, the Claimant was still receiving therapy and the progress was slow.

Discussion

[47] Counsel for the Claimant commended two (2) cases in particular for the courts consideration as it relates to an appropriate award for pain and suffering and loss of Amenities. The first case is ***Brenda Gordon v Juici Beef (Unreported)*** Claim No. HCV 2007/04212 delivered the 14th April 2010. In that case, the Claimant Brenda Gordon was employed to the defendant company. She slipped and fell during the course of her duties. She sustained the following injuries:

(i) A double level disc prolapse, injury to two lumbar discs;

(ii) Compression of lumbar nerve roots with numbness to both feet.

[48] She also gave evidence that she had pain with sexual intercourse and could not exercise and became overweight as a result. The accepted medical evidence was that she would continue to have mechanical back pain, which would vary in severity. Her PPD was assessed at 13% of the whole person. She was awarded $4.6M for pain and suffering and loss of amenities in April 2010 (CPI 60.8) which updates to $8,027,302.63

[49] The other case is ***Richard Rubin v St Ann's Bay Hospital and the Attorney General*****,** cited at page 250 of the Khan (Volume) 5. In that case, the Claimant Mr Rubin, suffered two (2) severe compression fractures of vertebrae T7 and T8. He was admitted at the St. Ann's Bay Hospital and transferred to the USA. He experienced severe pains and loss of height of two (2) vertebrae of ¾ of an inch. He underwent stabilization surgery with rods and spinal fusion. His post-surgery condition was complicated by significant pain and prolonged physical therapy for over one (1) year.

[50] He was diabetic and insulin dependent. His bones were more brittle and subsequently produced complications below the level of the fusion. He underwent several other surgeries. He had subsequent compression fractures after his surgeries. In 1993, his prognosis was guarded. The doctor opined that he had a

greater than 90% chance with continuing severe pain and a greater than 50% chance of ultimately requiring significant surgery to his thoracolumbar spine. An award of $3 million was made in January 1999, which revalue to $16,752, 631.58, using the current CPI of 105.7**.**

[51] In addition to three other authorities, Counsel for the Defendant also commends the case of ***Brenda Gordon*** for the Court's consideration. The other cases are: (i) ***Merdella Grant v Wyndham Hotel Co.*** (Unreported) Suit No. CL 1989/G045 delivered 8 July 1996 and (ii) ***Andrew Morgan v the Attorney General et al*** (Unreported) [2016] JMSC Civ. 137 delivered 6 May 2016, and (iii) ***Nicole Gayle v Garrie Cowen et a*** (Unreported) [2018] JMSC Civ. 157 delivered 17 December 2018.

[52] In the case of ***Merdella Grant v Wyndham Hotel Co.*** the plaintiff, a 44-year-old registered nurse, suffered a lumbar injury. Her permanent partial disability was assessed at 25% of the total person. The prognosis was that her condition would worsen with time and that she would need physiotherapy for the rest of her life and doctor's visits twice annually. Lifting was forbidden. The Court found that the Claimant could return to work despite the significance of her pain and disability. On the 27th of February 1996 her damages for pain and suffering and loss of amenities were assessed as $1,400,000.00. (July 2020 CPI 105.7), That award updates to $10,104,761.90

[53] In the case of ***Andrew Morgan v the Attorney General et al*** the Claimant was a firefighter who sustained the following injuries:

(i) chronic lower back pain affecting both lower extremities;
(ii) chronic degenerative facet joint (L5/S1);
(iii) chronic degenerative disc disease (herniated disc L5/S1);
(iv) chronic degenerative changes L4/L5; sacral cyst;
(v) aching sensation across his lower back.

[54] PPD was assessed at 14% of the whole person. The accepted medical evidence was that the Claimant would have challenges climbing stairs, pushing or pulling heavy equipment and bending. On occasion, the Claimant was not able to lift weight in excess of twenty pounds. Damages for pain and suffering and loss of amenities were assessed at $6,500,000.00 in May 2016. That award updates to $7,863,740.02.

[55] In the case if ***Nicole Gayle v Garrie Cowen et al,*** the Claimant had mild chronic discogenic neck pain, chronic right lumbar radiculopathy at L5 consistent with disc disease (L4/5) (MRI), disc disease at L5/S1 consistent with an absent right angle reflex, and renal disease for evaluation by a urologist. The chronic discogenic neck pain was rated as 2% whole person impairment and the chronic discogenic low back pain as 15% whole person impairment with a combined whole person impairment of 17%. The court awarded $5.5 million in December 2018 (CPI 97.6) which updates to $5,978,995.90

Submissions

For the Claimant

[56] Counsel for the Claimant submits that this case before the Court is unique in that the rehabilitation of the Claimant was protracted and that her treatment involved three (3) major lower back surgeries and a resultant foot drop. She agrees that there is a measure of similarity between the ***Brenda Gordon*** case and the instant case, given that both Claimants suffered traumatic injuries to the lower back, underwent surgery and were assessed with some impairment. She is of the view that the ***Brenda Gordon*** case provides a base guide in determining a fair estimate of damage.

[57] However, she takes the position that in terms of gravity and severity of the injuries, treatment, management, period of rehabilitation and the final residues and its

effects, the circumstances of the Claimant Brenda Gordon were significantly less severe when compared to those of the Claimant at bar. She submits that the period of rehabilitation was far more protracted in the case at bar when compared to the Claimant Brenda Gordon, in that the Claimant, Ms. Blair**,** underwent her last surgical procedure in April 2019**,** which is two (2) months short of eight (8) years post-injury. On the other hand, the Claimant Brenda Gordon underwent her last surgery approximately four (4) years post-injury.

[58] She also points out that Ms. Blair had to undergo an "intense course of physiotherapy" and that her pain was unrelenting so that she was referred to the Pain Clinic at KPH to manage her pain, where she was administered multiple trigger point injections, lumbar epidurals and varying pain medication to control her pain. The treatment regimen undergone by the Claimant at bar, highlights the protracted period of rehabilitation and the intensity of the pain experienced.

[59] She also highlighted the significant disparity in the assessed impairment rating of 19% whole person impairment in the case at bar, compared to **13%** whole person impairment in the **Brenda Gordon** case. Accordingly, she submits that the Claimant in the instant case should attract a significantly higher award.

[60] However, counsel commends the case of **Richard Rubin v St. Ann's Bay Hospital and The Attorney General of Jamaica,** (supra) as the most comparable case on which reliance should be placed in determining the most appropriate award for general damages in the instant case. She submits that the **Richard Rubin** case**,** albeit of some antiquity, bears the closest similarity with the case at bar.

[61] She nonetheless concedes that the injuries of Mr. Rubin "are not exactly on par" with that of the Claimant in the instant case, in that, whereas the Claimant Richard Rubin suffered two (2) fractures, the Claimant at bar suffered lumbar disc herniation with radiculopathy. Nevertheless, she takes the position that in general terms, both Claimants suffered traumatic insults to the back which were treated

surgically. It is in this regard that she posits that there is a reasonable measure of similarity in the essential facts, which forms the basis for comparison.

Submissions for the Defendant

[62] Counsel for the Defendant submits that the ***Merdella Grant*** case appears to be closest to the Claimant's in terms of the nature of the injuries. However, she takes the position that Grant's injuries would have been much more serious than those of the Claimant in the instant case. She submits that the final medical report of Dr. Douglas supports the conclusion that the Claimant is virtually pain free when she is not standing or walking for extended periods of time. Ms. Grant on the other hand, at the time of her assessment, was expected to live with her pain and significant disability.

[63] She notes that the Claimant in the instant case suffers from a foot drop, but is of the view that this is the only remaining aspect of her disability, which is significant and states that "heavy weather may be made of this part of her disability". As it relates to the three surgeries undergone by the Claimant, she submits that the Claimant would have been in pain prior to the surgeries, and that the surgeries improved her pain. Therefore, she submitted, "though it may be considered that she had to undergo three surgeries, the court should give more weight to the effect of the surgery than the fact that the Claimant had to undergo surgery." In balancing the disability rating of 25% in the ***Grant*** case with this Claimant's foot drop which persists, she submits that the damages for pain and suffering and loss of amenities in the instant case may be assessed between $7 million and $9 million.

Analysis

[64] The principle to be applied and the factors that are to be taken into consideration in assessing general damages were pronounced upon by the court in the case of ***Louis Brown v Estella Walker*** (1970) 11 JLR 561. They are:

(i) the extent and nature of the injuries sustained;

(ii) the nature and gravity of the resulting physical disability;

(iii) the pain and suffering endured; and

(iv) the duration and effect upon the person's health of the pain and suffering (including discomfort and inconvenience) which the claimant is likely to suffer after the date of the award.

[65] When I examine the cases presented by Counsel for the Claimant, I do not endorse her view point that the case of ***Richard Rubin*** (supra) is the most appropriate guide to resolve the issue of the quantum of the award to the Claimant under this head of damages. In spite of her recognition of the difference in nature of the injuries, Counsel submits that the aforementioned case is closest in similarity to the case at bar.

[66] I will again highlight the main differences in the injuries of the Claimants in the respective cases. The Claimant **Richard Rubin** suffered two (2) fractures, while the Claimant at bar suffered lumbar disc herniation with radiculopathy. Richard Rubin was diabetic and insulin dependent, his bones were more brittle and he subsequently produced complications below the level of the fusion. No such condition has been attributed to the Claimant in the instant case. While there is information that Richard Rubin "underwent several other surgeries", this would suggest that in addition to the first surgery, he had more than two more surgeries. Therefore, despite the fact that the case note has not provided sufficient information as to the total number of surgeries Mr. Rubin had, the information suggests that he would have had, at minimum, 4 surgeries. The Claimant in the instant case had three (3) surgeries.

[67] It is also noted that Mr. Rubin had subsequent compression fractures after his surgery in 1993. The prognosis as it relates to Mr. Rubin was that his pain was expected to continue with severity (more than 90%). Counsel for the Claimant has submitted that in comparing the authorities, the prognosis in the **Rubin** case should not be a significant factor in my assessment and has asked the Court to find that the "prognoses which obtained in the **Richard Rubin** case, by itself,

cannot and ought not to exceed the weight to be placed on the final residues and its impact on the Claimant at bar quality of life." However, this is one of the reasons I consider it unsafe to rely on the authority of ***Richard Rubin***. The prognosis is a factor that was highlighted in the case note and despite the absence of A PPD rating there is uncertainty as to the weight that was placed on the prognosis for Mr. Rubin by the tribunal in that case in arriving at the award for damages.

[68] Additionally, the fact that it was highlighted in the case note with no indication that it was not considered is an indication to me that it is a factor that would have been taken into consideration. At any rate, in the ***Rubin*** case, it is evident that at the last examination the Claimant was still experiencing severe pain. Therefore, if I were to consider this factor against the prognosis in the case at bar, that of the Claimant in the instant case would be more favourable, as after the final surgery the Claimant's pain was reduced. However more significantly, I am wary of the fact that the ***Rubin*** case is "of some antiquity", a fact recognized by counsel for the claimant. I am cautious about placing reliance on the older cases in circumstances where there are more current cases, sufficiently similar, on which reliance can be placed.

[69] I also take a corresponding view of case of ***Merdella Grant***, which counsel for Defendant has put forward as the most relevant authority. In that case, the major injury was to the lumbar spine. This bears some similarity to the lumbar injury suffered by the Claimant in the instant case. However, Ms. Grant's PPD was higher than that of the Claimant in the instant case; that is 25% of the total person impairment as compared to 19% of the whole person impairment in the instant case. Additionally, her prognosis appeared to be more dismal than that of the Claimant in the case at bar.

[70] It was stated that Ms. Grant's condition would worsen with time and that she would need physiotherapy for the rest of her life and doctor's visits twice annually. Lifting for her was forbidden. However, despite the fact Ms Grant's injury appears to have been more serious than that of the Claimant in the instant case, this Claimant has

also suffered an additional and significant disability, that is the foot drop which doctors have deemed "something that the Claimant will have to live with". However, as it is with the **Rubin** case, this case belongs to the era where, as noted by the Court of Appeal, where there has been significant distinction in awards in cases with similar injuries and circumstances, without any details being made available for the reason for the awards.

[71] This concern was most aptly expressed by Morrison JA in the Court of Appeal decision of ***Patrick Thompson & Ors. v Dean Thompson & Ors*** 2013] JMCA Civ. 42. When looking at the disparity in awards in the older cases he had this to say:

> "*On the face of it, the comparison of these two cases certainly does produce something of an anomaly. For, if the plaintiff, with a 10% whole person permanent impairment, was properly compensated in 1991 by an award worth $953,000.00 in* ***Green v Blackford****, then it is possible that an award worth $1,600,000.00 to the plaintiff, with no discernible permanent impairment, in* ***Hartley v Norman*** *in 1997 could well have been an erroneously high estimate. But, of course, the explanation of the disparity could equally be the opposite. It regrettably seems to me that, useful as they have proved to be to the profession and the judiciary over the last many years, the sometimes quite exiguous reports of previous – particularly the older - awards upon which reliance has to be placed in these matters do not always contain the level of detailed information about each case that would enable the court to make meaningful distinctions between particular cases."– p. 106*

[72] It is within this context that I find it more prudent to rely on the more recent cases. Despite the fact that ***Nicole Gayle v Garrie Cowen et al,*** is the most current authority presented to this court, I do not consider it to be the most relevant for the following reasons**:**

(i) The court in that case at paragraph 31 noted that the medical evidence indicated that it was unlikely that accident was the primary cause of the degenerated disc disease. Consequently, the award was reduced. Therefore, the major injury would have been to the neck which was described as mild.

(ii) Additionally, there is no evidence of the Claimant having to undergo surgery or any evidence of injury to the Claimant's foot in that case.

[73] The case of ***Andrew Morgan v the Attorney General et al*** bears some similarity to the instant case. In both cases there are injuries to the lower back (lumbar). The medical evidence was that the Claimant would have challenges climbing stairs, and lifting heavy things. However, the injuries of the Claimant in the present case are more serious in that she sustained an additional injury that is the foot drop. Additionally, she had to undergo three surgeries while there is no information that the Claimant in the ***Morgan*** case underwent any surgery.

[74] I also find the case of **Brenda Gordon**, in terms of currency and the nature of the injuries suffered, to be comparable to the case at Bar. In fact, of all the cases submitted it is the most comparable. However, I agree with counsel for the Claimant that the PPD of the Claimant in the instant case is significantly higher than that of the Claimant in the ***Gordon*** case. Therefore, the starting point for the award in this case should be significantly higher. That is a starting point of $10,000,000.00. However, I take into account that in addition to the similarities in back injuries, the Clamant in the instant case, in contrast to the Claimant in the ***Gordon*** case, has suffered a permanent foot drop and that she underwent three surgical procedures, another feature which is absent from the ***Gordon*** case. It is my view that this necessitates a further and significant increase in the award.

[75] Counsel for the Defendant has taken the position that counsel for the Claimant is "making heavy weather of the foot drop." However, it is my view that this injury should be a significant consideration to any award that I must make. Apart from the pain and discomfort that the Claimant experiences after standing or walking, I recognize that the Claimant is left with an obvious deformity which affects her normal gait which should not be trivialized.

[76] Counsel for the Defendant has also suggested that the number of surgeries should not feature significantly in the award, but the court should take account of the fact that post-surgery, the injuries are considered to be less severe. In doing so, she relies on the following statement of Dr Douglas:

> "*Ms Blair's symptoms of back pain is not as severe after the last surgery making the surgery a success.*"

[77] However, it is my view that the fact that Doctor Douglas made reference to the surgeries as the contributing factor to the reduction in severity of the injuries, is an indication that there is a direct correlation between the severity of the injury, pain and suffering and the number of surgeries. Therefore, this must be a significant consideration in the quantum for pain and suffering. I must also factor in the fact that the foot drop was a complication of the surgery, resulting from injury to the spinal nerve. This is something that she will have to live with for the rest of her life. I therefore find that award of $12,000,000.00 for pain and suffering and loss of amenities is appropriate in the instant case.

Loss of Earnings

[78] The claimant is alleging that she tendered her resignation on June 6, 2018 due to her inability to perform her duties. Accordingly, she is seeking to recover loss of income from that date up to the date of trial, computed at **$9,492.98** per fortnight which amounts to **$516,418.12.**

[79] Counsel for the Claimant submits that the Claimant's ability to work has been severely compromised as a consequence of her injuries and that she cannot be faulted for resigning her job. She has asked the Court to find that the Claimant's loss of employment is a continuing loss directly attributable to the accident and that she is entitled to loss of earnings up to the date of Judgment.

[80] The Defendant is challenging the quantum as it relates to the claim for loss of earnings for this period. Counsel or the Defendant submits that the Claimant should only be compensated for 200 days. She urges the court to disregard the June 6th 2018 date of resignation, and to take the date of resignation to be the November 13, 2018, which is the date on the Claimant's resignation letter. She submits that the Claimant should only be paid up to one month after her last surgery. That is May 31, 2019.

[81] She also submits that the sum should be calculated at $678.07 per day based on the Claimant's payslips. She is of the view that the award should total $135,614.00. She further submits that though the Claimant indicated that she resigned after discussions with her doctor at KPH, the medical evidence does not suggest that this was a requirement or necessity.

[82] She points to the medical evidence of Dr Douglas in his report dated the 21st of March 2018, where he states that she could return to work in her foot drop splint. Counsel opines that there was no other suggestion in the medical evidence that the Claimant could not work in spite of this diagnosis. She points out that the medical evidence speaks to the fact that there would be early fatigue upon standing and walking for long periods and that her function would be greatly diminished.

[83] She states that the Claimant, prior to her injury, worked part-time and her hours of work were not significant. She takes the view that the Claimant could have requested an extension of her working hours to enable her to take the necessary

breaks and rest as required according to her disability, and further, that she was in a position to seek alternative employment after recovering from her surgery.

ANALYSIS

[84] It is my view that the necessary reference date for the calculation of the loss of earnings of the Claimant is the date at which she ceased to receive a salary, consequent upon her inability to perform her duties on account of her injuries. When I peruse the report of Dr. Douglas, the recommendation to which counsel for the Defendant refers, was in respect to his examination of the Claimant on the 31st of January 2018. He stated that:

> "*6 months following the surgery the failure of the nerve to recover is suggestive of permanent damage, of the nerve and therefore unlikely to recover over the long term."*

[85] In his review Dr. Douglas also stated that:

> *"She would be able to return to work in her splint but will experience some early fatigue especially after long periods of standing and walking. Also her function will be greatly diminished in comparison to her preinjury level."*

[86] I have considered this suggestion of the Doctor, taking into account the undisputed evidence of the Claimant that she did in fact return to work subsequent to this review. In considering this issue it is necessary for me to highlight the evidence in relation to the circumstances that led to her resignation. The Claimant's evidence in this regard is that after the 2nd surgery she was placed on sick leave from July 2017 to the 23rd of January 2018. She had requested a transfer to the head office at Half way tree because she knew the difficulty she would face when the elevator was out of service and she would have to use the stair case. Her request for transfer at that time was not approved. She returned to work on

the 24th of January 2018. She had to use the stairs as the elevator was out of service**.**

[87] While climbing the stairs, she experienced massive pain in her back and numbness in left leg. As a consequence, she was admitted to the KPH for three (3) days and later placed on sick leave for three (3) months for which she received no pay. The pain medication she received only brought temporary relief. (For up to three (3) hours). She had "difficulty standing for long periods, general weakness on her left side which was made worse by the foot drop" She returned to work in April of that year where she was assigned to the Head office but given the same duties. She still had to climb the stairs but they were not as long as those at the airport. "She was not 100% better but she worked through the pain"

[88] Therefore, in observance of Dr Douglas' recommendation, the Claimant had in fact returned to work in April 2018. She worked up until June 2018. However, in accordance with her evidence that remains unchallenged, there was no change in the nature of her duties. She still had to climb the stairs. Essentially, despite changing her work station by assigning her to Head Office where, admittedly, the stairs were not as long as those at the airport, there was no change in the nature of her duties.

[89] Her evidence is that she was "given the same duties", and that she "worked through the pain". Therefore, despite the indication of Dr. Douglas in his January 31 review that "***her function will be greatly diminished in comparison to her preinjury level"***, her employer only found it necessary to change her work station but did not find it necessary to adjust the nature of her duties.

[90] Furthermore, her unchallenged evidence is that while at work in June 2018 and in the process of climbing the stairs she "felt a stabbing pain in left side of the back where the surgery was done". Her left foot "felt numb like her back open up back again" and she could not move. She again had to be placed on sick leave. Therefore, in view of her evidence, the Claimant would have twice experienced

significant aggravation of her injuries whilst on the job and after two (2) surgeries she was still expected to perform the same duties.

[91] I also take note of the fact that the Claimant's letter of resignation to the Ministry is in fact dated November 13, 2018, but indicates that her resignation took effect from the 6th of June 2018. Nevertheless, it is my view that my assessment can only be just if, in arriving at the relevant date for her loss of earning, I seek to ascertain the circumstances that prevailed during the period of June 6, 2018 to November 13, 2018, as it relates to the Claimant's injuries.

[92] It is indisputable that she was not receiving any salary during this period. The other issue to be determined is whether it is as a result of the injuries that she failed to report to work from June 2018. It is also undisputed that while at home, as her foot drop and back pain persisted, she was still having difficulty moving around. Accordingly, she was eventually readmitted to KPH on April 21, 2019 where she underwent a 3rd surgery, on April 30, 2019. It is therefore apparent that the Claimant's injuries were aggravated in June 2018 because her employer did not seek to sufficiently ameliorate her condition of work. That is, approximately 7-years post-accident, they would have been aware that she continued to suffer negative effects from the injuries as she would have had to produce medical certificates for her sick leave to be approved.

[93] Prior to the incident in June 2018, they would have been aware that she would have had a previous incident (that of January 2018) of aggravation of the injuries while on the job***.*** There is no indication that between June 2018 and November, 2018 they offered to make any change in the nature of her duties. Therefore, it is reasonable for me to find and I so find that in the circumstances, where her challenges persist to the point where her injuries were aggravated twice on the job, the last being June 2018, and where she continued to experience pain and discomfort up to the point of her third surgery in 2019, the Claimant's absence from work since June 2018 was directly as a result of her injuries. Consequently, her

loss of earnings must be calculated from the period she ceased to receive earnings from her employer regardless of the date of the formal resignation letter, to the date of judgment. No evidence has been presented that Ministry offered to reemploy her in ameliorated circumstances or that she was offered a job suitable to her medical condition that she refused to accept.

[94] Accordingly, I find that the Claimant is entitled to recover loss of earnings from June 6th 2018 to 27th of November2020. The Claimant has tendered into evidence, payslips that reflect that her salary up to August 20th 2017; was **$9,492.98** per fortnight. I therefore find that the award that she is entitled for this period is **$554,390.04**

Handicap on the Labour Market/ Loss of Future Earnings

[95] Counsel for the Claimant submits that

> "The real and substantial risk" of the Claimant being thrown on the open labour market has in fact materialized as the Claimant is and must now on the open market to compete with able bodied men/women of similar age suffering from none of her disabilities."

[96] She further submits that the multiplier/multiplicand approach should be applied to the calculation of the damages under this head. Relying on the case of **Godfrey Dyer vs. Stone** SCCA 7/88 she submits that with the Claimant now being 45 years old, a multiplier of eight (8) is applicable.

[97] Counsel for the Defendant also submits that damages under this head should be assessed using the multiplier/multiplicand method. However, she takes the position that "no evidence was led as to whether the Claimant would be very unlikely to find employment as reliance seemed to be placed on the fact that there were discussions between the Claimant and her doctor at KPH which led her to resign."

[98] Relying on the case of ***Janet Edwards v Jamaica Beverages Limited***, she acknowledges that a multiplier of 8 is appropriate for a female Claimant, who was also 45 years old at the time of trial. However, she submits that the medical evidence does not support the assertion that the Claimant cannot work. She is of the view that based on the medical evidence the Claimant is able to work using her foot drop splint. She also submits that the Claimant could:

> "request an extension of her hours to account for taking breaks and resting. She could also request working in a department that would not require her to take the stairs or that has an elevator. She could work in a less physically demanding role such as that of an attendant or clerk, if necessary"

[99] Having regard to the final medical report of Dr Douglas that the Claimant's "function would be diminished", she accepts that the Claimant is entitled to an award under this head. However, she suggests that a multiplier of 5 is more appropriate in this case. She also submits that the multiplicand should be calculated on the basis of an annual net salary of ***$250,000.00.***

Analysis

[100] In the case of ***Moeliker v A Reyrolle & Co Ltd*** [1977] 1 All ER 9, at page 15, Browne LJ stated that an award for handicap on the labour market, or loss of earning capacity:

> "*…generally arises where a plaintiff is, at the time of trial, in employment, but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid*."

[101] However, the case of ***Thompson v Smith and another*** [2013] JMCA Civ. 42 has clearly established that the Claimant does not have to be employed at the time

of trial in order to receive an award under this head. At paragraph 80 Morrison JA stated that:

> "*Once the court is satisfied that there is a substantial risk that the claimant will at some point in the future find himself on the labour market, "what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market*"

[102] Counsel for the Defendant has not denied that the Claimant is entitled to an award under this head. Therefore, the next step is for me to determine what approach I should take in determining an appropriate award for the Claimant. There are in fact two approaches available to the court. (i) The award of a lump sum and (ii) arriving at a sum by a precise mathematical calculation. That is, the multiplicand/multiplier approach. The choice that is adopted is dependent on the circumstances of each case. (See the cases of ***Archer Ebanks v. Japther McClymouth*** Claim No. 2004 HCV R172, delivered March 8, 2007 and ***Thompson v Smith and Anor*** Supra)

[103] In the case of **Iclilda Osbourne v George Barned and Others** (Claim No 2005 HCV 294, judgment delivered 17 February 2006), at paragraph 18 Sykes J., as he then was, stated:

> "*The cases suggest that the choice of method is influenced by the information available to the court, that is to say, where the claimant has been working for some time before the accident so that the court has some reliable data concerning her income, her remaining working life and so on then the multiplier/multiplicand method may be used (**Campbell v Whylie** (1999) 59"*

[104] Therefore, in order to apply the multiplicand/multiplier approach the Court must have real, assessable figures on which it can rely. Both parties have agreed that

the multiplier/multiplicand approach in the circumstances of this case is the appropriate approach The Claimant has produced evidence of her net salary as at August 20th 2017 which is $ 9892.72 per fortnight. It is my view this is the most current and reliable figure that is available to the court. I therefore find that a multiplicand of ($9,492.98 x 26) $246,817.48, is appropriate for assessing the Claimant's loss of future earning capacity.

The Multiplier

[105] Counsel for the Claimant relying on the case of **Godfrey Dyer vs. Stone, SCCA 7/88** submits that the appropriate multiplier is 8. Counsel for the Defendant relying on the authority of ***Janet Edwards v. Jamaica Beverages Limited*** *[*2017] JMSC Civ.76 submits that the multiplier should be 5. Counsel has not clearly articulated the basis for the reduction. However, what I have gleaned from her submission is that she is positing that the Claimant has not produced evidence that she has sought alternate employment, or reemployment by her previous employers. On this basis, she should not benefit from a multiplier of 8 but it should be reduced to 5.

[106] I hold this perception owing to her submission that:

> "The medical evidence did not support the assertion that the Claimant cannot work. The medical evidence stated that the Claimant could work using her foot drop splint, she could request an extension of her hours to account for taking breaks and resting. She could also request working in a department that would not require her to take the stairs or that has an elevator…. she could work in a less physically demanding role such as that of an attendant or clerk, if necessary. Having regard to the final medical report of Dr Douglas that her function in the role would be diminished. In light of the foregoing, it is submitted that a multiplier of 5 would be more appropriate in this case"

[107] The case of ***Kiskimo v Salmon*** (SCCA No 61/1989, judgment delivered 4 February 1991), dealt with the question of whether a judge was correct to discount the figure arrived at after applying the multiplier /multiplicand method. At page 11 the court stated that:

> "I *must say that I have the greatest doubt whether the method of discounting used by the learned judge in this case should be encouraged. It has nothing to recommend it and indeed I think it is wrong. The usual, and indeed the recognized method of allowing for contingencies and the fact of immediate lump sum payment is by adjusting the multiplier. Where however, a judge merely makes an overall estimate of what should be the loss of earning capacity, then I think, he would be perfectly entitled to discount that total. The method adopted by the judge will depend more often than not, on the adequacy of the evidence before him and in some instances on the nature of the injuries which might well create many imponderables as to the plaintiff's future. But I think, if we are to ensure some uniformity in awards under this head the arithmetic approach should be preferred as it allows this court to maintain some equilibrium in the figure taken as a multiplier by trial judges."*

[108] In the instant case, at her last employment, the Claimant was employed as a sanitization worker. Up to April 30, 2019, prior to her 3rd surgery, the medical evidence of Dr Douglas, and the Claimant's unchallenged evidence, is that she was still experiencing serious effects of the injury. As was discussed in the previous section, her resignation would have been stimulated by the aggravation of her injuries while on the job, for which she had a subsequent surgery some 10 months later. That is, "as the foot drop and back pain persisted she was readmitted to the KPH on April 21, 2019 for a 3rd surgery". That surgery was performed on April 30th 2019.

[109] On his last medical examination of the Claimant, conducted on the April 17, 2020, Dr Melton Douglas reported that her complaint was that she had mild pain in the lower back and that: “She is unable to stand for 20 minutes because of the development of the lower back pain. She can walk for 10 minutes but then has to stop and sit down and rest before she can continue her journey. She cannot perform the lifting of any heavy objects”.

[110] The Doctor’s findings that “her symptom of back pain is not as severe after the last surgery, making the surgery a success”, in my view does not conflict with her complaints. It points to a reduction in severity but not an absence of pain. Additionally, he did mention that “she will not recover from the complication of the surgery, resulting in the injury to the spinal nerve causing the foot drop”.

[111] In light of the medical evidence, I am of the view that the purpose for the wearing of the foot drop splint is to improve her gait, but it does not eradicate her functional challenges. In fact, despite stating that “her function has improved significantly following her last surgery,” Dr Douglas maintains that the Claimant “is still challenged functionally as a result of the foot drop; mainly by the functional loss from the foot drop.”

[112] Furthermore, the Claimant’s evidence indicates that her duties as a sanitization worker involved cleaning and walking the floors. This would essentially require her to do much standing, lifting and carrying the sanitization products from the point of storage to the point of use and cleaning and removing waste. Therefore, even after her final surgery the medical evidence is that she will not be able to perform at her pre accident level.

[113] Defence Counsel’s submission that “she could request an extension of her hours for taking breaks and resting, or work in a department that would not require her to take the stairs or that has an elevator, or work in a less physically demanding role such as that of an attendant or clerk” would apply in circumstances where she

is making a request of an employer to whom she is currently employed. The realty of this case is that the Claimant is currently unemployed due to the effects of her injuries

[114] There is no indication that there is a policy of the defendant to re-employ an employee after resignation. Additionally, as was earlier highlighted, there is no indication that she was offered reemployment in ameliorated circumstances. Counsel for the Defendant suggests that she could be employed as a clerk or attendant. However, there is no evidence that these positions are available, or were offered to the Claimant. Furthermore, even if these positions were available there is no evidence that the Claimant possesses the skill set to function in any such position. Moreover, most employers have a predilection for efficiency. I am cognizant of the fact that the nature of the job of a sanitization worker depends primarily on the individual's physical aptitude. Consequently, it is my view that at 45 years of age, the Claimant will have serious challenges competing on the job market with her functional challenge.

[115] In the case of ***Thompson v Smith*** (supra) Morrison JA at paragraph 74, stated that:

> "*In my view, the position of the 2nd respondent in this case, in the light of the very serious injuries which he suffered as a result of the accident and the nature of his employment, amply satisfied these criteria*."

[116] In light of the foregoing view expressed by the learned Judge of Appeal, it is my view that the essential consideration on this issue is whether the injuries of the Claimant are sufficiently serious, so as to inhibit her from functioning in her vocation, thus placing her at a disadvantage of gaining employment, or if she does gain employment, it will be an employment with a reduction in her pre-accident earning. This requirement would have been satisfied even in the absence of evidence of any attempt to find alternative employment.

[117] When I examine the nature of the Claimant's injuries, the prognosis of the doctor and the nature of her job, I find that her prospect for re-employment on the Labour Market, especially at her pre-accident salary, appears to be quite dim. Consequently, I find no basis for reducing the multiplier from 8 to 5. Therefore, I find that a multiplier of 8 is appropriate in all the circumstances. As such the loss of future earnings for the Claimant is calculated and is assessed as follows: ***$246,817.48 x*** **8 years = $1,974,539.84.**

Future Care

[118] The Claimant claims the replacement cost of 5-foot drop splints at the current cost of $5,650.00, (a total of $28,250.00). The claim is based on Dr Douglas' findings, that she will require the foot drop splint for the rest of her life. He also indicates that it has a life span of three (3) years. Relying on the case of **Biggs v Courts JA Ltd**. CL HCV 0054/2004. Counsel for the Claimant submits that the appropriate multiplier is 16**.**

[119] Counsel for the Defendant has conceded that the Claimant is entitled to an award under this head. She however suggests that a multiplier of 8 for a 45year old woman should be applied. While she has not indicated why she considers this multiplier to be appropriate, I presume that she has taken the position that the multiplier for loss of future care should be the same as the multiplier for the loss of future earnings.

[120] However, my appreciation of the law in this area is that the multiplier for loss of future earning or handicap on the labour market is applicable to the Claimant's working life whereas an award for future care is directed at life expectancy. It is generally expected that a person's life expectancy will be greater than their working life. Consequently, the multiplier for the cost of future care should be greater than that for loss of future earnings.

[121] The case of ***Kenroy Biggs v Courts Jamaica and Ors.*** supports this view. In that case, Sykes J., as he then was at paragraph 121 stated that:

> "*This jurisdiction has very little experience with selecting multipliers for cases of future medical care. This is not to say that the process should not begin. What it does mean is that the process should be watchful. As the Lord President pointed out in O'Brien at page 329 'the factors which must be taken into account in selecting a multiplier for future wage loss are not the same as those which are appropriate to a claim for the cost of future care for the remainder of a person's lifetime*.'"

[122] And further at paragraph 129 he stated:

> "*I would use a multiplier of 22. I arrived at this multiplier using the decision of* ***Stone v Dyer*** *as a guide. That case did not deal with multipliers for future cost of care but with loss of earnings. The rough guide from that case shows that 26 years old would have multiplier of 14 if I were calculating loss of future earnings. However, the principle is that the multiplier for cost of future case is to be significantly higher than that for future earnings calculations*…."

[123] In accordance with the aforementioned authority, in adding another 8 years to the multiplier for loss of earning in this case, I would arrive at an appropriate multiplier for the life expectancy of the Claimant who is now 45 years old. Therefore, in calculating the cost for future care I apply a multiplier of 16.

[124] The evidence of Dr Douglas is that the Claimant would need to replace the foot drop splint every three years. The cost of $5,650.00 per splint is not being challenged by the Defendant. Therefore, applying the multiplier of 16, the Claimant would require a total of 5-foot drop splint for the rest of her life. That would be at a

total cost of $28,250.00. Consequently, I make an award of $28,250.00. for the cost of future care**.**

Orders

[125] Damages are awarded as follows:

Special Damages

Medical Expenses	$ 898,906.25
Travelling Expenses	$ 317,100.00
Extra Help	$ 798,000.00
	$2,014,006.25

Interest on Special Damages at the rate of 3% from the 7th of June 2011 to the 27th of November, 2020.

Pre-trial Loss of Earnings

Before resignation		$ 223,085.03
After resignation		$ 554,390.04
	Total	$ 777,475.07 (no interest)
Cost of Future Medical		$ 28,250.00 (no interest)

General Damages

Pain and Suffering and Loss of		$ 12,000.000.00
Less interim payment of		$ 1,500,000.00
	Total	$10,500,000.00

Interest on $ 1, 500,000 (interim payment) to be paid at the rate of 3% from the 8th of May 2014 to the date it was paid.

Interest on the $10,500,000 to be paid at a rate of 3% from the 8th of May 2014 to the 27th of November, 2020.

Loss of Future Earning **$1,974,539.84** (no interest).

Cost to the Claimant to be agreed or Taxed.