IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV2588/2005

BETWEEN **CHERRY DIXON- HALL** **CLAIMANT**
(As amended)

AND **JAMAICA GRANDE LIMITED** **DEFENDANT**

Mr. Manley Nicholson and Ms. Georgia Hamilton instructed by Nicholson & Phillips for the claimant

Mr. Lowel Morgan & Ms. Camille Wignall instructed by Nunes, Scholefield Deleon & Co. for the defendants

January 29 - 30 & February 13, 2007

McDONALD-BISHOP, J. (Ag.)

1. Mrs. Cherry Dixon-Hall, the claimant, is a 58 year old American citizen. On the 9th May, 2003, whilst as a guest at the defendant's hotel in Ocho Rios, St. Ann, she slipped on a wet floor and fell. Consequently, by claim form with accompanying particulars of claim filed on 31st August, 2005, she claimed damages against the defendant for negligence and /or breach of statutory duty. She avers in paragraph 3 of her particulars of claim:

> "3. That as a result of the said accident the Claimant suffered injuries and damages.
>
> PARTICULARS OF INJURY
> (i) Fracture of the 7th rib
> (ii) Severe left wrist sprain
> (iii) Sciatica and muscular injury to lower back
> (iv) Systemic Lupus Erythematosus;
> (v) Several lupus flares becoming steroid dependent for the management of the lupus
> (vi) Four months of physiotherapy...

PARTICULARS OF SPECIAL DAMAGES

Medical Expenses	US$13,603.27
Loss of Earnings (27months @ $2000.00.)	US$ 54,000.00
Transportation	US$1,460.00
Total	**US$69,063.27****

**and continuing

Current exchange rate of J$61.80 to US$1.00"

2. The defendant admitted liability for negligence and/or breach of statutory duty but filed a defence in respect of quantum putting the claimant to strict proof of her averments as to the injuries and damages she sustained as a result of the fall. Accordingly, judgment upon admission of liability was entered for the claimant for damages to be assessed. It is for that purpose that this case now stands before me.

3. I am mindful that there are two main factors that must be taken into account in assessing damages and these two factors have been usefully distinguished by Cockburn CJ in **Fair v London and North Western Rly Co** (1869) 18 WR 66 as recorded in **Munkman on Damages for Personal Injuries and Death,** 11th edn. at page 9.

> "In assessing the compensation, the jury should take into account two things: first the pecuniary loss the plaintiff sustains by the accident; secondly, the injury he sustains in his person or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only his present loss, but his incapacity to earn a future improved income."

The issues for my resolution are, therefore, the usual in cases of personal injury, viz: (a) What are the items of loss and injury for which compensation should be given and (b) how are these items to be quantified or reduced into monetary terms?
Before proceeding to an examination of these questions, it is considered imperative that the claimant's case be set out in some detail.

THE CLAIMANT'S CASE

4. The claimant stated that on May 9, 2003, while at the hotel, she slipped on the wet floor and fell and immediately she started feeling pain .The pain was to her entire body but was particularly severe in the areas of her back, rib, left wrist and

arm, neck and hip. The pain she felt was quite severe, in her estimation, and got worse as the days progressed.

5. She was seen and treated by Dr. Lothian Wright on the said day of the accident in her room at the defendant's hotel. X-rays were done on May 10, 2003 on the referral of Dr. Wright and she was diagnosed with undisplaced fracture of the 7th rib and soft tissue injury of the right elbow. She was given injection and medication in her hotel room. She was reviewed by Dr. Wright on three subsequent occasions while in Jamaica.

6. In support of her claim that she sustained injuries while in Jamaica, she relied on the medical report of Dr. Lothian Wright of Outreach Medical Centre, Ocho Rios, St. Ann dated 7th June, 2003. It was admitted into evidence by consent as exhibit (1). This report will be later set out in detail.

7. The x-ray report over the signature of Dr. Karlene Neita, Consultant Radiologist, dated 13th May, 2003, was also admitted into evidence as exhibit (2) by consent. This shows that x-ray examination was carried out on the claimant upon the referral of Dr. Wright. The report shows that examination was carried out on the chest, ribs and elbow. In relation to the chest and ribs it indicates: an undisplaced right 7th rib fracture. Left elbow: No abnormalities detected.

8. Upon returning to the USA on 19th May, 2003, she continued to have severe pain and had difficulties using her wrist. On 20th May, 2003, she attended the North Central Bronx Hospital for treatment of her injuries. There she was treated by Dr. Eric J. Williams. She was diagnosed with fracture of the 7th rib, severe left wrist sprain, sciatica and muscular injury to lower back. She was also diagnosed with arthritis to her left wrist. Those injuries, she claim, are direct results of the fall.

9. She was prescribed analgesics, non steroidal anti- inflammatory agents and steroids as well as referral to physiotherapist. She obtained physiotherapy for three

months. She has tendered into evidence a certificate under the letter head of North Central Bronx Hospital and over the signature of Gladys Schroeder dated 11/18/04 (exhibit 4) which states that the claimant was referred for Occupational Therapy on October 15, 2003 and that she started therapy on October 20, 2003. It indicates that she attended therapy approximately one time per week until January 26, 2004.

10. In or about November, 2003, after the physiotherapy course, she had a sudden and unexpected flare up of her lupus erythematosus (her spelling which differs from that of Dr. Williams) condition. She was diagnosed with this condition in 1998. This was the first she was having a flare up after her diagnosis and she had never had a flare up before the fall. She had to be hospitalized as a result of the flares on two occasions. Since November 2003, she has had several other small flare ups.

11. She has received intensive course of medical treatment and continued to experience pain quite frequently. Sometimes the pain is to her entire body and at times, to areas such as her lower back, left wrist and elbow. On some days, she would wake up feeling well and without any warning, everything changed and she would start to feel pain to her entire body or to selected areas. As a result of the lupus flares, she has been rendered steroid dependent which has changed her life completely.

12. She now has unwanted weight which caused her to be totally dissatisfied with her appearance. She is very conscious of how drastically her appearance has changed. She is barely able to take care of herself. She can no longer take baths as she cannot go down in the bath; she can only take showers. She can no longer carry out household chores without assistance. She can no longer drive when her pains are at their worst. She is also experiencing difficulties walking and it takes much effort for her to climb the stairs. She can no longer take care of her elderly mother as she used to when she visited her. Since been injured, her relationship with her common law husband has been severely affected especially as it relates to matters of intimacy as the impact of the fall has left her disabled.

13. Prior to the accident, she was involved in the community in which she lives. She is no longer able to take part routinely in church activities as well as take walk in the nearby park. Prior to the fall, every year, particularly summer, she would take part in barbecues, street fairs, dance competitions, road trips and other highly physical and engaged activities that are staged by the residents. She has taken part in such activities for twenty years. However, since the injuries, she can no longer participate in these activities and all she can do is to provide moral support to her neighbours, family and friends who participate.

14. She has incurred medical expenses amounting to US$13,603.27 as a result of the intensive medical attention and treatment she received for her injuries and the flares of the lupus. She has also incurred transportation expenses, including taxi and airfares, which currently amount to US$1,460.00. These expenses have been occasioned partly due to her inability to drive for several months following her injuries.

15. Prior to being injured, she worked at Raddy's Health Food Store as manager. This is a store she operated with her common-law husband. Since the fall she has not been able to go back to work and as a result she has lost and continued to lose income. She earned a net monthly salary of US $2,000.00. Before working at Raddy's, she worked at Kaufmann Concert Hall and was paid a rate of US$10.00 per hour.

16. Her medical expenses have depleted her life's saving and in addition her inability to work has rendered her as a financial burden to members of her family. Her daughter who she was assisting financially to further her education has to discontinue her studies as she is no longer in a position to provide such financial assistance.

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17. The claimant's sister, Cora Dixon, also gave evidence on her behalf. She stated that since May 2003, she has to attend to the claimant by providing nursing and financial assistance. She spend most of her weekends with the claimant assisting her in any way necessary including shopping, cleaning and accompanying her on social/ business/ medical appointments. She also spoke to knowing the claimant's employment history. She also stated that she knows the claimant was unable to work when she was injured in the fall because she had to assist her and had to take her to the hospital. She also testified that the claimant has been declared disabled by the State of New York and is in receipt of disability benefits.

18. This is the evidence that the claimant has put before the court in her effort to discharge the burden of proof placed on her to prove, on a balance of probabilities, that the fall that resulted from the breach of the defendants have resulted in the injuries, damages and losses she now complains of. The gravamen of counsel's submission on her behalf is that the defendant must be held liable for all the injuries and losses alleged by the claimant as they are consequences of the fall. He contended, as the cornerstone of the claimant's case, that the defendant will have to take the victim as it finds her, that is, with a pre-existing lupus condition. Accordingly, the "egg-shell skull" principle applies to render the defendant liable in damages as the damages claimed would not be remote. He prayed in aid the well known case of **Smith v Leech Brain & Co. Ltd [1962] 2 QB, 405.** This case, I must say, still stands as good authority on the issue of the applicability of the "egg shell skull" rule to the question of causation.

ISSUE

19. It is accepted that damages are given for all the consequential losses and expenses which flow from the injury caused by the defendant's breach. It is within the acceptable bounds of the law that the damage must be the consequence of the breach or put another way, that the breach has caused it or brought it about. It is possible however, for the damage to be remote or alternatively that the defendant's breach did not cause the loss. It is thus the contention of the defendant that although

it is liable for the fall, its liability does not extend to all the damages and losses claimed by the claimant. The claimant has been put to strict proof as there has been no admission of facts in this regard.

20. The issue therefore is whether the defendant should be held liable in damages for all the damages and losses that are alleged by the claimant to have flowed from the breach of duty of the defendant resulting in her fall.

ANALYSIS AND FINDINGS

21. In analysing the claimant's claim for general damages under the orthodox headings of pain and suffering, loss of amenity and loss of future earnings or loss of earning capacity, I have done so within the framework of the useful guidelines set out by Wooding, CJ in **Cornilliac v St. Louis** (1965) 7 WIR, 491 (C.A. Trinidad and Tobago) being:

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

NATURE AND EXTENT OF THE INJURIES SUSTAINED

22. The claimant said that immediately upon her fall she started feeling pain. This pain was to her entire body but was particularly severe in her back, rib, left wrist and arm, neck and hip. She said *"the pain was quite severe and in fact got worst as the days went by."* She was seen by Dr. Lothian Wright in her hotel room on the same day and on three subsequent occasions. She was referred for x-ray.

Medical report of Dr. Lothian Wright

23. Dr. Wright documented his examination and findings as follows:

"7th June, 2003

TO WHOM IT MAY CONCERN

RE: CHERRY DIXON

The above-mentioned was seen by me on the 9th May 2003. She gave history of slipping on wet floor and fell hitting her left Elbow and right Chest area. She complained of severe pain of the right Chest exacerbated by the slightest of movements, deep breathing and cough.

Also complained of moderate pain of the Left elbow.

ON EXAMINATION

Sight tenderness of the right elbow, no bruises detected. Tenderness was however, exacerbated by active or passive movements of same elbow.

Moderate to severe pain and tenderness of the left chest area. Point of maximum tenderness in the region of the 7th and 8th rib, posteriorly to the mid auxillar line, area was also slightly swollen.

X-ray of the chest and right elbow was subsequently done.

RESULT

Chest: COPD – Undisplaced right 7th rib fracture

Left elbow: No abnormalities detected.

DIAGNOSIS : **Fracture of the 7th Rib**

Soft Tissue injury of the right elbow

TREATMENT: **Patient was subsequently put on Panadiene F and Cataflam.**

Ms. Dixon was subsequently reviewed by me on three separate occasions and advised to rest and continued Medication.

PROGNOSIS GOOD

In my estimation patient having been injured on the 9th of May 2003 should recover sufficiently within two (2) months to carry out her daily active living."

24. The claimant has not indicated in her evidence which part of her body got hit when she fell. As can be seen in the medical report of Dr. Wright, however, he stated that the claimant said she fell hitting her chest and elbow. There is no evidence from the claimant that this was not so and no explanation has come from her as to why the doctor would have said she told him only about hitting these specific areas. There is thus evidence on the claimant's own case that at the first opportunity that presented itself after the fall, she reported only hitting her chest and elbow.

25. The claimant also said that immediately upon the fall she started to feel pain which was to her entire body but was particularly severe in the areas of her back, rib, left wrist and arm, neck and hip. She makes no mention of her elbow. However, Dr. Wright in his said report spoke to the complaint he received from the claimant being *"severe pain of the right Chest exacerbated by the slightest of movement, deep breathing and cough" and that she "also complained of moderate pain of the left elbow."* This was the extent of her complaint in relation to the pain she was experiencing that was documented on the first opportunity that presented itself.

26. There is no evidence that has come on the case indicating that she had, in fact, advised Dr. Wright that she had severe pains all over her body and in particular to the areas now specified by her in her evidence as to where the pain was most severe. This omission in the doctor's report is not explained by evidence coming from either the claimant or from the doctor himself.

27. The evidence clearly shows that following on the complaint of the claimant and after the examination conducted by the doctor, diagnostic tests were ordered for the elbow and chest. Nothing was done about all the other areas of her body mentioned in evidence by the claimant. The x-ray report of Dr. Karen Neita confirms the referral of Dr. Wright and it shows that x-rays were done on the chest, ribs and elbow in accordance with the instructions. There is no evidence that up to the date of the x-ray, a day after the fall, there was report as to injuries to other parts of the claimant's body.

28. Following on the x-rays, the claimant was seen on three other occasions by Dr. Wright for review and follow -up care. There is no evidence to directly indicate or to lead to the inference that the claimant complained as to pain in other areas of her other than the chest and elbow. The claimant remained in Jamaica for about nine days or so after the fall and there is no independent evidence to show that during that time she had sought and obtained medical attention for the severe pain all over her body especially that in her wrist, neck, hip and back that got progressively worse by the days. In the absence of any evidence to the contrary, it is accepted that the claimant told Dr Wright only about severe pain to her chest and moderate pain in her elbow as recorded in his medical report. I, therefore, find it difficult to accept as credible the claimant's assertion that immediately after the fall she had severe pain to her entire body and in particular the areas not complained of to Dr. Wright.

29. I have noted too, in examining Dr. Wright's report, that he said that the claimant's complaint was in relation to left elbow and right chest. Then he spoke about examination to the right (not left) elbow where no bruises detected and also to the left (not right) chest where he found tenderness in region of 7th and 8th rib. He also said x-rays of chest and right elbow were subsequently done. There seems to be an error in the doctor's reference to examination of right elbow and left chest. This possibility of an error is borne out by the x-ray report that states that x -ray was done to chest, ribs and elbow. There is no specification of right chest or left elbow. The results were, however, shown to be: undisplaced fracture of the right 7th rib laterally

and no abnormalities to the left elbow. This indicates, and I so accept, that examination was carried out in relation to the right chest and left elbow as initially complained of by the claimant. In fact, Dr. Wright spoke to the correct results as showing no abnormalities to the left elbow. His diagnosis was then fracture of the 7th rib and soft tissue injury to the right elbow. What the x-ray result does show is that the claimant's left elbow and right chest were examined in keeping with her complaint. The doctor's error would not take away from the proven fact that her left elbow was medically examined for injuries and no abnormality was noted.

30. Dr. Wright stated that after reviewing the claimant, he advised bed rest and that she continued the medication. After three further reviews of the claimant's condition, Dr. Wright opined that her prognosis was good and stated that he expected her to be back in good health within two months of the fall. There is no evidence that any other complaint, other than the initial one as to elbow and chest, was found by this doctor.

31. I will also go a bit further and register my observation that there is no evidence that the claimant had indicated to Dr. Wright, as part of her medical history, that she had lupus at the time of the fall. This was a pre-existing medical condition, according to the claimant, but there is no evidence from the medical report that this was disclosed to the first doctor who saw and treated her in Jamaica. I would think that a condition such as lupus would have been disclosed so that the doctor would be alerted to any underlying illnesses that could affect the course of treatment to be administered. In fact, no further report has been obtained from Dr. Wright to show that the lupus condition was disclosed and whether, in light of the pre-existing lupus condition, his treatment and prognosis would have been the same.

32. I accept the report of Dr. Wright that he examined the claimant and diagnosed a fractured rib and soft tissue injury to one of her elbows- be it right or left it really makes no difference. His diagnosis is supported and clearly influenced by the x-ray report signed by the consultant radiologist, Dr. Karlene Neita.

33. It is thus clear that the only evidence of the nature and extent of any injuries to the claimant when she left Jamaica were as diagnosed by Dr. Wright with the help of x-ray being: undisplaced fracture to right 7th rib and soft tissue injury to right elbow.

34. A critical omission from the report, that remains, is that Dr. Wright has proffered no conclusion as to whether, in his opinion, the injuries he saw were consistent with the claimant falling and hitting her chest as she had explained to him. Again, the claimant has sought to rely on this medical report that in the end offers no real assistance to her on the ultimate question, that is, the causal nexus between the fall and the injuries she is alleging. This remains a fact to be ultimately determined by me on all the evidence.

35. Following on the treatment of Dr. Wright, the claimant said she continued to have severe pains upon her return to the USA on May, 19, 2003. On May 20, 2003, a day after she returned, she went to Dr. Williams. I will now proceed to the medical reports of Dr. Williams offered in support of the claimant's assertion that she suffered injuries over and above those diagnosed in Jamaica. It is absolutely necessary, for these purposes, for the reports of Dr. Williams to be set out verbatim.

Medical reports of Dr. Eric J. Williams

36. In his report dated July 24, 2004 and under the letter head of North Central Bronx Hospital (exhibit 3), Dr. Williams reported as follows:

> **"To Whom It May Concern,**
>
> **I submit this letter on behalf of Ms Cherry Dixon as she is a patient under my care. Ms. Dixon suffered traumatic injuries sustained in a fall while vacationing in Jamaica on May 9, 2003. After a period of convalescence she returned to the United States and began treatment for her injuries under my care on May 20, 2003. Ms. Dixon suffered multiple injuries secondary to her fall including a closed fracture of the 7th rib, a severe left wrist sprain, sciatica and muscular injuries to the lower back. Ms. Dixon has been under treatment with analgesics, non-steroidal anti- inflammatory agents and steroids. Ms. Dixon has shown some mild improvement in her condition, however she remains disabled.**

Ms. Dixon has also been diagnosed with systemic lupus erythematosus (his spelling) a deleterious disorder of the immune system. Previously her condition has been quite stable in regards to the illness. However since her fall in May 2003, she has had several lupus flares as evidenced by an elevated esr of 70 and an anti DNA of greater than 200. Since May 20th she has been hospitalized twice and has numerous lupus flares. She is now steroid dependent for the management of lupus.

Sincerely

SGD Eric J. Williams, MD
Attending Physician
North Bronx Healthcare Network"

37. In another letter that is undated (exhibit 5) he wrote:

"To Whom It May Concern

I submit this letter on behalf of Ms. Cherry Dixon as she is a patient under my care. This letter is to serve as an addendum to my previous report regarding the injury to Ms. Dixon's wrist. Firstly, Ms. Dixon suffered a severe sprain to wrist that in my opinion was caused by the fall. The acute sprain and resulting reactive arthritis were both a direct result of the injury. The pre-existing lupus would have had no bearing on the injury, as her lupus flares did not begin until after the fall. Please contact me with any further questions at 718-519-2195.

Sincerely,

SGD: Eric J. Williams
Attending Physician
North Bronx Healthcare Network "

38. In his third letter dated 17th June, 2006 (exhibit 6B), he wrote in response to a letter from the claimant's attorneys-at-law (exhibit 6A):

"To Whom It May Concern

I submit this letter on behalf of Ms. Cherry Dixon, as she has been a patient under my care for some time. The intent of this is to add clarity to my assessment of Ms. Dixon's injuries. As a result of the fall Ms. Dixon suffered a severe wrist sprain that has resulted in reactive arthritis that will remain with her permanently. Ms. Dixon continues to suffer with chronic pains and stiffness in this joint that negatively impacts her functional capacity. Ms. Dixon also suffers with chronic lupus eythmatosis (his spelling noted to be different from his spelling in previous

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report dated July, 24, 2004). **The natural history of this disorder is typified by episodic exacerbations. At the time of the accident Ms. Dixon's lupus had been quite stable for and (sic) extending (sic) period of time. While recovering from the fall injury Ms. Dixon experienced a major flare and ultimately required hospitalization and aggressive medical treatment. The clinical presentation supports a trigger and response relationship between the fall and the subsequent flares of Ms. Dixon's lupus. Please contact me with any further questions regarding this matter.**

Sincerely,

SGD: Eric J. Williams, MD

39. Clearly, Dr. Williams spoke to injuries not reported by Dr. Wright who had treated the claimant four times whilst she was in Jamaica. Mr. Nicholson has asserted that Dr. Wright is the hotel's doctor who attended to the claimant in a hotel room and he has made the suggestion that Dr. Wright might not have been detailed in his diagnosis. Apart from the claimant's testimony that Dr. Wright is the hotel's doctor, I see no evidence to support the conclusion that his objectivity and professional judgment would have been impaired in any way. The mere fact that he attended to the claimant in the hotel room is not enough for me to accept that he is the defendant's doctor, without more.

40. In any event, the claimant has sought to rely on the doctor's report- even if he is the hotel's doctor- and has tendered it into evidence without calling him to explain or amplify the contents of his report. There is no evidence of any attempt made on her part to have Dr. Wright correct any thing seen as erroneous in his report or to amplify or explain anything with which she might have had a difficulty. This is the report that has been placed before the court and it is within my purview, as the tribunal of fact, to scrutinize it and to see what weight is to be attached to its contents.

41. The claimant cannot properly, as a matter of law, seek to discredit her own witness in the manner undertaken by counsel on her behalf. It is the law that if a witness fails to come up to proof or gives adverse evidence, the party calling the

witness is not, as a general rule, entitled to turn around and seek to impeach his or her credit or to otherwise cross examine the witness as if he or she is a witness for the opposite party. There is, however, an exception to this rule in the case of hostile witnesses but not in the case of witnesses who are merely unfavourable (see **Blackstone's Civil Practice, 2004, para. 47.60**). The court needs evidence to explain any omissions, inconsistencies or discrepancies there are on the claimant's case. Any explanation there might be must come from the evidence of the respective witnesses and not from conjectures. The claimant cannot now ask the court to ignore Dr. Wright's findings and prognosis that she has herself presented for the court's scrutiny. She has to contend with the discrepancies and inconsistencies on her case wherever they exist and seek to resolve them by evidence.

42. In considering the submissions of Mr. Nicholson concerning the utility of Dr. William's reports and that this doctor's diagnosis and prognosis should be preferred to those of Dr. Wright, I am propelled to make note of some critical observations of the reports of Dr. Williams. These are the reports on which the claimant is seeking to rely to prove that all the injuries and losses suffered by her have resulted from the fall. In the first report, it is noted that in addition to the fractured rib reported in Jamaica, there were added, as part of the diagnosis, sprain and reactive arthritis to left wrist, sciatica, lower muscular back pains and worsening of her pre-existing lupus condition. No mention is made of any injury to her elbows.

43. Given the differences in the finding of Dr. Williams and Dr. Wright-both claimant's witnesses- the court ought to be assisted by proper and credible evidence as to the correlation, if any, between the fall and the resultant injuries that were not diagnosed in Jamaica. The guidance of an expert is imperative particularly as it relates to the alleged effect of the fall on the pre-existing lupus condition and the resulting steroid dependency that has allegedly wreaked havoc on the claimant's life. As the tribunal of fact, I cannot, of my own knowledge and without assistance from suitably qualified persons, conclude that the fall has ultimately led to the disability now claim by the claimant. Under general principles of evidence, expert evidence is

only admissible where the matters in question fall outside the court's experience. This case involves such questions. Expert evidence is, therefore, required.

44. It is clear that no permission has been sought and obtained for an "expert witness" to be called. This is a case that was filed after the **Civil Procedure Rules (2002)** had come into effect. The requirements of **Part 32 of the CPR** have not been complied with and so it would appear that there was no intention on the part of the claimant to have an "expert witness", properly so called, to assist in the proof of her case. **Part 32** deals with the provision of expert evidence to assist the court and an "expert witness" is defined in the rules as "*an expert who has been instructed to prepare or give evidence for the purpose of court proceedings."(emphasis mine.)*

45. The claimant has tendered the reports of Dr. Wright and Dr. Williams without objection by the defence. The court was never asked for permission to treat any of them as experts in accordance with the rules. I do accept that the result of a fall, where it is without complications and involves no complex medical questions, is ordinarily not a matter that would require specialized medical skill and training over that of a general practitioner. Here, however, the claimant has gone beyond direct and simple results of a fall into the realm of indirect and latent results.

46. The claimant is asking the court to accept the opinion of Dr. Williams that her sprained wrist and resultant arthritis, sciatica and lower back pains were direct results of the fall and that *"the clinical presentations supports a trigger and response relationship between the fall and the subsequent flares of Ms. Dixon's lupus."* The defendant, through its counsel Mr. Morgan, has challenged the reliability of the report and asked the court to reject Dr. William's opinion it being one not coming from an expert. Mr. Nicholson stated, in response, that the reports were admitted by consent and so the defendant cannot now challenge its contents.

47. In light of the documents being rendered admissible by consent, does it mean the court is bound to accept the contents of the document, without more? I think not.

The credibility and reliability of the document (as of that of the witness had he been called) are issues for the tribunal of fact to determine. The evidence having now been admitted, it now becomes a question of weight rather than of admissibility. The question of weight is thus a matter that falls exclusively within the purview of the fact finder. The parties, therefore, cannot tell the tribunal of fact what weight should be attached to a particular document and how it should be treated once it had become evidence.

48. My inherent duty to evaluate the evidence in the exercise of my jury function is not ousted merely by admissibility of the document by consent of the parties. Of course, where properly admitted evidence is placed before the court and it is found credible and reliable and it stands unchallenged, then there would be no proper basis for the court to reject it. The first hurdles to be crossed, however, before evidence may be accepted as unchallenged is that it is admissible and credible and so can be acted on.

49. In this case, the claimant is relying on the opinion of a witness (who is said to be a doctor) on the ultimate issue which has to be determined by the court. The general rule is that opinion evidence is inadmissible. However, it admits to an important exception in the case of expert witnesses. It is for the court, however, to ultimately accept that a particular witness is an expert and not the parties and that is the reason for the requirement that the court's permission must be first obtained for a person to be regarded as an expert. So even though the defendant has agreed to the admissibility of Dr. Williams reports, it has not agreed that he is an expert. It is for me to rule that he is one.

50. It is totally a question of law for the court as to whether the purported 'expert' witness has undergone a sufficient course of study or is of sufficient experience to qualify as an expert in order for his opinion to be admissible and acceptable. Such evidence is usually introduced by a statement of qualification. The CPR has incorporated this basic requirement in **r.32.13 (a)** where it is provided, inter alia, that

"an expert witness's report must give details of the expert witness's qualification." Accordingly, a party relying on opinion evidence must ensure that the court is presented with proper information in this regard so that it can safely accept a witness as an expert so that the opinion evidence intended to be adduced may be properly admitted.

51. This has led me to ask at this juncture: what do I have in this case for me to admit and accept opinion evidence as an exception to the general rule? This question has propelled me to closely scrutinize the reports of Dr. Williams because he is the one who has proffered an opinion as to the effects of the fall on the claimant. Upon a consideration of his reports, I made the following findings:

- There is no distinction between what he was told by the claimant or seen from other sources and what is in his personal knowledge. He spoke to no clinical examinations or tests personally conducted by him on the claimant on which his independent findings could be based. Neither has he referred to any other examinations conducted by any other medical personnel on which he had relied to properly base his conclusions.

- He indicated no diagnostic test done or ordered by him to analyse the claimant's condition particularly as it relates to sciatica, sprain to the wrist and the muscular back pains. He mentioned that the claimant was diagnosed with a fractured 7th rib, for instance, but he gives no indication as to from which source he has derived such diagnosis. There is no reference that he might have confirmed this by any x-ray he caused to be done in New York or from any medical or x-ray report from Jamaica that he might have examined and on which he could have based such a conclusion.

- The question that arises is: on what clinical basis has he concluded that the claimant had the injuries he spoke about? Is it just based on what the claimant told him or is it based on his own personal examinations and findings as a doctor? These are critical questions that remain unanswered on the terms of

Dr. Williams' report. The court cannot speculate. These questions do arise because at no place in his reports, for instance, does he say the claimant made complaint to him of pain in the areas noted or that she complained of injuries allegedly sustained in a fall. He wrote as if he found pain but he has not indicated any examinations done by him to arrive at such conclusion. He spoke definitively of injuries she sustained in 'the fall' as if it is within his personal knowledge that there was a fall and not what was told to him by the claimant.

- There is no indication that he has independently diagnosed the claimant with lupus and had himself treated her for the flares. He has not indicated for how long he has had the claimant as a patient and have been treating her pre-existing condition, if at all .He spoke about her not having any flares before the fall all mirroring what the claimant herself has said. From which source has he derived such information? This is not stated. The claimant has said she started attending Dr. Williams in 1999 or 2000, she cannot remember. This would have been after 1998 when she said she was first diagnosed with lupus. Where is the medical report from a doctor or institution confirming her diagnosis with lupus and her course of treatment since 1998? One cannot tell from Dr. Williams' reports whether he had in fact confirmed by his own diagnosis that the claimant has lupus. He has stated several conclusions without showing the court how he arrives at them. The claimant stated that she has been hospitalized twice for lupus. There is no proper medical report confirming this as to dates of admission, complaint, treatment administered, by whom and so forth.

- One of the troubling things about Dr. Williams' reports is that that he has presented hearsay as facts in his report and so I am not able to distinguish what are, indeed, facts within his own knowledge and what constitute hearsay. It is accepted as a matter of law that an expert need not have personal knowledge of every relevant matter within his field of expertise and

may base his testimony on the research and findings of others to arrive at his conclusion but these must be indicated in his report and the basis on which he grounds his conclusions must be stated. **R.32.13 (1)** has confirmed this principle. There is nothing put before me to ground the reputability of Dr. Williams' conclusions.

- Above all else, the court is left asking: what is the competence and qualification of Dr. Williams to proffer an opinion as to the causal nexus between the fall and the lupus condition that is now being blamed for the resultant disability of the claimant? Dr. Williams has disclosed no qualification and specialized training in the treatment of lupus that would qualify him to speak on the cause and effect relationship between a fall and lupus. Apart from placing "MD" behind his name and signing as "Attending Physician," he has not indicated any qualification nor has indicated any area of specialty and competence for me to treat him as an expert witness so as to properly accept his opinion in this regard. In fact, even the condition with which the claimant is allegedly afflicted is spelt differently in his reports and so I am not even certain as to the type of lupus with which she is afflicted, if any at all.

- I will even go further and say that I am not satisfied that he understands his duty while, purportedly, acting as an expert witness and stating his opinion. His duty is to the court and not to the person whom he has treated. This is expressly declared in the provisions of the CPR **r.32.3** where it is stated:

> 32.3 (1) It is the duty of an expert witness to help the court impartially on the matters relevant to his expertise.
>
> 2) This duty overrides any obligations to the person by whom he or she is instructed or paid.

Following from this, there is a requirement for a certificate of understanding to be declared by persons acting in such capacity **(r.32.13 (2)).** There is no demonstration or declaration on the part of Dr. Williams that he understands

that his overriding duty is to the court. In **Blackstone's,** (supra) **at para. 52.1**, the changes that have been brought about by the CPR, in relation to expert evidence, are explained thus:

> "The effect of the CPR has been to restrict what was formerly the parties' almost unhindered right to call their own experts to give evidence in court. Rule 35 .4(1) provides that no party may call an expert, or put in evidence an expert's report, without the court's permission.
>
> The duty of the expert by r. 35.3(1), is no longer to the instructing party, but to the court. This is an overriding duty, and it is hoped will allow the expert to feel liberated from what may previously have been perceived as a pressure to win the case for the instructing party."

52. In the end, the question of the effect of the fall on lupus is a medical question on which the court must be assisted in order to come to a proper finding as a matter of fact. This assistance must come from a person qualified to speak from his qualification and training and on whose opinion the court may safely rely in coming to its findings on the ultimate issue. Having seen the medical reports tendered in this case, I see no basis on which I can safely accept the word of Dr. Williams in order to arrive at a conclusion that the claimant was properly diagnosed by him with the other injuries not diagnosed in Jamaica. In particular, I cannot accept his opinion that the claimant had lupus that was exacerbated by the fall because I do not take him as an expert. His opinion, for all practical purposes, on this issue, is really inadmissible and of no value, being one not coming from a person who is an expert witness.

53. Upon a close scrutiny of the claimant's case, I find that apart from her say so, there is no credible and independent evidence to satisfy me, on a preponderance of probabilities, that the claimant had lupus as a pre-existing condition at the time of her fall and which has been exacerbated by the fall. I cannot find her, therefore, as

having a "thin skull" at the time of the fall for the "egg shell skull rule" to apply making the defendant liable for all the losses and injuries alleged by her.

54 Counsel for the claimant has brought to my attention the case of **Brewster v Davis (1992) 42 WIR 59** (Barbados case) to demonstrate the applicability of the "egg shell skull rule" and how I should treat with the evidence in this case. In **Brewster v Davis** (supra), the plaintiff unknowingly suffered from systemic lupus erytematosus ("SLE"). She was involved in a car accident for which the defendant's admitted liability. The SLE caused the claimant renal malfunction and materially contributed to acute renal failure. The SLE was only diagnosed after the accident and it was many months later before her renal function returned to normal. She, however, faced the possibility of recurrence. It was held that the "egg shell skull rule" was still the law in Barbados and that accordingly the defendant was liable to the claimant for the acute renal failure. Her claim for loss of earnings and loss of pension rights by reason of diminished life expectancy, however, failed on the ground that any loss of life expectancy could be attributed to the SLE rather to any liability of the defendant's.

55. Ironically, that case on which counsel sought to rely has also managed to throw up even more the serious deficiencies in the claimant's case. For, in that case, the court had the benefit of the evidence of specialists whose opinion it could and did accept. The claimant in that case relied on the report of Dr. George Nicholson to whom the plaintiff was referred after she was diagnosed with SLE. He was a reader in Medicine and Nephrology at the University of the West Indies and consultant physician at the Queen Elizabeth Hospital. With reference to him, Sir Denys Williams, CJ said: *"SLE is one of his specialties and I accept him as an expert..."* In the same case, Dr. Lawrence Baker gave evidence for the defendant. He was a consultant physician and nephrologist at St. Bartholomew's Hospital, London. In relation to him, the learned judge also said: *"I accept him as an expert on these matters."* Clearly, the case at bar does not stand on the same footing. There is nothing in Dr. Williams' report of sufficient cogency for me to safely and confidently assert that *"I accept him as an expert in these matters."*

56. The claimant has placed Dr. Williams' report before me to ask me to find that Dr. Wright has not made a proper and complete diagnosis of the claimant and that Dr. Williams did so. But having not given me the qualification of either, I see no basis on which I should prefer the report of Dr .Williams to that of Dr. Wright. Dr. Wright's report, at least, indicates statements of facts as distinct from merely what was told to him. It shows his own examinations conducted and the basis for his diagnosis. His diagnosis is, at least, substantiated by the radiologist report that X-rays were done showing certain injuries while the claimant was in Jamaica.

57. Although Dr. Wright has not indicated whether the injuries he saw were consistent with a fall causing impact to chest and elbow, I so find, on a balance of probabilities that they were so caused. This inference is drawn from the fact that immediately following upon the fall the claimant reported to the doctor that she hit these areas and that she felt pain to those areas. From this, I infer that the injuries found in these areas were a direct and foreseeable consequence of the fall for which the defendant should be held liable in damages.

58. **In the absence of cogent and credible evidence to the contrary, I find that a displaced fracture to the right 7th rib and soft tissue injury to her right elbow was the nature and extent of the claimant's injury as a result of the fall.**

NATURE AND GRAVITY OF THE RESIDUAL DISABILITY

59. There is a clear and unexplained discrepancy that remains unresolved on the claimant's case in respect of the extent of any residual disability resulting from the fall. Dr. Wright, after seeing the claimant four times, reported that he expected the claimant to resume active daily living within two months of his examination of her. This prognosis was clearly given without any consideration of lupus as a pre- existing condition and was given based on the injuries reported to him and what he found to have existed while the claimant was in Jamaica. The claimant has not furnished any further report from Dr. Wright with an altered prognosis that would now take into

account her pre-existing condition of lupus. Dr. Wright has not spoken as to any residual disability.

60. The claimant, however, has said that she has not resumed her active daily life since the fall. She said she has been rendered disabled to the extent that she can no longer help herself. There is no expert report or any medical report, at all, that serves to confirm a causal nexus between the injuries she claims and her alleged resultant disability.

61. Dr. Williams in his first report of July, 2004 stated then that after a four month course of physiotherapy for her injuries, the claimant showed some mild improvement in her condition, however, she had remained disabled. He did not say the nature of her disability, the basis on which he draws a conclusion as to her disability and how long he expected the disability to last. Indeed, the claimant has had physiotherapy, but the report tendered in evidence has gone no further than to give the duration of the treatment. It has not said what areas were subject to physiotherapy, the treatment administered and the results. The physiotherapist has, therefore, not indicated whether or not any residual disability remained after therapy.

62. In his last report dated June 2006, Dr. Williams stated that the sprain to her wrist, which has resulted in a reactive arthritis, will remain with her permanently. In relation to her wrist he stated: *"Ms. Dixon continues to suffer chronic pain and stiffness in this joint that negatively impacts her functional capacity."*(emphasis mine). He has not said that it has rendered her totally disabled. He said it has negatively impacted her functional capacity. He has not stated, however, the manner in which and the extent to which this has impaired her functional capacity.

63. Even more significantly, though, is that there is no indication by this doctor as to any continued disability of the claimant from any other injury or condition that he had diagnosed other than the arthritis to the wrist. He has not stated to date that the lupus has rendered her disabled in the manner and to the extent asserted by the

claimant. The doctor she is relying on to establish her claim has given no indication of any permanent residual disability apart from her wrist. I am not satisfied on the evidence that an injury to the wrist was part of the injuries sustained as a result of the fall. There is thus no medical evidence of continuing and permanent disability as a result of the fall as alleged by the claimant. In the end, I find it difficult to accept the claimant's evidence, unsupported as it is by medical evidence, that the fall has rendered her permanently disabled.

64. The assertion of the claimant's sister in her evidence that the claimant has been declared disabled by the State of New York is not supported by any evidence from the claimant herself. Neither is there any documentary proof of that fact. The source of the sister's assertion is unknown and so stands as one without factual proof and medical basis. I view this as a bit a bit of evidence that stands out primarily as hearsay which ought to have been struck out as inadmissible. I therefore treat it as having no weight.

65. Mr. Nicholson has asked me to use the fact that the claimant attended court with the use of a cane and with her wrist in a band as evidence of her resultant disability. I refuse to make such a finding in the absence of credible medical evidence on which to ground it. I find that I am not satisfied on a balance of probabilities that there is any permanent residual disability of the nature and extent described by the claimant as resulting from the fall.

66. In the end, I find that any serious disability that might have resulted from the fall would have been a temporary one as contemplated by Dr. Wright. He stated that he had advised bed rest when he reviewed her condition. I will accept, therefore, that there was a period of inability to enjoy her daily living as she would have liked and that whatever discomfort there might be remaining is not as extensive as that following in the aftermath of the fall

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THE PAIN AND SUFFERING ENDURED

67. The claimant said that immediately upon the fall, she started to feel severe pain all over her entire body. She said she is continuing to feel pain all over her entire body now. She attributes this to the fall. But as already been found, there is no reliable medical evidence to explain the reason for the pain she is still having. I cannot speculate. The court must be furnished with proper evidential proof of that which is asserted. The onus is on the claimant and her credibility in this regard is still in doubt in light of the fact that for almost nine days after the fall, while in Jamaica, she made no report of injuries to the areas of her body that she is now complaining about. It is of note too that while in Jamaica, she did not seek any second opinion as to the injuries she said she had sustained given that the pain was getting progressively worse despite treatment by Dr. Wright.

68. I do accept that following the fall, the claimant had to endure pain and suffering in the areas reported by her to Dr. Wright. She complained then of severe pain in her chest, the right region, and to her left elbow. Whether it was soft tissue injury to the left elbow or right elbow, I accept that she complained of moderate pain to her elbow. I hold that the pain and suffering that she had to endure as a result of the fall extended only to those areas. Incidentally, the claimant has said nothing about injury to her elbow in her particulars of claim that was filed shortly after the fall. Also, Dr. Williams in his report of 2006, speaks of no reported pain in the chest and elbow by the claimant. The only chronic pain he speaks about was to her joint-the wrist. Indeed, at no time at all has he stated that he had diagnosed an elbow injury. I have grave difficulty accepting the claimant as a truthful witness whose testimony I can safely accept as to the extent and intensity of the pain and suffering she endured as a result of the fall.

69. I would accept that her pain and suffering continued for a period and I will use the two month prognosis of Dr. Wright and be generous and put it to a period of at most six months during which she might have endured pain and suffering as a

result of the fall. In all the circumstances, she is entitled to a substantial award under the head of pain and suffering but not for all the injuries alleged.

LOSS OF AMENITY

70. The claimant has indicated impairment in her enjoyment of many aspects of her life that she asserted is largely attributed to her steroid dependency. There is no explanation, for the court's benefit, as to whether and how the fall injuries or, indeed, any of the injuries alleged could have affected her in the manner she claims. There is no credible evidence of any causal connection between the injuries she said she sustained in the fall and this resultant loss of enjoyment of life. The claimant's case stands and falls on the available medical evidence explaining her injuries. He who asserts must prove. While I do accept that she might have had some residual discomfort and inconvenience in her daily life immediately following on the fall, I am not satisfied on a balance of probabilities that there has been any substantial loss of amenities to the extent as claimed.

PECUNIARY LOSSES: Present /Prospective

LOSS OF FUTURE EARNINGS/HANDICAP ON THE LABOUR MARKET

71. Mr. Nicholson has argued that the claimant is entitled to an award for loss of future earnings or handicap on the labour market. There is no documentary proof that the claimant was employed at the time of the fall and is unable to work as a result. There is thus no documentary proof of income, and/or diminution in income and no explanation for the absence of such proof. Above all, I am provided with no credible evidence that the defendant's breach has caused this alleged inability of the claimant to work. In light of the absence of such evidence to satisfy me on a balance of probabilities that there has been any material pecuniary loss of income that has flowed or is likely to flow from the defendant's breach, I refuse to make an award under any of these heads.

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FUTURE MEDICAL /NURSING CARE

72. The onus is on the claimant to establish not only the need for care and medical attention but also the extent of the care and attention needed. Naturally, she is entitled to recover such expenses and any other reasonable cost of care that have reasonably been incurred or is likely to be incurred, as a result of the injuries arising from the defendant's tort. Having examined the circumstances of this case, I see no basis on which damages may be awarded under this head given the absence of proof that the defendant's breach has resulted in such needs and expenses likely to be incurred in the future.

SPECIAL DAMAGES

73. It is accepted that the claimant is entitled to have an award in respect of items pleaded under this head provided they are properly proved. It has often been repeated by the courts that figures cannot just be thrown up at the court to say: 'this is what I have lost, compensate me.' Affirmative proof of the particular loss is required and it must ultimately be proved, BY EVIDENCE, that it was the tort of the defendant which caused the claimant to suffer such losses and to incur such expenses. Against this background, I now seek to examine the claimant's claim under this head.

Medical expenses

74. The claimant has claimed over US$13,603 for medical expenses incurred and had stated in her particulars that this expense is continuing. At commencement of these proceedings, a sum was announced to be agreed between the parties under this head at US$5,168. 30 *subject to the court's finding that the damages claim flowed from the fall.* I have, however, found that there is no credible evidence that all the damages, claimed by the claimant, are as a result of the injuries that I have found to have been sustained in the fall. Therefore, I am prepared to compensate the claimant for that portion of her medical expenses that were incurred for treating the injuries that I accept were as a result of the fall. A sum could not be agreed. Counsel for the claimant, in the end, was instructed to provide proof of expenses incurred for

medical expenses for treatment of these injuries to the chest and elbow. No proof of medical expenses incurred for these injuries was advanced. Regrettably, therefore, any losses incurred by the claimant for medical expenses as a result of the fall have not been proved.

Loss of Earnings

75. There is no medical evidence or any other evidence supporting the claimant's evidence that she has been disabled as a result of the fall to the extent that she could not work immediately after the fall and can no longer work. Dr. Wright's report stated that she was expected to resume her active daily life after two months. There is nothing categorically saying that she should not work but he said he had advised bed rest. For how long is not stated. However, I have already held that I would accept her period of incapacity to be for up to six months.

76. There is no documentary proof of employment to support the claimant's claim that at the time of the fall she was employed and did not earn an income as a result. It is the claimant's evidence, supported by her sister, that she has been employed to Raddy's Health Store since 1995 as manager. This is a family business operated with her common law husband. Since the fall, she said she has not returned to work. The reason for this is not satisfactorily proven to be connected to the defendant's breach, that is, as a result of the fall. She has thrown at the court the sum of US$2,000.00 and asked the court to accept that as her salary per month that is lost. This is by no means a small sum. Yet, there is no evidence from her common law husband or from any other person, like an accountant, to show that she was employed to the store as manager. There is no explanation proffered for the absence of formal and documentary proof of employment and income as alleged.

77. It is not only the inability to work that is to be proved under this head but the loss that flow from such inability, since a person can be ill and unable to work but is nevertheless paid an income during the period of illness. Even if I were minded to give her compensation for the period that Dr. Wright expected her to be not able to

resume her active daily living, there is no evidence, apart from her saying so, that she has lost income during that period. The loss must be strictly proved and be connected to the tort of the defendant for it to be recoverable under this head. It is for this reason that I refuse to make an award on the basis of the minimum wage as submitted by counsel on her behalf. The claimant has simply failed to prove her loss and that the defendant's acts or omissions have brought it about. In **Hepburn Harris v Carlton Walker SCCA 40/90 delivered December 10, 1990,** Rowe, P reiterated the basic principle in relation to the proof of loss of earnings by which I am guided and that is:

> "Plaintiffs ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned."

Transportation

78. The claimant also claims for transportation expenses the sum of US $1,460.00. All she has stated is that she incurred transportation expenses *"in taking taxi and airfares*; also that these costs have been *"occasioned partly due to her inability to drive for several months following the injury."* Transportation costs have not been detailed to show a connection between the traveling costs and the injuries sustained. There is no proof in terms of the places traveled, the purpose for the travel, the mode of travel and the actual expenses incurred in so doing. The costs of transportation pleaded have not been proved in, any way, as been connected to the fall injuries for which the defendant is liable.

79. Counsel has asked me to take judicial notice of how much it would cost for taxi fare to travel from Bronx to Queens in New York. The "evidence" advanced in support was attempted through the submission of counsel rather than by evidence of the witness that it would be US$40.00 each way. This is not permissible. Counsel cannot in his submission attempt to give evidence and the court cannot take judicial notice of such alleged fact- it not being a notorious fact. The claimant must prove it. A reasonable sum for transportation would have been what she had expended to seek medical treatment for the injuries reported in Jamaica but again, there is no evidence

that she incurred expenses in so doing. The court is thus without evidential assistance to make an award under this head.

QUANTIFYING THE AWARD

80. Having looked at the claim in all its entirety, the question is now the quantum to be awarded in respect of the injuries sustained as a result of the defendant's breach. It cannot be denied that the claimant is entitled to an award of substantial damages for pain and suffering and to a lesser extent for loss of amenities. Mr. Nicholson has asked for between $5million- $6.5 million under this head. He relies on the case of **Merdella Grant v Wyndham Hotel Co. reported at Khan's, Recent Personal Injury Awards, vol. 4, p. 194.** There the injuries sustained by the claimant from a fall from a chair were lumbar strain; fracture of the traverse process of the 5th lumbar vertebra; sciatica and chronic herniation of the L4-L5 disc. The injuries were accepted by the court with the assistance of expert evidence to have been results of the fall alleged. **Merdella Grant (supra)** was assessed at having a 25% whole person disability. Her award would stand today at $3,486,876.60 applying the relevant consumer price indices.

81. Mr. Nicholson claims that the injuries in the instant case are more serious. I disagree. His assertion is not supported by the evidence. In light of the failure of the claimant to prove that injuries over and above the fractured rib and soft tissue injury to her elbow were as a result of the fall, this case is far less serious than **Merdella Grant's**. In fact, the injuries are so dissimilar that **Merdella Grant's** case affords no useful guide. This claimant has not even proved to have been assessed with a whole person disability. There is no medical evidence of disability. Her award cannot be as high as **Grant's** in respect of pain and suffering and loss of amenities.

82. He also brought to the court's attention the case of **Richard Rubin v St. Ann's Bay Hospital** et al reported at **Khan's, vol 5.** This case, like **Merdella Grant,** affords no appropriate and useful guide. In that case, the claimant sustained two severe compression fractures of vertebrae T7 and T8. Mr. Nicholson himself

conceded that the cases are patently dissimilar for **Richard Rubin** (supra) to be of any real assistance.

83. The defendant has supplied for the court's consideration the case of **Leroy Robinson v James Bonfield and Conrad Young** reported at page 99 of **Khan's, vol. 4.** Upon examination, I find that **Leroy Robinson** sustained injuries to more areas of the body. His injuries were multiple abrasions to the left hand; swelling to left elbow; abrasions to eyebrow and fracture of right wrist. He had no permanent disability formally assessed but his total period of incapacitation was 8 weeks. His age is not given. He was left with a slight deformity of the wrist and palm. His award when updated now stands at $657,521.32. This case can be taken as a useful guide as to the appropriate range within which the award should fall.

84. The defendant also brought to my attention **Leroy White v Winston Waldron** reported in **vol 5 of Khan's** at page 103. The injuries were swelling and tenderness of the left elbow and displaced fracture of the olecron process at left elbow. **Leroy White** had surgical intervention, which is absent in this case, and he was left with a whole person disability of 4%. His award under this head amounted to $1,013,564 when updated today.

85. Reference was also made to the case of **Andrea Perelman v Patrick Anglin et al** reported in **Khan's, vol 4** at page 197. The injuries to that claimant were far more extensive than in the instant case. In addition to fractured ribs, that claimant had injuries to her legs, right knee, lower back and face. She was assessed with a whole person disability of 14%. She was awarded $500.000 in 1996. Updated, that award now stands at approximately $1,300,000.00 today. She has more than twice the injuries sustained by the claimant in this case.

86. As expected, there is no identical case placed before me. Each case has to be judged on its own facts and consideration given to the peculiarity of each claimant and the effect of the injury on him. The court will then, in the end, just have to do

the best it can by using previous awards for similar class of injuries as a guide. Where there is no such guide, the court will still have to do the best it can.

87. I have taken into account the age of this claimant and the severity of her pain and suffering immediately after the fall. At her age, a fall is, likely to be of greater impact than it would on a younger person. She had severe pains to the chest which I accept and moderate pain to her elbow. For at least two months the doctor expected her to be affected. I took into account pain for up to six months at most. She now speaks of having pains in her elbow although her elbow was never itemized by her in her particulars of claim. In **Leroy White** (supra) only the elbow seemed to have been involved but it was a displaced fracture that required surgical treatment and resulted in some degree of permanent disability. In this case, there was involvement of the chest leading to a fractured rib but it was an undisplaced fracture. The injury to her elbow was soft tissue injury without any recorded permanent disability. Her injuries seem within the range of **Robinson,** and less serious than those recorded for **White.**

88. Just by way of information, I have also looked at the U.K range of awards for the types of injuries found to have been sustained in this case. **Munkman on Damages for Personal Injuries and Death, 11th edition** has provided in **Appendix 1 page 223, the guidelines for the assessment of general damages in personal injury cases (sixth edition) compiled for the Judicial Studies Board.** This offers an interesting insight into the English courts approach to making awards in respect of different types of injuries. In 2002, injuries for moderate or minor injury to elbow which are those that cause no permanent damage and do not result in permanent impairment of function such as simple fractures, tennis elbow syndrome and lacerations stood at up to a maximum of £6,750. Fracture of ribs causing serious pain and disability for a period of weeks only-stood at up to £2,000 (see pg. 234). Combined, both would represent a figure of up to £8,750 at the top of the range; that would translate to somewhere in the region of JA$875,000.00- JA$900,000.00 as the upper limit. It would be higher today since the figures given apply to 2002. The difference in the bracket of awards between the rib and the elbow seem to be based

on the statement contained in the guidelines that *"the hands are cosmetically and functionally the most important parts of the upper limb."(page 245).*

89. I am mindful, however, that the award has to be based on our own current socio-economic realities and range of awards in comparable cases that exist within our jurisdiction or in neighbouring jurisdictions of similar socio-economic development (see **Singh (Infant) v Toong Fong Omnibus Co Ltd. [1964] 1 WLR 1382at 1385, PC,** an appeal from Malaya).We cannot base our awards on what obtains in another jurisdiction with no similarities and ignore the comparable awards within our jurisdiction The reference to the UK is merely to offer an insight into how they value injuries to different parts of the body.

90. In the end, in looking at all the cases presented in this case by the parties, I am reminded that the award must not be extravagant or mean but must rather be a fair and sensible compensation for the injuries sustained. I, therefore, award by way of damages for pain and suffering and loss of amenities $650,000.00.

91. The claimant has failed to prove items of special damages pleaded. I have no choice but to refuse from making an award under this head. In this regard, I would reiterate the words of Lord Diplock **in Ilkiw v Samuels [1963] 1 W.L.R. 991** where he said at page 1006:

> "In my view it is plain law- so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last hundred years- that you can recover in an action only special damage which has been pleaded, **and, of course proved**..."(emphasis added)

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

- **GENERAL DAMAGES:** Pain and suffering and loss of amenities in the sum JA$650,000.00 with interest thereon at 3% as at September 5, 2005 to February 13, 2007.
- Costs to the claimant to be agreed or taxed.