



[2019] JMSC Civ 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV02031

BETWEEN	GEOFFREY FAGAN	CLAIMANT
AND	FIESTA JAMAICA LIMITED	DEFENDANT

IN OPEN COURT

John Graham and Stephanie Graham instructed by John G. Graham & Co. for the Claimant

Kerry-Ann Sewell for the Defendant

March 16, 2017, March 28, 2017 and February 7, 2019.

Assessment of Damages – Personal Injury – Defence Limited to Quantum – loss of Earnings – Future medical expenses – Loss of Future income

PALMER, J

[1] This is an assessment of damages in the claim brought by Geoffrey Fagan against his former employer, Fiesta Jamaica Limited, for injuries he sustained while on the job. Judgment in Default of Defence was entered on July 16, 2015 and an application was made to have the judgment set aside, which was later abandoned. The Defendant has not disputed liability but has put the Claimant to strict proof of his loss.

Claimant's case

[2] The Particulars of Claim states that Mr. Fagan resides in the parish of Hanover and was at all material times an employee of the Defendant. The Defendant is a company duly incorporated under the laws of Jamaica and is the owner and operator of a resort

and spa located at The Point, Lucea, in the parish of Hanover. According to the Claim, Mr. Fagan began his contract of employment with the Defendant on June 28, 2009, as the Assistant Chief Steward. Included in the contract he says was an implied term that the Defendant would provide a safe place of work or system of work.

[3] The Claim states that on September 17, 2010, Mr. Fagan was engaged in his lawful duties together with other employees of the Defendant in organizing and preparing for a “Beach Party Buffet”, which involved the use of an unstable table with several items on it, to include an ice sculpture. He said he stooped to push a chair under a table when the table tilted, causing a block of ice on the table, to topple on to his head. He is not very clear about what happened next but says that he remembers being at the Cornwall Regional Hospital where, after overnight observation and X-rays of his neck he was revealed to have no evidence of a fracture of any bone, he was sent home with pain medication. A sick note for ten (10) days was given following which he resumed his usual occupation.

[4] Mr. Fagan said that shortly after the incident he developed neck pains and though he was given a cervical collar at the hospital, the persistence of these neck pains, which radiated into the right upper extremity, were such as lead to him to seek further medical attention. He received several sessions of physiotherapy and different analgesic medications, and eventually was sent to a neurosurgeon because of the persistent neck and arm pains. After undergoing an MRI scan, he was recommended to have cervical spinal surgery which, to date, he has not done.

[5] The Claim is that the incident was caused by the negligence and/ or breach of the statutory duties on the part of the Defendant, its employees and/ or agents pursuant to the Occupiers Liability Act and the Workmen’s Compensation Act. Particulars of Negligence / Breach of Statutory Duty:

a. Failed to take any or any reasonable care to see that the Claimant would be reasonably safe in carrying out his duties;

b. Failed to ensure that the table provided was secure and stable;

- c. Failed to provide an alternative table which was suitable;*
- d. Caused and / or permitted the Claimant to stabilize the table when it was unsafe and/or dangerous to do so;*
- e. Failed to remove the ice sculpture and other food items from the table whilst the Claimant went underneath the table;*
- f. Failed to provide the Claimant and other employees with proper equipment for the handling of the ice sculpture;*
- g. Failed to provide the Claimant and the other employees with a safe system of carrying out their lawful duties.*
- h. Failed to pay compensation for injuries occurring in the course of the Claimant's employment arising out of the accident in particular the Claimant;*
- i. Failed to provide its employees with a safe place of work.*

[6] The Claimant was born on October 13, 1956, and was 53 years old at the time of the accident. As a result of the incident, he suffered pain and sustained loss and damage, the particulars of the which are set out in the medical reports of:

- (i) Dr. Carl Bruce, Consultant Neurosurgeon and Cerebrovascular and Skull Base Surgeon, dated July 19, 2013;*
- (ii) Dr. Delroy A. Fray, Consultant Orthopaedic surgeon, dated October 24, 2011 and June 15, 2012;*
- (iii) Dr. Albert Walker dated March 26, 2014;*
- (iv) MRI reports of Dr. Konrad Kirlaw, Consultant neuro-radiologist, dated October 12, 2010, and;*
- (v) Dr. Carlene Gentles, consultant radiologist dated July 20, 2011.*

[7] The Claimant claims interest pursuant to the Law Reform (Miscellaneous Provisions) Act on the amount found to be due to him and at such rate and for such period as the Court thinks fit.

Defendant's case

[8] The Defendant admits liability for the incident, the subject matter of this claim and now seeks an opportunity to defend this matter on the issue of quantum. No admission was made to any injuries, loss, damage or expenses incurred as pleaded in paragraph 9 of the Particulars of Claim and the Claimant was put to strict proof of the allegations made therein. In particular, the Defendant requires the Claimant to specifically prove that the multi-level disc disease diagnosed by Dr Bruce and Dr Fray were caused by the accident of September 17, 2010.

Assessment of Damages

[9] The Claimant seeks General and Special damages associated with his loss. Special damages must be specially pleaded and proved, and are awarded in respect of out of pocket expenses and loss of earnings actually incurred down to the date of the trial itself. They are generally capable of substantially exact calculation, or at least of being estimated with a close approximation to accuracy. The basic principle as far as special damages are concerned, is that the injured party ought to be placed in the same financial position, as far as money can do so, as he would have been in at the date of trial if no accident had occurred.

[10] General damages, on the other hand, by their very nature tend to be incapable of precise mathematical calculation. At page 479 of his text, **Commonwealth Caribbean Tort Law**, 2nd Ed, Gilbert Kodilinye states that in Commonwealth Caribbean jurisdictions, general damages are usually assessed according to the guidelines laid down by Wooding CJ in **Cornilliac v St Louis** [(1965) 7 WIR 491, Court of Appeal, Trinidad and Tobago, p, 492 where the learned Judge stated that the court should take into account:

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

[11] Mr. Fagan's evidence is that he suffered injury as stated above, in the accident. He was admitted that he spent overnight at the Cornwall Regional Hospital for observation and was released the following day. His injuries were stated as follows:

- (a) *Blunt trauma to the skull*
- (b) *Loss of Consciousness*
- (c) *Compressed cervical and lumbar spine*
- (d) *Cervical Spondylolisthesis*
- (e) *Lower back pain*
- (f) *Soft tissue injury to the neck*
- (g) *Neck pain*

[12] He claims to have incurred the following medical expenses:

(a) <i>Physiotherapist</i>	<i>\$12,500 .00</i>
(b) <i>Office visits Dr Fray</i>	<i>\$26,800.00</i>
(c) <i>X- Rays</i>	<i>\$25,000.00</i>
(d) <i>Cost of Transportation</i>	<i>\$43,300.00</i>
(e) <i>Cost of Medication</i>	<i>\$7,259.46</i>

[13] Due to the injuries he received, Mr. Fagan said that when he returned to work he was unable to discharge his duties, and was eventually dismissed by the Defendant as a consequence. He said that his injuries have also caused him to incur substantial expenses which he has been unable to settle from his personal resources. He accordingly had to seek loans from family and friends just to meet his expenses. He outlines his loan obligations as follows:

(a) <i>Scotia bank Loan</i>	<i>\$1,900,000.00</i>
(b) <i>NCB Key Card (JA\$ account)</i>	<i>\$60,000.00</i>
(c) <i>US \$ account \$1,400.00 at rate US \$1=\$128.00</i>	<i>\$179,200.00</i>
(d) <i>First Choice Loan</i>	<i>\$16,000.00</i>
(e) <i>Personal Loans (friends & family)</i>	<i>\$370,000.00</i>
(f) <i>Rent arrears</i>	<i>\$168,000.00</i>
(g) <i>Jamaica Public Service</i>	<i>\$59,000.00</i>
(h) <i>National Water Commission</i>	<i>\$44,000.00</i>
(i) <i>Flow Cable</i>	<i>Mari \$18,000.00</i>
(j) <i>OAS Cable</i>	<i>\$12,000.00</i>

[14] Mr. Fagan also claims that due to his injuries he continued, to suffer great pain and distress, and is severely handicapped in his movements in a manner which has not permitted him to successfully undertake any structured employment since the accident. He claimed to suffer from persistent and sometimes debilitating body pains brought on by sitting or standing for prolonged periods, as well as headaches and occasional seizures.

[15] Mr. Fagan stated that he had been advised by Dr. Carl Bruce that he requires surgical intervention to alleviate some of the medical issues being experienced. The estimated cost of the surgery according to the report of Dr Bruce is \$2,946,000. He stated that he was also referred to physiotherapy three (3) times per week by Dr. Delroy Fray. Mr. Fagan was quite active prior to the accident but stated that he is now unable to run or play football and cricket as he used to prior to the accident. At the time of the accident, he says he earned an average of approximately \$43,097.94 per fortnight from June 2009 to October 2011. As a result of the accident, he said that he has been unemployed from November 2011 to January 2017. He has also had to rely heavily on family members to assist him because he is in pain and cannot do all the things he could before the accident.

[16] He also stated that at the time of the accident he was living with his common-law spouse and young daughter, Nastassia Fagan. He claims that due to the constant pain he felt after the accident and inability to contribute financially to the household, the relationship with his common-law spouse broke down. Additionally, he stated that his sex life has been severely affected by the persistent pain and discomfort in the lumbar spine and this contributed to his inability to have any meaningful long-term relationship.

[17] Mr. Fagan has five (5) children, aged 35, 28, 22, 21 and 10 years respectively. He stated that he continued to have financial responsibilities for the three (3) youngest children as they are all currently enrolled in school. He complained that the quality of his life has been diminished, he had lost interest in things he used to love and that the whole situation has had a drastic emotional impact on him as he feels burdened by the mountain of obligations that he is unable to meet due to the accident.

[18] Dr A. Fray in his medical report dated October 24, 2011 stated the Claimant's history as:

"While working he suffered blunt trauma to his skull compressing his cervical spine and lumbar spine." "He had loss of consciousness for approximately 15 to 20 minutes. He had no ear, nose or throat bleed and was treated at Cornwall Regional Hospital. He was observed for 24 hours and then sent home. Since then he has been experiencing neck and low back pain. The pain radiates to his arms and legs. He has no sphincter disturbance but complains of weakness and numbness in the right upper limb. Physical work involving lifting or bending aggravates it. Since then he is only able to work short periods of time."

[19] On medical examination, he stated that spinal mobility was mildly restricted in his cervical and lumbar region. He could bend over to three feet off the ground pain-free. Normal muscle bulk was noted and his straight leg raised 60 degrees right and 80 degrees Left. Power, tone, sensation and reflexes were normal except for grade III power to his right upper limb. No sensory deficit was noted. An MRI of his cervical spine was done on October 12, 2010 and revealed multilevel degeneration disc disease. Plain x-rays of his lumbar spine revealed mild lumbar spondylosis.

[20] Dr Fray had follow-up examinations with 2-3 week intervals and stated that the little improvement has been noted. Mr. Fagan's complaint up until then was weakness and numbness in the right upper limb. A repeat MRI was done on July 20, 2011 which revealed similar multilevel disc disease as before but impingement of the C4, C5, and C6 nerve root was noted. Dr Fray concluded that that would explain the weakness and numbness in his right upper limb, which had been resistant to conservative treatment.

[21] On June 15, 2012 Dr Fray stated that Mr. Fagan's symptoms had persisted with no change in his neurological status and it was necessary for him to be seen by a neurosurgeon to assess the possibility of surgery. He concluded then that Mr. Fagan had reached maximum medical rehabilitation. Using guides to the evaluation of permanent partial disability with respect to the total person was stated as approximately 23%.

[22] Consultant Neurosurgeon, Dr Carl Bruce, in his medical report dated July 19, 2013 notes that at the time of consultation Mr. Fagan complained of neck spasms radiating to the right shoulder and lower back pain. This pain was associated with tingling sensations and muscle spasm. Mr. Fagan complained that at times his arm has no strength and he was unable to retrieve a fishing pot due to weakness and tiredness in the arm. An MRI of the lumbar spine done revealed multi-level disc herniation at L3/4, L4/5 and L5/S1 and he was assessed as having multi-level disc disease with nerve root compression. Mr. Fagan was seen to have a lumbar whiplash injury and both injuries were observed as being consistent with the accident described. He had conservative management with medication and physiotherapy without resolution of his symptoms, but because of persistent neck and back pain, he is unable to perform his usual job or his activities of daily living.

[23] Dr Bruce stated that the surgical option would be anterior cervical decompression fusion and plating. The cost of implants, hospitalization and surgery and physiotherapy was stated as being approximately J\$2,500,000.00. Using the American Medical Association Guides to the evaluation of permanent impairment, Mr. Fagan was estimated as having a DRE category III impairment of the cervical spine which equated to a 15% impairment of the whole person impairment and a 5% lumbar spine whole person impairment. His total whole person deficit is therefore estimated to be 23%.

[24] The Defendant's expert, Dr Randolph Cheeks, in his report dated December 8, 2016, spoke to his consultation with Mr. Fagan who was by then sixty (60) years of age. He noted that on examination Mr. Fagan presented the clinical picture of a slim middle-aged male adult of healthy general appearance with physiological vital signs. He had a normal demeanour which he maintained throughout the interview and examination and did not appear to be in pain or distress. He did not get the impression that Mr. Fagan was attempting to embellish his symptoms or to be deceptive. Dr Cheeks conducted a neurological examination and found evidence of a post-traumatic radiculopathy of discogenic origin affecting the right sixth cervical nerve root in an individual who was harbouring pre-existing asymptomatic age-related degenerative changes.

[25] X-rays revealed no evidence of fracture to the cervical spine. He noted that an MRI scan of the cervical spine done in July 2011 (10 months after the accident) had shown evidence of multilevel degenerative disc disease at the 3 lower levels of the sub-axial region of the cervical spine from C4-5 to C6-7 with facet arthropathy at C4-5 AND C5-6. The MRI done in May 2013 (2 years and 8 months after the accident) showed evidence of degenerative changes affecting the lower 3 lumbar levels with disc desiccation and narrowing as well as an annular tear at L4. The following was his diagnosis:

- (a) Age -related cervical multilevel degenerative disc disease which predated the accident;*
- (b) Persisting right-sided traumatic cervical radiculopathy caused by the accident;*
- (c) Age related multilevel degenerative lumbar disc disease which predated the accident."*

[26] Dr Cheeks further stated that the degenerative changes seen in the cervical and lumbar regions of the spine represent age related changes. As stated by the AMA Guides to the Evaluation of Permanent Impairment, Edition 6 degenerative disc disease is not regarded as diagnostic of injury and usually reflects age-related wear and tear. Ref-AMA Guides which stated that the identification of degenerative disk disease at one or multiple levels, similar to the finding of arthrosis in an extremity joint, is not diagnostic of injury or disease related pathology. He concluded that the degenerative changes seen in the MRI scan of his cervical spine in July of 2011 and in his Lumbar MRI in May of 2013 are demonstrating age-related changes which is a prevalent problem that generally advances with age, although its occurrence is not restricted to the elderly. To the extent that this individual has a residual radiculopathy affecting a single level, i.e. the right C6 nerve root, this meets the criteria for a class II motion segment lesion of the cervical spine and is rated at the default level of 11% of the whole person (range is 9% - 14%). Dr Cheeks noted that whilst the age-related degenerative disease was present before the accident, the radiculopathy was not, and it was his opinion that the radiculopathy was caused by the accident. Therefore, in his view the PPD resulting to this individual from this accident is 11% of the whole. Surgery would not alter this final PPD rating.

[27] From a functional perspective, Dr Cheeks noted that Mr. Fagan lived alone and took care of all his own activities of daily living without the need for help or supervision. He says that he is continuing to seek employment at a managerial level but without success thus far, and says that he manages his living expenses by leasing out his fishing boat. Dr Cheeks noted that based on the description of the mechanism of injury given by Mr. Fagan that he was convinced that Mr. Fagan hurt his neck in the accident resulting in the traumatic radiculopathy which has been unrelenting. The MRI scan indicated that he did have pre-existing cervical disk disease but the appearance of the radiculopathic arm pains and the objective neurological feature of the C6 radiculopathy following the accident was a new development post-trauma, and it was Dr Cheek's opinion that the radiculopathy was caused by the accident and he should undergo cervical spinal surgery as previously recommended.

[28] Dr Cheeks stated that based on the demonstration by Mr. Fagan of the dynamics of the incident, he was concluded that it was not possible for him to sustain an injury to his back in this incident which caused an acute flexion injury to his neck. Such an injury cannot produce the axial loading of the lumbar spine which is needed to cause injury to the lumbar discs. He found therefore that the multilevel degenerative disc disease seen in his cervical and lumbar spines are age related and pre-dated the accident. Dr Cheeks noted that degenerative disk disease is well recognized in the medical literature as being a normal progressive age-related phenomenon.

[29] Dr Cheeks noted that the 6th Edition of the Guides uses the Diagnosis Based Impairment (DBI) method of assessing disability, which replaced the fifth edition in 2007 which used the Diagnosis Related Estimate (DRE) method and has been found to be inaccurate and unreliable for Rating purposes. As stated on Page 2, section 1.2 of the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment which was published in 2007 quote. Earlier versions of the Guides were subject to criticisms which included the following:

- There was a failure to provide a comprehensive, reliable, unbiased and evidence-based rating system.

- Impairment ratings did not adequately or accurately reflect loss of function.
- Numerical ratings were more the representation of 'legal fiction than medical reality'.

[30] Consequently, according to Dr Cheeks, the DRE method of impairment rating being unreliable for rating purposes, the DBI rating system has been the standard international rating tool since then. Dr Cheeks did not agree with the rating of PPD produced by Claimant's expert, Dr Bruce, in his report of July 19, 2013. Dr Cheeks' prognosis was that without surgery, Mr. Fagan's neck and arm pains were likely to persist indefinitely. Surgery to his cervical spine (micro-cervical discectomy) to relieve the pain of the cervical radiculopathy stands a good chance of relieving his neck and arm pain and reduces the risk of progression to spinal cord damage should he be unfortunate enough to be involved in another accident. In his view, the age-related degenerative changes which are present in the MRI scans of his cervical and lumbar spines tend to slowly progress with age which is the usual natural history of this condition.

[31] The Claimant's expert arrived at a PPD of 15% for the neck injury, which was increased to 23% when the degenerative lumbar injury was taken into consideration. The Defendant's expert arrived at a lower PPD of 11% for the neck injury by reference to an updated edition of the authoritative literature. Dr Cheeks also excluded the degenerative lumbar injury as being likely to have been attributable to the accident, suggesting that it was a pre-accident condition; having no causal link to the accident but was instead being age-related. On a balance of probabilities, the opinion of Dr Cheeks in regards to percentage PPD as well as the absence of a causal link between the degenerative lumbar injury and the accident, is preferred to that of the Claimant's experts. I reject that liability for the age-related degenerative lumbar condition is to be attributed to the Defendant.

Submissions

Pain and suffering and loss of amenities

[32] For the Claimant it was submitted that Mr. Fagan had lost substantial amenities based on his robust and athletic lifestyle that he led prior to the accident. He could no longer engage in activities such as running, playing football and cricket. He previously

earned \$43,097.94 per fortnight, inclusive of gratuity, from June 2009 to November 2011 when he was dismissed by the Defendant. Between November 2011 to January 2017 he remained unemployed due to the accident and had to rely heavily on family members. Mr. Fagan also became heavily reliant on people to do things for him when previously he had been a 'do-it-yourself' type.

[33] It was submitted that he as a result of the accident he could not contribute financially to the household as he used to and his common-law relationship at the time broke down. He also could not contribute adequately to the maintenance and schooling of his 3 youngest children. The pain he suffered also affected his sex life due to the pain and discomfort in the lumbar spine which in turn impacted on his ability to have any long term meaningful relationships. The overall quality of his life was severely diminished as he has felt burdened by the many obligations that he has been unable to meet.

[34] For the Claimant reliance was placed on the following authorities in support of his claim for damages for pain and suffering and loss of amenities:

(i) ***Merdella Grant v Wyndam Hotel Company*** (July 7, 1996), Khan's volume 4 pages 194-196;

(ii) ***Marie Jackson v Glenroy Charlton and George Harriott*** (May 4, 2001);

(iii) ***Brenda Gordon v Juici Beef*** (April 2010);

(iv) ***Stephanie Tilmutt v JUTC*** (July 2010)

[35] In ***Merdella Grant*** the claimant suffered a 25% PPD of the whole person and was awarded \$1.4M in July 1996 (when the CPI was 40.38), which with a CPI of 254.70 up to December 2018 updates to \$8.83M. She, a 54-year-old nurse, had been sitting on a chair which collapsed beneath her, tilting her backwards. She suddenly became immobile and was taken to hospital where she remained for seven (7) days on bed rest and traction. She complained of severe pain throughout her body but in particular to her back and legs. She was given physiotherapy but was unable to walk on discharge and remained at home in bed for three (3) weeks. The Claimant's expert stated that she would need

physiotherapy for the rest of her life, would have to retire early due to her injury and would need a sedentary job for the future as prolonged standing aggravated her condition. The injuries referred by the Claimant were far more severe than the case at bar, and though there was the presence of lower back pain in that case, unlike the case at bar there is no indication that it was age-related.

[36] In **Marie Jackson** the Claimant suffered an 8% PPD of the whole person and was awarded \$1.8M (when the CPI was 57.39), which updates to \$7.99M in December 2018. The Claimant was 26 years old at the time of the motor vehicle accident in which she suffered a severe injury resulting in her being permanently disabled. She also developed a phobia of travelling in motor vehicles. She received a severe whiplash injury and injury to her lumbar spine with a resultant disc prolapse. Despite having had surgery she continued to have pain with frequent absence from work, limitation in home activities and the condition limited sexual relations with her husband. She had to seek loans from her previous employer to cover her medical bills. She was recommended to receive physiotherapy and to engage in swimming to develop her body.

[37] **Brenda Gordon v Juici Beef** the Claimant who was employed to the Defendant company, slipped and fell while washing pots. The Claimant suffered a double level disc prolapse, injury to two lumbar discs, compression of lumbar nerve roots with numbness to both feet. She complained that she had pain with sexual intercourse and could not exercise and became fat as a result. Her medical expert opined that she would continue to have mechanical back pain, which would vary in severity, and her function would be permanently impaired. Her PPD was assessed at 13% of the whole person. \$4.6M was awarded to the Claimant (when the CPI was 158.7) which up to December 2018 updates to \$7.38M.

[38] In **Stephanie Tilmut v JUTC** the Claimant, a bus conductress, fell when she was replacing a roll for the ticket dispensing machine and injured her back. About two and a half years later she was made medically redundant by the Defendant. The medical evidence suggested that she would suffer pain in her lower back and neck for her life and the injuries would affect daily living. The award assessed was \$7.5M which was reduced

to \$6M as a result of the Complainant's own acts which was adjudged as a 20% contribution this injury. That \$7.5M when the CPI was 161.1 She was assessed as having a PPD of 24% at a time when the CPI was 161.3, which updates to \$9.5M as at December 2018. Based on the foregoing the Court was invited to award \$8.5M as at January 2017, which based on the prevailing CPI updates to \$9.1M at December 2018.

[39] Counsel for the Defendant noted that by the time Mr Fagan had seen Dr Cheeks that he was not undergoing any physiotherapy. It was submitted that based on the assessment of Dr Cheeks that Mr Fagan had fully recovered from his injuries save for neck pain at the limit of the arc of motion and reduced grip strength in the right hand. Counsel referred to the case of ***Marcia McIntosh v Elite Wholesale and Distributors Ltd*** Claim no HCV1973/2009, where a 55-year-old administrative assistant received injuries due to a motor vehicle accident. The Claimant had chronic whiplash, chronic cervical spondylosis, chronic cervical myelopathy, right bicep tendonitis, right rotator cuff tendiopathy and right periscapular spasms. She continued to have physiotherapy and had to occasionally receive trigger point injections to relieve the severity of the pain for a day or sometimes a few days. She also required the assistance of a house helper to assist her in performing her domestic duties. She was assessed as having a PPD of 15% of the whole person and in March 2009 the CPI was 61.0 and the award was \$4.5M, which updates to approximately \$8.3M in December 2018.

[40] In the case of ***Candy Naggie v The Ritz Carlton Hotel Company of Jamaica***, Claim NO. 2004 HCV 00503 documented in Ursula Khan's Recent Personal Injury Awards, Volume 6 at page 198, a hotel employee aged 25 was injured on November 19, 2000 as she lifted a heavy urn with ice and fell backwards. She suffered:

(a) Severe back pain across lower back radiating to the right thigh;

(b) Protrusion of L4 / L5 to the right side.

[41] She was admitted to the Mobay Hope Medical Centre and treated. She developed a depressive condition and was given anti-depressants. When she was later discharged on December 11, 2000 she had shown signs of much improvement. Tests on March 8,

2001 showed minimal protrusion of L4/L5 without enhancement of the neuronal tissue. Physiotherapy was strongly recommended and when seen by R.C. Rose, Consultant Orthopaedic Surgeon, on March 30, 2005 was observed to have the following complaints:

- (a) Intermittent lower back pains aggravated by sitting or standing for more than 15 minutes;
- (b) Inability to perform household chores;
- (c) Requiring analgesics to sleep;
- (d) Occasional pains along posterior aspect of the right thigh;
- (e) Impaired sexual activity;

[42] Dr Rose diagnosed mechanical lower back pains and opined that the claimant would be plagued by intermittent lower back pains aggravated by prolonged sitting, standing, bending and lifting. He assessed Permanent partial disability as follows:

- (a) Relating to the lumbosacral spine pathology 5% of whole person;
- (b) Restriction in extension of lumbosacral another 5% of the whole person;
- (c) Total permanent partial disability 10% of the whole person.

The Court awarded General damages of \$1.75M in December 2005 with a CPI of 94.65. With a CPI for December 2018 the figure updates to approximately \$4.71M.

[43] The Defendant also referred to the **Brenda Gordon v Juici Beef** referred to above by the Claimant's Counsel. The Defendant's Attorney relied in her submission on the case of **Salome Bailey v Virginia Dare and Ors** Suit CL 1996 B-237, where the Claimant suffered injuries arising from a motor vehicle accident. The Claimant suffered:

- (a) Swelling to forehead;
- (b) Tenderness over right shoulder and right hip;
- (c) Fracture of the left ilium;
- (d) Crack fracture of the left iliac bone;
- (e) Posterior herniations at C4-C5, C5-C6 and C6-C7 creating cord impingement without myelopathy;
- (f) Fracture of the C5 and C6 vertebrae;
- (g) Intra-articular swelling in the right C5 and C6 facet joint;
- (h) Interspirous ligament injury to C5-C6 and C6-C7;

- (i) Injury to posterior ligaments at C5-C6 and C6-C7;
- (j) Degenerative spondylosis and loss of lordosis in the spine;
- (k) Grade 1 anteriorlistesis of the C6 and C7.

[44] She was assessed as having a PPD of 10% of the whole person and in the comments of Harris J, observed as have suffered excruciating pains since the date of the accident to present. In November 1999 the Claimant was awarded \$1.2M which in December 2018 updates to approximately \$5.83M.

[45] It was submitted the injuries of all the Claimant's in the above cases were more serious than those of Mr Fagan for the following reasons:

- All the Claimants were unable to perform household chores while there is no evidence that Mr Fagan could not perform such tasks. Dr Cheeks observed that he lived alone and took care of his own activities of daily living without the need for supervision.
- **McIntosh** and **Bailey** experienced severe pains and **McIntosh** even required trigger point injections to deal with her pain, while Ms. Bailey's pain was described as excruciating from the date of the accident to the time of the assessment. Dr Cheeks observed that Mr Fagan was not currently on any medication though when he did feel pain he made use of over-the-counter pain suppressants.
- That though Mr Fagan complained of his pain continuing unabated up to the time of the assessment, he had not shown evidence of having seen a doctor since being discharged from Mr Fray's care in June 2012 when he referred to Dr Bruce to assess the possibility of surgery. He was assessed for surgery but received no other medical treatment. The submission was that this further supports the conclusion that though alleging pain it was certainly not of the severity of the Claimants in the cited cases.
- There was also evidence in **Candy Naggie** of emotional trauma resulting from her injuries, which is absent in the case at bar.

- His claim that his sex life was affected, it is not supported by the medical evidence.

It was submitted for the Defendant that an award of \$5.5M would be reasonable in the circumstances.

[46] I agree with the submissions made for the Claimant that the injuries received by the Claimant were not as severe as those suffered in the cases cited. In view of the assessment of Dr Cheeks that discounts the percentage PPD of the whole person as assessed by the Defendant's experts, I find that the sum of \$5.8M is reasonable to compensate the Claimant under this head of damages.

Loss of Earning capacity/ handicap on the Labour market

[47] It was submitted for the Claimant that he was not employed to any person or company between November 2011 and January 2017 despite his efforts to find work. He stated that he had been looking for jobs at varying positions and not just in managerial positions as Dr Cheeks said he was informed, but was without success despite applying for several jobs and being interviewed. Once he disclosed his symptoms and injuries he would be denied the position. In January 2017 he did obtain a job with a hotel, though he still suffered persistent pain resulting from his injuries which left him unable to undertake activities to the extent that he used to prior to the accident. Relying on the authority of **Marie Jackson v Glenroy Charlton and George Hewitt** where an award of \$200,000 was made, the submission was that \$400,000 should be awarded in this case.

[48] For the Defendant, reference was made to **Moliker v Reyrolle** [1977] a All ER 9 at 17 per Brown, LJ who stated:

The consideration of this head of damages should be made in two stages. 1. Is there a substantial or real risk that the Plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the Court must assess and quantify the present value of the risk of financial damage which the Plaintiff will suffer if that risk materializes, and the factors, both favourable and unfavourable, which in a particular case will, or may,

affect the plaintiff's chances of getting a job at all or an equally well paid job".

[49] In the case of **Dawnette Walker v Hensley Pink** SCCA No. 158/01 the Court of Appeal held that "there must be some medical evidence confirming the likelihood of such a risk". In Walker's case the medical evidence was that the injuries were likely to have a "mild impact" on her employment. Harrison J opined that with such a finding there appeared to be a contrary indication of any possibility of a risk of loss of employment of the Appellant. This the learned judge found was a disqualifying factor to obtain an award under this head.

[50] It was submitted for the Defendant that the Claimant has failed to submit any evidence that could form a basis for such a finding in this case or any risk of injury causing him to lose his current employment or it preventing him from regaining employment. The submission is that he said he was engaged as a fisherman between 2011 and the beginning of 2017 when the boat got damaged. Dr Cheeks said that he informed him that he even leased his boat during the period. Before that time, he claims to have been seeking work but without success though he provided no evidence to the court of his efforts, for e.g. job applications or rejection letters. It was submitted that the Claimant was not looking for work as he was already gainfully engaged as a fisherman. Furthermore, it was submitted that the Claimant had skills other than those that required the use of manual labour.

[51] It was submitted further that he brought no evidence to show that he was likely to lose his current job as a result of his injury. In fact, it was suggested that the fact that the getting of the job at the Royalton coincided with the damage to his boat, which demonstrated that he was out of the formal job market by choice because the fishing business was more beneficial. It was submitted that no order ought to be made under this head in Mr Fagan's favour.

[52] While I do not accept that there is evidence to support the contention that there was a correlation between the damage to the boat and the resumption of work, I also find that there is not sufficient before this court to find that he was at risk of losing his current

job due to his injuries and that, even if so, he was at risk of not finding similar employment. I therefore make no finding for the Claimant under this head.

Future medical care

[53] Surgery has been recommended by the medical experts on both sides. The Claimant cannot be helped any further by medicine alone. In order to see any improvement, he must have surgery, although even this will not erase all disability. According to D. Fray:

“This patient has been followed up monthly until now. His symptoms have persisted with no change in his neurological status. It is now necessary for him to be seen by a neurosurgeon to assess the possibility of surgery. It is therefore safe to assume that this patient has reached maximum medical rehabilitation... His surgical option would be anterior cervical decompression fusion and plating. The cost of implants, hospitalization and surgery and physiotherapy would be approximately J\$2,500,000.00.

[54] In his medical report of March 7, 2016, Dr Bruce noted:

“...He will need anterior cervical decompression, interbody fusion with peek cages and an anterior cervical plating with nerve monitoring. The current estimate inclusive of the hospital, radiographs and medical fees for this would be \$2,946,000.”

[55] Mr Fagan was recommended to undergo physiotherapy three (3) times a week in order to alleviate some of the symptoms caused by the injury, which he will need to continue until the surgery can be done. The Claimant accordingly submitted that a sum of \$5.5M would have been reasonable in the circumstances. The Defendant submitted that the only evidence presented to the court is the sum of \$2,960,000 and is the only sum that should be awarded.

[56] Almost 3 years have elapsed since the estimate for the surgery that had been given in 2016, which as noted by the Claimant’s Counsel, did not include an amount for the anaesthetist. While a figure was not quoted for the likely cost for the anaesthetist, I

find that when I give consideration to the cost of the anaesthetist and the time that has elapsed since the last estimate that an award of \$3.5M is reasonable under this head.

Special Damages

[57] According to Kodilinye at page 478, examples of special damage include not only medical expenses and loss of earnings, but such smaller items such as damage to clothing and taxi fares to and from hospital. Under medical and nursing expenses, the plaintiff is entitled to claim the cost of treatment and care which he reasonably incurs as a result of his injuries. This would include payment of hospital bills and doctors' fees.

Loss of Earnings

[58] The Claimant submitted that the Claimant worked as Assistant Chief Steward earning \$43,097.94 per fortnight from June 2009 to October 2011, inclusive of gratuity. He was not employed to any person or company during the period between November 2011 to January 2017, but would engage in insignificant and unprofitable fishing endeavours. His fishing endeavours included the use of fish pots and that his earnings ranged from \$2500 - \$300- weekly and on some occasions nothing was earned from the activity for reasons ranging from theft to poor catches. He claimed that the boat was not in operation between 2011 and 2016 as the engine had been stolen and he could not afford to rent or lease another boat. It is noted that Dr Cheeks suggest that he was leasing the boat during that period. It was submitted that the sum of \$6,378,495.12 is reasonable when one considers that it does not factor in the overtime he could have worked, the periodic increases in salary and any promotions.

[59] The Defendant's Counsel submitted that loss of earnings is an item of special damages that must be specifically pleaded and proven. Mr Fagan claimed the sum of \$5,867,476.68 as his lost income between August 15, 2011 to October 30, 2016. It was noted by Counsel that in his evidence Mr Fagan stated that he worked with the Defendant up to November 2011 and not August 15, 2011 as pleaded in his Amended Particulars of Claim. At the date of his separation, it was submitted, he was earning an average net

salary of \$33,015.98 per fortnight inclusive of gratuity, which the Defendant's Attorney submitted would result in a loss of earnings of \$3,400.545.

[60] It was further submitted that the claim was predicated on the Claimant's allegation that he was not earning an income between November 2011 and October 2017, which the Defendant submitted was untrue. It was submitted that the Claimant was wilfully vague on the amount of his weekly catches and how much he earning during lobster season. He stated that three (3) men would accompany him on the boat to collect the pots and that when they returned to shore they clear the daily expenses and split the balance equally. It was submitted that it was unlikely that he engaged in the activity for five (5) years and could not give less vague information. In fact, the fact that he earned from fishing was not mentioned in his witness statement nor his pleadings. It was submitted that all this pointed to the conclusion that not only did the Claimant commence working as a fisherman after he lost his job but has deprived the Court of any information on which it can accurately access the income he earned from the activity. The submission is that the award for loss of earnings should be discounted by 50 percent and an award of no more than \$1,700,272 awarded.

[61] It is clear that there is inadequate evidence of a precise amount earned from the fishing activity. The Court cannot speculate on the quantum and declines to pursue that line any further. The Claimant states in his witness statement that at the time of the accident he earned on average of \$43,097.94 per fortnight from June 2009 to October 2011 and claims that as a result of the accident, he has been unemployed from November 2011 to January, 2017. The Court has not been provided with all the pay slips to prove the exact amount of salary received by the Claimant, but certainly the Defendant company should have been in a position to provide some of this information if they intended to refute the base amount he was claiming. The following information was however, provided from the copies presented to the Court:

Date	Description	Hours	Rate	Amount \$
Aug. 27, 2011	Grat schem	80.00	66.2504	5,300.03

	Holiday pay	16.00	462.5130	7,400.21
	Regular pay	80.00	462.5130	37,001.04
Sept. 10, 2011	Grat schem	80.00	48.0168	3,841.34
	Reg. hours	80.00	462.5130	37,001.04
Sept. 24, 2011	Grat schem	80.00	47.3278	3,786.22
	Reg. hours	80.00	462.5130	37,001.04

Oct. 8, 2011	Grat schem	80.00	55.2457	4,419.65
	Reg. Hours	80.00	462.5130	37,001.04
Oct. 22, 2011	Grat schem	80.00	73.7842	5,902.73
	Reg. Hours	80.00	462.5130	37,001.04
Nov. 5, 2011	Grat schem	122.67	54.2285	6,652.21
	Notice Pay	180.00	462.5130	83,252.34
	Reg. Hours	56.00	462.5130	25,900.73
	Vacation	66.67	462.5130	30,835.74

[62] The table shows payments made to the Claimant for the payment in lieu of notice and vacation pay in the month of November and a payment for holiday pay made in August. They also show consistently a payment for 'Grat schem' and Regular hours. The Claimant asserted in his witness statement that he was paid the sum of Approximately \$43,097.94 per fortnight from June 2009 to October 2011. There is no explanation as to how this figure was arrived at. The Court can only conclude that these 'Grat schem' and the Regular hours were the only consistent payments. The payment for holidays and vacation are based on whether the Claimant would have worked or not during those days. Also the notice pay is a one- time payment. These payments cannot assist in giving a true picture of what the Claimant earned. The salary per fortnight for the 80 hours was **\$37,001.04** and the payment for Grat scheme was on average over the period **\$4247.09**. On cross-examination of Mr. Fagan, his evidence was:

Q. When employed with Fiesta you were paid fortnightly weren't you

A. Yes

Q. That salary was taxed

A. Yes

Q. Salary deductions were also made

A. Correct

Q. At end of each fortnight you would get a payslip

A. Yes

Q. (Shown docs) Aren't those payslips from August 27, 2011 to November 5, 2011

A. It would appear to be copies of the payslips

An agreed bundle of documents Exh. 1 – 11 agreed

Exh. 12 – Copy payslips from August 27, 2011 – November 5, 2011

Q. (Shown payslip for August 27, 2011) under Earnings Regular hours would be for 2 40 hour work weeks

A. That is what I was paid for

Q. And the amount you received was \$37,001.04 (Reg. Hours)

A. Yes

Q. And GRAT scheme was \$5300.03 correct

A. Yes

Q. Holiday pay was not something you got every month was it

A. No

Q. (Shown Sept 10, 2011 immediately following) Would you agree that the regular hours was \$37,000.01 but GRAT Scheme reduced

A. Yes

Q. What is GRAT Scheme

A. That is money that would be paid to you based on the occupancy of the hotel

Q. You agree then that that amount is not a fixed sum

A. No

Q. In the hotel industry there is a high and a low season correct

A. For some hotels

Q. During the high season the occupancy level would be higher than in the low season

A. Correct

Q. Would you agree that in the low season your GRAT Scheme – means Gratuity Scheme, would be significantly less than what you would get in the high season

A. Yes

Q. What months of the year would the high season be

A. It varies. For some hotels they say that their season begins in August and others begin in November. It varies. I cannot categorically tell you when that hotel starts their season. I am not 100% sure it starts for that season

Q. When would the high season or low season be for Fiesta

A. I could not tell you when the season starts for Fiesta. I was not privy to that. I only know when there was high occupancy

Q. (Look at all of Exh. 12) Would you agree that for some months in particular in the summer period the GRAT scheme would be very small or none paid at all

A. I would not agree that none was paid at all. I would not agree with 'not very small'

Q. Would you agree that on a regular fortnight your pay was the 80 hours works plus whatever GRAT scheme was being paid

A. Correct

[63] It would appear from his evidence in cross-examination that 'Grat schem' was part of the payment given to the Claimant. At the time of his dismissal the earnings for the Claimant can at best be said to be a salary of \$37,001.04 per fortnight and payment for 'Grat schem' on average of \$4247.09. The court will accept the information it has since there were receipts showing an amount before and at the time of and after the accident. For the period November 6, 2011 to January 14 2017 he was out of a job, and the evidence of the Claimant was not challenged when he claimed to have been dismissed after the accident due to inability to work due to his injury. The evidence about his fishing activity was in fact quite vague, but even accepting the submissions of the Defendant on the point, if the expenses of running the boat and any maintenance of pots was taken out and then divided between the Claimant and the three (3) other fishermen, the amount he would get could only be described as being at the subsistence level. At two fortnights per month or 160 hours (assuming a 40-hour work week), Mr. Fagan received payment up to November 5 and began a new job in January 15, 2017. The number of fortnights from November 6, 2011 to January 14 2017 is 135.36, with the resulting total being \$5,583,346.88.

OTHER CLAIMS

[64] The Claimant has indicated that he is indebted as already outlined for Scotia bank Loan, NCB Key Card, US \$ account, First Choice Loan, Personal Loans (friends & family), Rent arrears, Jamaica Public Service, National Water Commission, Flow Cable and OAS Cable. The Claimant has not provided evidence to support a conclusion of there being a direct link between to the tort for which the Defendant has admitted liability and the and the Claimant's stated expenses. In the case of **Blake, Donald v Edward Barnaby, Northern Cash & Carry Ltd**, 200HCV02758 OF 2009, at page 5, Justice Roy Anderson stated as he declined to make an award regarding some special damages

With regard to the special damages claimed by the Claimant he has 'thrown some figures at the head of the court' but provides little, if any, support for them. It is trite law that special damages must be pleaded and proved

Award

GENERAL DAMAGES- with interest at 3% from May 28, 2015

Pain and suffering and loss of amenities **\$5,800,000.00**

SPECIAL DAMAGES- with interest at 3% from September 17, 2010

Loss of income- **\$5,583,346.88** (less taxes and deductibles)

Surgery and Hospitalization- **\$3,500,000.00**

Medical and other expenses- **\$212,064.76**

Total.....\$15,095,411.64

Costs awarded to the Claimant to be taxed if no agreed.

Delivered on February 7, 2019