IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011HCV0861

BETWEEN	**ALICIA GOULBOURNE**	**CLAIMANT**
AND	**CABLE & WIRELESS(JAMAICA) LIMITED (Trading as LIME)**	**1ST DEFENDANT**
AND	**THE PORTMORE MUNICIPAL COUNCIL**	**2ND DEFENDANT**
AND	**THE PARISH COUNCIL FOR THE PARISH OF ST. CATHERINE**	**3RD DEFENDANT**
AND	**PROPS AND MORE**	**4TH DEFENDANT**
AND	**SCHEED INTERNATIONAL LIMITED**	**5TH DEFENDANT**
AND	**CABLE & WIRELESS(JAMAICA) LIMITED (TRADING AS LIME)**	**ANCILLARY CLAIMANT**
AND	**PROPS AND MORE**	**1ST ANCILLARY DEFENDANT**
AND	**SCHEED INTERNATIONAL LIMITED**	**2ND ANCILLARY DEFENDANT**

CONSOLIDATED WITH

CLAIM NO. 2014HCV 04606

BETWEEN	**ALICIA GOULBOURNE**	**CLAIMANT**
AND	**PROPS AND MORE**	**1ST DEFENDANT**
AND	**SCHEED INTERNATIONAL LIMITED**	**2ND DEFENDANT**

Mr Sean Kinghorn, Miss D. Archer and Miss O. Lawrence instructed by Kinghorn and Kinghorn for the Claimant

Mrs Dixon Frith and Mrs. K. McDowell instructed by Grant, Stewart, Phillips and Co., for the 1st defendant/Ancillary Claimant

Heard: July 22, 23, 24 and 30, 2015 and January 27, 2016

Negligence – Whether 4th and 5th defendants are independent contractors or servants and agents of 1st defendant - Occupiers' Liability Act – Whether the defendants or any of them were occupiers of the premises in question - Damages – Assessment

LINDO J.

[1] This claim by Alicia Goulbourne is for damages against the defendants for negligence and/or breach of the Occupiers Liability Act as a result of an incident which took place on October 6, 2010 as she was walking onto the premises of the Naggo Head Taxi Stand in Portmore, St Catherine. She claims that when she stepped on the asphalt on the roadway in the taxi stand it gave way causing her to suffer a violent fall and thereby sustained personal injury and suffered loss and damage.

[2] The 1st, 4th and 5th defendants are limited liability companies duly incorporated under the Laws of Jamaica, the 2nd Defendant is a body corporate duly incorporated under the Municipalities Act and the 3rd defendant is a body corporate duly incorporated under the Parish Councils Act.

[3] On July 6th 2011 the 1st defendant filed a defence in which it admitted that at all material times the Naggo Head Taxi Stand was in the custody, care and control of the 4th and 5th defendants whose services it retained "as independent contractors" to refurbish the existing stalls, repave the parking lot, install fencing and construct a bathroom at the Naggo Head Taxi Stand.

[4] The 1st defendant also filed an ancillary claim against the 4th and 5th defendants claiming that in the event it is held liable to the claimant, it claims an indemnity and or contribution in relation to the claimant's claim, and costs together with interest incurred by the 1st defendant in defending the claim.

[5] The 1st defendant contends that the 4th and 5th defendants are liable for the injuries sustained by the claimant as they were not the servants or agents of the 1st Defendants but at all times were independent contractors who were hired to refurbish

the taxi stand, and accordingly those Defendants had control of the premises and held themselves out as capable of carrying out the required work safely and efficiently as and as such the 1st Defendant is not vicariously liable for their actions.

[6] The 3rd defendant had filed a defence on April 30th 2014. This defence was filed out of time.

[7] On July 23, 2015 judgment was formally entered against the 2nd, 3rd, 4th and 5th defendants and judgment in default of acknowledgement of service and defence of the ancillary claim entered against Scheed International Limited, the 5th defendant. The court also ordered that claims 2011HCV00861 and 2014HCV04606 be consolidated and tried together. The trial was treated as an assessment of damages in respect of those defendants against whom judgment had been entered. In view of all the circumstances, the court took the view that the overriding objective of ensuring that justice was done dictated that the trial should proceed.

The Evidence

[8] The claimant's witness statement filed on July 18, 2014 stood as her evidence in chief. She states that while walking along the side walk of the Naggo Head main road with her baby in her hand, she stepped down to enter the taxi stand and "the asphalt caved in with me causing me to fall to the ground with my son in my hand." She further states that she fell on her back and twisted her right ankle and vendors who were selling at the location assisted her and she was taken to the doctor by a representative from LIME "whose name is Anthony Parish".

[9] Her evidence further is that she was examined by the doctor and was given a prescription and that on the second day after the incident the pain got unbearable and she was taken to the Med-Life Medical Centre where she was given anti inflammatory medication and muscle relaxants, was referred to do magnetic resonance imaging (MRI) and was given 5 weeks sick leave. She produced a list of her medical expenses to date and gave evidence that her mode of transportation changed as she had to use the services of a taxi as walking and taking public transportation was not possible as a

result of the pain she was experiencing. She also made mention of her inability to do her domestic chores and indicated that she had to hire outside help.

[10] In cross examination, Miss Goulbourne maintained that at the time of the incident she was able to see clearly and where she stepped the area was clear. She admitted that there was machinery marked 'LIME' and insisted that it was Mr Parish, an engineer from LIME, who took her to the doctor and paid for that visit. She denied knowing Props and More, when it was suggested to her that the costs paid to the doctor were paid by Props and More.

[11] Mr Scheed Cole's gave evidence that he is the managing director of Scheed International Limited and also managing director of Props & More and is a trained visual artist. He further stated that Scheed International Limited was registered in 2010 and Props and More registered in 2007. He also indicated that Scheed International and Props and More have Facebook pages on which work done are posted.

[12] In cross examination, he indicated that LIME contacted him through his Props and More Facebook page to do a mural of the toll road, sculptures to go on each round-a-about, create a design and to design shop fronts and that he explained to Mrs Playfair Scott that he would need a sub-contractor. He indicated that it was a "rush job...by extreme measure... would say it was a war zone... told two weeks to come up with design..." He also indicated that he did not get a contract, and that he did the design and was given 1½ months in which to do it. He also stated that to take on the construction he incorporated Scheed International Limited.

[13] Mr Cole further stated that as the project progressed, he had to report to LIME and when there was a problem on site he reported to LIME as "they were the ones who bring me, I wasn't working independent..." He added that a LIME representative was frequently there and if a decision was to be taken to change anything they were the ones to give that directive. He also admitted that he would also be in contact with other persons from LIME in respect of the project and named 'Courtney' and 'Stephen Pryce' as well as indicated that "[he] met with the CEO at the time who Tara reported to..."

[14] He indicated that at one point during the project, LIME ordered a change in the design of the shops and the choice of colours, and that approval was sought from the Parish Council, and a meeting was held. He further stated that he could not speak at that meeting but had to speak through LIME.

[15] Mr Cole stated that in relation to the work at the Naggo Head Taxi Stand, Scheed International and Props and More were not responsible for all the work and that LIME had workers on the site as well.

[16] Tara Playfair Scott gave evidence that she was a former employee of LIME and that as an employee, she was instructed as a Consultant of the Promotions and Events Department. She states that she came to know Mr Scheed Cole having seen an article about him in a local newspaper and having seen images of his work on Facebook and she decided to contact him to carry out the improvements and renovations to the shops and entertainment quarters at Hellshire Beach and that she contacted him and met with him at his business place.

[17] She further states that having begun Phase 1 of the Hellshire project, LIME looked to the Naggo Head Taxi stand and simultaneously began renovations there and that Scheed International carried out major improvements on the bus park. She indicated that LIME has not expended any monies towards the medical care and expenses for the Claimant and that "Scheed International has solely borne responsibility for the Claimant's injuries and should be responsible for the cost". She also stated that Anthony Parish was not a part of the project and during the time she was employed to LIME Anthony Parish was not an employee.

[18] Under cross examination, she indicated that it was company policy to enter into an independent contractor agreement once an independent contractor is being engaged and that the situation with Scheed International was an exceptional case and they were working based on an oral contract.

[19] She indicated that it was part of her responsibility to check if contractors are competent and she made checks. She stated that she came to the conclusion that the 4th and 5th defendants were one and the same and that she did not do any research to

find out if Scheed International had done a similar project before. She also indicated that she went to the office/warehouse of Mr Cole and looked at some of his work and was of the view that he was competent to do the work. She also indicated that what she saw on Facebook impressed her enough for her to meet with him.

[20] Ms Playfair Scott said that she was in charge of the project and that the question of safety was with the persons LIME hired. She could not recall if LIME did anything to warn the public about the impending construction and neither could she recall if she did anything, but stated that it would be Mr Cole's responsibility to cordon off the area and it would be Mr Courtney Bell's duty to see that Mr Cole did so.

Issue of Liability –Claimant's submissions

[21] On the issue of liability, Counsel for the claimant submitted that the 1st defendant has confirmed that the 4th and 5th defendants were its servants and or agents in the implementation of the project of renovating the Naggo Head taxi Stand. Counsel asked the court to note that the decision to renovate was solely that of the 1st defendant and that it sought and obtained the approval of the Parish Council to do the work. Counsel noted that the 1st defendant conducted site visits and instructed the 4th and 5th defendants what work was to be carried out and the standard with which it was to be done. She also noted that the 4th and 5th defendants had to present its drawings and plans to the 1st defendant for approval and that the work carried out was done for and on behalf of the 1st defendant.

[22] Counsel also submitted that the 1st defendant has not presented any evidence as to the relationship that existed between it and the 4th and 5th defendants on the day of the incident and pointed out that the witness for the 1st defendant had indicated, under cross examination, that in October 2010 when Scheed International was contracted as an independent contractor on behalf of LIME there was an oral contract and this was an exceptional case.

1st Defendant's submissions

[23] On behalf of the 1st defendant, it was submitted that the 4th and 5th defendants were independent contractors employed to carry out renovation works at the Naggo Head Taxi Stand and that LIME is not liable for any injuries that the claimant may have suffered as a result of any defective construction done by those defendants.

[24] Mrs. Dixon Frith expressed the view that the evidence demonstrates that they were independent contractors and is indicated by the fact that the 4th and 5th defendants were hired to renovate the taxi stand and the manner and mode of completion was completely up to them. She pointed out that Mr Scheed Cole gave evidence that he subcontracted work to a subcontractor and that LIME had no control of the manner in which the work was to be done.

[25] Counsel noted that the renovation work done by Scheed International/Props and More was not integral to the business of LIME but was to increase LIME's presence in Portmore. She added that the work done was an accessory to the main business operated by LIME and that Scheed International issued invoices to LIME for work done and these were all satisfied by LIME.

[26] Counsel pointed out that in the pleadings the claimant has admitted that the 4th and 5th defendants were independent contractors hired by LIME hence she stated that it was unnecessary for evidence to be adduced that they were independent contractors. She therefore expressed the view that the claimant was precluded from averring or questioning whether in all the circumstances they were independent contractors.

[27] Additionally, Counsel noted that in relation to the claimant's claim under the Occupiers Liability Act , there is no dispute that the taxi stand was under the custody, care, management and control of the Portmore Municipal Council and the Parish Council for St Catherine and is owned by them and accordingly, they were the occupiers of the premises, and as LIME sought and received approval from the Parish Council to commence the work, LIME itself was merely a visitor or invitee to the premises and Scheed International and Props & More, having been in temporary occupation to complete the works, were also occupiers of the premises at the time.

[28] Counsel indicated that the case **Wheat v E Lacon & Co. Ltd.** [1966] AC 552, is instructive and in discussing the issue of who is an occupier, Lord Pearson at page 589 -590A of the judgment said:

> "*The foundation of occupier's liability is occupational control, i.e., control associated with and arising from presence in and use of or activity in the premises. In Duncan v Cammell Laird & Co.Ltd. Wrottesley J. Said:*
>
> *"it seems to me that the importance of establishing that the Defendant who invites is the occupier of the premises lies in the fact that with occupation goes control and the importance of control is that it affords the opportunity to know that the Plaintiff is coming on to the premises, to know the premises, and to become aware of dangers, whether concealed or not, and to remedy them, or at least to warn those that are invited on to the premises"*

[29] Counsel suggested that in applying those principles, LIME was not an occupier as it did not have sufficient control over it, did not conduct the actual works and there is no evidence that LIME knew the state of the taxi stand.

[30] Counsel noted that further, or in the alternative, LIME contends that since it hired the 4th and 5th defendants as independent contractors, the Act excludes it from being liable. She quoted Section 3(6) of the Act which states:

> *"Where damage is caused to a visitor by a danger due to the execution of any work of construction, maintenance or repair by an independent contractor, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done"*.

[31] She noted that the House of Lords in **Ferguson v Welsh** [1987] 1 WLR 1553, in interpreting identically worded legislation, held that the section was designed to afford

protection from liability to an occupier who has engaged an independent contractor who has executed work in a faulty manner. She added that it was further noted that liability may still flow to the occupier if he did not take reasonable steps to satisfy himself that the contractor was competent and that the work was being properly carried out.

[32] She posited that LIME took steps to ensure that the work was being done by a competent contractor as it was on the satisfactory completion of the same type of work at Hellshire that the 4th and 5th defendants were engaged to commence work at Naggo Head and officers of LIME periodically visited to view the premises and the work being done. She indicated that it was not reasonable to expect LIME to supervise their activities.

Issues

[33] It falls to be determined whether the 4th and 5th defendants were acting as the servants and/ or agents of the 1st defendant or were independent contractors and whether the 1st defendant is liable by virtue of the provisions of the Occupiers Liability Act whether the 4th and 5th defendants were its servants and /or agents or were independent contractors.

[34] In coming to a determination on these issues, I note that a person who is employed to carry out a job may be a servant or agent or be an independent contractor and that a servant is said to be a person who has a contract of service, in which case the master can order what is to be done and the manner in which it is to be done. A servant is therefore a person employed to do work subject to the control and directions of his employer and is engaged to obey orders from time to time.

[35] On the other hand, an independent contractor is one who is his own master and exercises his own discretion as to the time and mode of his work and is bound by his contract, but not by his employer's orders. Whilst an employer is liable for the torts of his servants, he is generally not liable for those of his independent contractors: **Quarman v. Burnett** [1835-42] All ER Rep 250

[36] I find on the evidence that the renovation work was done for and on behalf of the 1st defendant, LIME. It was the 1st defendant that contacted the 4th and 5th defendants and gave instructions on what work was to be done and the manner in which it was to be done. I accept as true the evidence of Scheed Cole that the 1st defendant visited the work site and that he had to report to the 1st defendant frequently as to the progress of the project and that LIME was there to give directions and also he had to report to LIME if he had any problem on the site. In short, the evidence is that by doing the project he was following their instructions and orders and he was managed by LIME in relation to the project.

[37] Notwithstanding the submission of Counsel for the 1st defendant that it was upon the satisfactory completion of the Helshire project that Scheed International commenced worked at the Naggo Head Taxi Stand, I find on the evidence that it was during the Helshire project that LIME brought on the Naggo Head project.

[38] I also note that the claimant, in her pleadings did not make an admission, as suggested by Counsel for the 1st defendant, but stated as an alternative, that the 4th and 5th defendants were independent contractors of the 1st defendant.

[39] I find on a balance of probabilities that the 4th and 5th defendants were acting as servants and or agents of the 1st defendant in carrying out the work at the Naggo Head Taxi Stand. I am fortified in my view in light of the evidence of Scheed Cole, who I accept as a witness of truth, that he was managed by LIME in relation to the project and that he had asked for a contract but did not get one, and also on the evidence of Tara Playfair- Scott that there was only an oral contract between the parties. As such, there is no evidence on which I can find that there was a contract which was in force under which the 4th and 5th defendants were operating, and by which the court could find that they were in fact independent contractors.

[40] It therefore falls to be determined if the 1st defendant is liable under the Occupiers Liability Act.

[41] The statutory provisions which are relevant for the purpose of this case are contained in section 3(1) **-** (6) of the Occupiers' Liability Act (the Act). The Act imposes

a duty of care on an occupier to see to the reasonable safety of visitors to his property. Section 3(1) – (6) reads as follows:

> "3 --(1) *An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
> *(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*
> *(3)The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing –*
> *(a) …*
> *(b) An occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*
> *(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.*
> *(5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.*
> *(6)Where damage is caused to a visitor by a danger due to the execution of any work of construction, maintenance or repair by an independent contractor, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done"*

[42] The law in respect of the liability of an occupier is in the general principles governing the law of negligence. In **Donoghue v Stevenson** [1932] AC 562 Lord Atkin stated that there is proximity between an occupier and such persons who enter his premises, they being his "neighbour". This imposes on an occupier a duty to take such reasonable care to avoid acts or omissions which are reasonably foreseeable and would injure his neighbour. The standard of care is that which is reasonably expected of an occupier in his particular circumstances, see **Goldman v Hargrave** [1967] 1 AC 645.

[43] In determining whether the 1st defendant is an occupier within the meaning of the Act, the test is whether it has a sufficient degree of control associated with and arising from its presence in, or the use of, or the activity in the premises to ensure their safety and to appreciate that a failure on his part to use care may result in injury to a person lawfully coming on to them: **Wheat v E. Lacon & Co. Ltd**., *supra.*

[44] I find on the evidence that the 1st defendant had the approval of the Parish Council to carry out renovation work at the Naggo Head Taxi Stand and that it employed the 4th and 5th defendants as well as other workers to carry out the work.

[45] In view of the foregoing, I find on a balance of probabilities that the Naggo Head Taxi Stand was occupied by the 1st defendant and its employees during the period the renovation work was taking place.

[46] The 1st defendant and its servants or agents, the 4th and 5th defendants, in my view had a sufficient degree of control arising from their presence in, use of, and activity in the Naggo Head Taxi Stand to ensure that it was safe for the use of visitors. They therefore had a duty to take such care as is reasonable to see that the premises were reasonably safe and to prevent injury to the visitors arising from any unusual danger which they know or ought to know of.

[47] Even if I am wrong in my findings and the 4th and 5th defendants were in fact independent contractors of the 1st defendant, I find that on the evidence presented, the 1st defendant would still be liable. The 1st defendant has not shown that it took any steps to satisfy itself that the 4th and 5th defendants were competent and that the work they were engaged to do was properly done. There is no evidence of any investigations done to ascertain the competence of the 4th and 5th defendants.

[48] On the totality of the evidence, I accept the evidence of the claimant as credible and I find that the 1st defendant is liable to the claimant for the injuries she sustained on October 6, 2010. There shall therefore be judgment for the claimant against the 1st Defendant.

[49] The 1st and 2nd ancillary defendants having failed to file a defence to the 1st defendant's ancillary claim are deemed to have admitted the ancillary claim by virtue of the provisions of Rule 18 of the CPR. They are therefore bound by the judgment of this court.

[50] The indemnity on which the ancillary claim is founded arises on the contract between the 1st defendant/ancillary claimant and the 2nd ancillary defendant and notwithstanding the court finding that the 1st and 2nd ancillary defendants were servants and agents of the 1st defendant it is irrelevant s they failed to respond to the ancillary claim.

[51] The agreement to indemnify the 1st defendant was made by the 2nd ancillary defendant in relation to this claim. In the circumstances the 1st defendant is entitled to be indemnified by the 2nd ancillary defendant in respect of this matter.

[52] There shall therefore be judgment for the 1st defendant/ancillary claimant against the 2nd ancillary defendant. The 1st defendant is entitled to its costs which are to be taxed if not agreed and are to be paid by the 2nd ancillary defendant.

[53] The 1st defendant/ancillary claimant is entitled to its costs which are to be taxed if not agreed and are to be paid by the 2nd ancillary defendant

[54] I will now determine the damages which the claimant ought to be awarded.

Special damages

[55] In the Further Amended Particulars of claim the claimant has pleaded a total of $210,000 under the head of special damages. In respect of medical expenses, this was supported by documents which were agreed and tendered into evidence. This is a total of $48,245.25. For transportation expenses, the claimant pleaded $50,000.00 "and continuing". She has provided evidence to show that she incurred expenses totalling $53,900.00.

[56] The cases of **Murphy v Mills** (1976) 14 JLR 119, **Kenroy Biggs v Courts Jamaica Limited & Peter Thompson** 2004HCV00054, unreported, delivered January

22, 2010 and **Owen Thomas v Constable Foster & The Attorney General of Jamaica** CL1999/T095, unreported, delivered January 6, 2006 all make the point that the claimant is required to specifically plead and prove all special damages.

[57] Additionally, I am guided by the case of **Thomas v Arscott & Anor** (1986) 23 JLR 144 where Rowe P at page 151 I - 152A said:

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

[58] In **Arscott** the Court of Appeal reduced the damages awarded from the amount proven to the amount pleaded. As there has been no amendment to the particulars of Claim, I will award the sum pleaded which is $50,000.00

Loss of earnings.

[59] In relation to her claim for loss of earnings, the claimant has pleaded the sum of $60,000.00 as the amount lost for the period she was on sick leave and her Counsel has noted that the medical report indicates that she was given 5 weeks sick leave because of the severity of her injuries.

[60] Counsel for the 1st defendant submitted that the claimant is precluded from seeking same from the 1st defendant as sections 3 and 4 of the Holidays with Pay Act stipulate that a worker is entitled to be paid while on sick leave.

[61] The claimant has produced a payslip dated October 22, 2010 which shows her gross salary for the month as $60,000.00 and has provided evidence that the medical report was submitted to the Human Resource Department of her employer Cost Club Limited (T/A MegaMart Wholesale Club). She has not specifically proven that she has lost earnings in the sum claimed or at all.

[62] I find on a balance of probabilities that the claimant was paid by her employer for the period during which she was on sick leave as evidenced by the payslip produced. I am therefore not inclined to make an award for loss of earnings as this in my view would amount to double compensation.

[63] The total award under the head of special damages will therefore be **$98,245.25**

General damages

[64] Miss Goulbourne's evidence is that as a result of the injury she has suffered pain to her foot and lower back and she had to wear a foot band and walk with crutches. She indicated that because of the pain in her back she was unable to do her laundry and as such she had to employ outside help to carry out this domestic chores.

[65] She was examined by Dr. Myrna V. Clarke whose medical report dated November 8, 2010, indicate, *inter alia, '*severe right foot and ankle sprain, mild to moderate lower back strain .... She was unable to weight bear and had to move around with crutches and required 5 weeks sick leave'.

[66] Counsel for the claimant pointed out that there is no challenge to the injuries sustained by the claimant as outlined in the medical reports tendered in evidence. The following cases were submitted as useful guides in coming to a determination as to the sum to be awarded:

(i) **Maureen Golding v Conroy Miller,** Khan, Vol. 6, page 62 in which case the claimant sustained an undisplaced fracture of the left fibula and had pain in the left leg. She was fully recovered after 6 months and had no PPD and was awarded $580,000.00 (CPI 98.9). This updates to $1,362,325.58. (CPI for December 2015 232.3)

(ii) **Garfield Scott v Donovan Cheddesingh and Phillip Campbell,** Khan, Vol. 4,page 214 where the claimant had excruciating pains, headaches, contusion on the right shoulder and hip, puncture wound on left forearm, swollen, painful

and tender knee and was awarded $300,000.00(CPI 43.9) which updates to $1,587,471.52

(iii) **Horace Williams v Knoekley Buckley and Nestle JMP Jamaica Limited,** Claim No. 2009HCV 00247, unreported, delivered December 18, 2009 where the claimant had soft tissue injury and strain to ligaments of the lumbar vertebra and was awarded $750,000.00(CPI 150.4). This updates to $1,158,410.90

[67] Counsel submitted that the cited authorities provide an appropriate range of award for injuries of the nature and severity suffered by the claimant and further submitted that an award between the range $1.3m and $1.6m would be reasonable.

[68] On behalf of the 1st defendant it was submitted that the injuries suffered by claimants in the cases of **Maureen Golding v Conroy Miller** and **Garfield Scott v Donovan Cheddesingh and Phillip Campbell** are far more severe and extensive and so the cases should not be relied on. Counsel pointed out that the Claimant suffered no fracture as compared to first mentioned case and only mild to moderate pain in her back and ankle, no punctured wounds compared to the Claimants in the cases being relied upon.

[69] Counsel commended for consideration the case of **Phyllis Bennett v Wayne Jones and Anor** [2015]JMSC Civ 49,delivered March 25, 2015, and expressed the view that the claimant Bennett, suffered more extensive injuries than the claimant in the case at bar. Her injuries were lower back strain, mild osteoarthritis of the right hip, mild spondylosis at junction and chronic ulceration to the right leg with peripheral neuropathy and was awarded $1,000,000.00 in March 2015, which updates to $1,043,107.31.

[70] She expressed the view that given the disparity in injuries when compared to those suffered by the claimant in the case at bar, the updated figure should be reduced significantly and she suggested that it be reduced by 30% to approximately $700,000.00.

[71] While noting that there are no authorities that reflect the exact injuries as pleaded by the claimant, Counsel for the defendant also referred to the following cases as able to provide guidance:

1. **Edna Webb v Fitzroy Bonner & Uriah Riley**, Harrisons' Assessment of Damages, 2nd. Edition, page 67. In this case the claimant suffered an undisplaced fracture of the medial malleolus of the tibia; fracture dislocation of left ankle; abrasions ; scars and 5% disability of the left lower extremity and was awarded $180,232.00 (CPI 41.4) which updates to $1,011,301.77

2. **Cecil Gentles v Artwells Transport Co. Ltd. and Joslyn Chambers,** Recent Personal Injury Awards, Volume 5, Ursula Khan, page 60 where the claimant suffered a fracture of his ankle and was awarded $300,000.00 for pain and suffering and loss of amenities in February 2000 (CPI 53). After indexation this amounts to $1,314,905.00

[72] Counsel indicated that the injuries in these two cases are more severe than those suffered by the claimant and suggested that the award to her be between $700,000.00 and $800,000.00.

[73] In seeking to arrive at an award for pain and suffering and loss of amenities, the court adopts the following dictum by Lord Hope of Craighead in **Wells v Wells** [1998] 3 All ER 481:

> "*the amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the claimant's general damages*".

[74] I have therefore considered the similarities and distinguishing features of the cases referred to by Counsel and I find that the cases referred to provide a reasonable guide in coming to a determination on the sum to be awarded.

[75] I agree with Counsel for the defendant that whilst it is evident that the claimant suffered injuries evidence of which are supported by the medical report, the cases relied upon by the claimant show injuries which are in fact far more severe and extensive than those suffered by the claimant.

[76] In coming to the determination as to what is a fair amount to be awarded, I found the case of **Horace Williams,** referred to by Counsel for the claimant, to be the closest in comparison. I will however discount the award made to Williams in arriving at a figure to adequately compensate the claimant in the case at bar as her period of incapacity of approximately five weeks, is shorter than that of Mr. Williams.

[77] It is therefore my view that an award of $1,000,000.00 is appropriate for the pain and suffering endured by the claimant.

[78] On the issue of costs, Counsel for the claimant submitted that the Civil Procedure Rules (CPR) allow the court to summarily assess costs. Counsel asked the court to consider the number of parties and the number of counsel involved as well as the complexity of the matter and suggested that an award of costs be made in the sum of $750,000.00.

[79] Counsel for the 1st defendant expressed the view that the proper basis for summarily assessing the costs has not been placed before the court for an appropriate assessment to be made. She placed reliance on Rule 65.7 (1)(a) of the CPR, read together with 65.9(1) and (2) to indicate that the court is constrained from exercising its jurisdiction to assess costs unless the party seeking the assessed costs has supplied the court and all other parties a brief statement showing the disbursements incurred and the basis upon which that party's attorney at law's costs are calculated. She noted that this statement has not been supplied.

[80] While I agree that the CPR allows the court to summarily assess costs and that it would save time, I find that there has not been sufficient information placed before me from which I can make a proper assessment of the costs so I will refrain from so doing and order that the costs be agreed or taxed.

Award

[81] General damages for pain and suffering and loss of amenities awarded in the sum of $1,000,000.00 with interest at 3% from the date of service on Cable & Wireless to the date of judgment

Special damages awarded in the sum of **$98,245.25** with interest at 3% from October 6, 2010 to date of judgment

Costs to the claimant to be taxed, if not agreed.