NMCO

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
CLAIM NO. 2005 HCV 294

BETWEEN	**ICILDA**	**OSBOURNE**	**CLAIMANT**
AND	**GEORGE**	**BARNED**	**FIRST DEFENDANT**
AND	**METROPOLITAN MANAGEMENT**		
	TRANSPORT HOLDINGS LTD		**SECOND DEFENDANT**
AND	**OWEN**	**CLARKE**	**THIRD DEFENDANT**

Miss Marion Rose-Green instructed by Marion Rose-Green and Company for the claimant

Mr. Manley Nicholson instructed by Nicholson Phillips for the first defendant

February 2 and 17, 2006

ASSESSMENT OF DAMAGES, PERSONAL INJURY, LOSS OF EARNING CAPACITY, LOSS OF FUTURE EARNINGS, COST OF FUTURE ASSISTANCE

SYKES J

1. The claimant is now 60 years old. She was a practical nurse employed to Hopefield Home for the Aged located at 9 Hopefield Avenue. Her career was cut short because of injuries she suffered while traveling in a bus driven by Mr. Owen Clarke, the third defendant, who was, at the material time, the servant or agent of Metropolitan Management Transport Holding Limited, the second defendant, which owned the bus. Mr. George Barned, the first

defendant, owned and drove the other motor vehicle involved in the accident. Judgment was entered against the first defendant alone. This judgment is concerned solely with assessment of damages.

2. The accident to which I referred earlier occurred on October 12, 2002. Miss Osborne was sitting in a seat at the front of the bus when it collided with Mr. Barned's vehicle. The accident occurred on Molynes Road. The force of the impact ejected her from the seat and she fell, striking her back, against a bar inside the bus. She also injured her right knee with the result that it became cut and swollen.

THE ASSESSMENT

3. I should state at the outset that there are broad principles that must be taken into account when assessing personal injury claims. One is that while there ought to be consistency in personal injury awards in a particular jurisdiction, this must not outweigh the fact that the court is not compensating an abstract claimant but the one before the court. I fear that some of the submissions of Mr. Nicholson have not paid sufficient regard to this principle. This is not to say that compensating the particular claimant means that the court ignores similar awards. I am guided by this statement of principle enunciated by Lord Morris in ***H. West & Sons Ltd v Shephard*** [1963] 2 All ER 625 at page 633 D – G

> *The first of these questions may be largely answered if it is remembered that damages are designed to compensate for such results as have actually been caused. If someone has been caused pain then damages to compensate for the enduring of it may be awarded.... Apart from actual physical pain it may often be that some physical injury causes distress or fear or anxiety. If, for example, injuries include the loss of a leg there may be much physical suffering, there will be the actual loss of the leg (a loss the gravity of which will depend upon the particular circumstances of the particular case) and there may be (depending upon particular circumstances) elements of*

consequential worry and anxiety. One part of the affliction (again depending upon particular circumstances) may be an inevitable and constant awareness of the deprivations which the loss of the leg entails. These are all matters which judges take into account. In this connection also the length of the period of life during which the deprivations will continue will be a relevant factor (see Rose v. Ford).

Lord Devlin spoke in a similar vane at page 636 E

[T]here is compensation for pain and suffering both physical and mental. This is at large. It is compensation for pain and suffering actually experienced.

4. The principles derived from these passages are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will live with this injury for quite some time is part of the subjective portion of the assessment. In the case before me, Miss Osbourne will be aware of her back injury. As I will expand on later, the doctor says that activities of daily living will aggravate her injury. In short, the injuries suffered and awareness of them, in this case, are life long. For this, she must be compensated. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant before the court. I now turn to an analysis of the evidence.

The nature and extent of injuries sustained

5. As stated earlier the claimant fell and hit her back on a metal bar in the bus and also cut her knee.

Medical report of Dr. Paul Robinson

He reports that he saw the claimant on October 12, 2002 and she was found to be suffering from

a. whiplash injury;
b. tenderness to the posterior aspect of the neck; and
c. painful swelling of the lower back.

He prescribed analgesics and muscle relaxants and sent her home for fourteen days. I pause here to observe that there is no evidence that Dr. Robinson was an orthopaedic specialist. It appears that no one realised the seriousness of the injury until much later when Miss Osbourne returned to work.

Medical report of Mr. R. C. Rose, Consultant Orthopaedic Surgeon

It is convenient that I deal with a submission made by Mr. Nicholson in relation to the credibility of the claimant. Mr. Nicholson submitted that between October 2002 when the claimant was seen by Dr. Robinson and March 31, 2005 when she was seen by Mr. Rose, there is no evidence that Miss Osbourne was seen by any doctor. This gap, submitted Mr. Nicholson, casts grave doubt on whether the injuries complained of in this assessment were really caused by the accident of October 12, 2002. If, Mr. Nicholson continued, the claimant was really in pain, why didn't she seek medical treatment for over two years? How can we be sure that the injuries flowed directly from the accident?

I do not accept this submission. First, the claimant has said that she did not have much money to attend doctors and when she tried the public hospital system the waiting time overwhelmed her and so she left. She added that she was being assisted financially by her son and daughter in law. Being the proud woman that she is she did not wish to become a permanent charge on their generosity so she bore her pain with great stoicism. However, when the pain became even more intense she decided to "take it in hand". Second, the medical examination

undertaken by Mr. Rose establishes that there is a causal connection between the injuries and the accident. As Lord Reid indicated in ***H. West & Sons*** a brave man who makes light of his disabilities ought not to receive less compensation on account of that (see page 628E).

An examination of Mr. Rose's report reveals that he knew that he was examining a patient in 2005 who alleged that the maladies from which she is now suffering arose from an accident in October 2002. The opening paragraph and history recorded from Miss Osbourne makes this clear. Mr. Rose also enquired about her past medical history. Thus based upon the evidence before the doctor he could not be under any mistaken view of what he was being asked to do. He was indeed being asked to say whether there was a causal connection between the injuries and the accident. The doctor carried out a physical examination of the patient which was supported by radiographs. After this the doctor concluded that Miss Osbourne suffered from chronic mechanical lower back pains and chronic cervical strain. I repeat his prognosis verbatim

> *Ms Osbourne will be plagued by intermittent lower back and neck pains and these will be aggravated by activities of daily living which involves sitting, bending, lifting and sudden movements of the neck.*

This grim assessment came after he made the diagnoses of chronic mechanical lower back pains and chronic cervical strain.

I now quote from the section of the report captioned *disability rating*

> *Her permanent partial disability as it related to the lumbo-sacral spine is five percent of the whole person. The permanent partial percentage disability as it relates to the cervical spine is also five percent of the whole person.* ***Her***

total partial percentage disability is ten percent of the whole person *(sic).*

I now quote from the report his findings on physical examination.

> *Examination of the cervical spine revealed mild tenderness on palpation of the sternocleidomastoid muscles. The following are the ranges of motion of the cervical spine: extension 20°, forward flexion 25°, right and left lateral rotation 35° bilaterally. The neurovascular status was intact in both upper extremities.*
> *Examination of the lumbo-sacral spine revealed mild tenderness on palpation of the midline of the lower lumbar spine. There was no spasm of the erector spinae muscles. The neurovascular status was intact in both lower extremities. Straight leg raising was 75°bilaterally with onset of lower back pains.*

The radiographs showed increased lumbar lordosis with mild spondylolistesis at L4 – L5 level. There was also sclerosis of the pedicles bilaterally at the L4 – L5 level. There was sclerosis of the upper part of the body of T12 with anterior body osteophytes.

There is nothing in the report that would suggest that the doctor failed to give satisfactory consideration of the causal link between the accident in October 2002 and his examination in May 2005. Mr. Nicholson has not raised the issue of the competence of the doctor and neither has he suggested that the claimant's injuries have come from any other source but the accident. It means then that there is no proper evidential basis for me not to accept that the findings of Mr. Rose cannot be linked causally to the accident. The absence of visits to the doctor cannot, without more, deflect the conclusion that the accident caused the injuries seen in 2005.

The gravity and extent of resulting physical disability

6. In my view what the medical report of Mr. Rose shows is severe impairment of the claimant. The 35° right and left bilateral rotation

means that the side to side movement of her head is greatly reduced. Her chin does not reach around to her shoulder which would be approximately 90° from looking straight ahead. The extension of only 20° means that she has great difficulty looking upwards. Similarly, the 25° forward flexion means that she is restricted in her ability to look down at her feet.

When the doctor said that the neurovascular status was intact he was seeking to determine whether the pain she experienced and still experiences were attributable to damage to the nervous system. This has been ruled out and so he concluded that it was the actions (mechanical) of sitting, bending and so on, which did and would aggravate her back. The L4 – L5 level is quite low down in the lower back. T 12 refers to the cervical area of the spine.

Miss Osbourne's evidence is that she returned to work after the two weeks of initial rest recommended by Dr. Robinson. She did not last a week before she was off again. Her work as a practical nurse involves lifting of patients and objects. This involves a lot of bending. Her back pained her and she was given a further two weeks off. She returned to work after this second period of two weeks with the same result. Her employers told her that she could not "manage the work anymore" and so her services were terminated. According to her, since the injury she has to employ a household helper. Apparently, she had one before but since the accident the helper is now a necessity. She tried to find employment in January 2006, but her back forced her to give up the job. The injury has affected her ability to cook, wash and other household activity.

In light of Mr. Rose's report, this inability to use her back is not surprising. Daily activities will aggravate the injury. To put it another way, the claimant does not have to engage in any unusual activity before her back is aggravated. If this is so, then future work is well

nigh impossible. Who is going to employ a 60 year old woman with chronic back and neck pains which can be brought on by ordinary activity? On this evidence alone her ability to compete on the open labour market with other 60 year olds has diminished to say nothing of competing with able bodied youngsters.

The pain, suffering endured, and loss of amenity

7. Miss Osbourne's pain has been continuous and aggravated by ordinary activity. Just this fact alone means that her enjoyment of life has decreased considerably. A body free of chronic mechanical lower back pain and free of chronic cervical strain is a thing of temporal value. She has a legal right not to have this state of affairs altered by the tortious act of another. As Lord Roche so eloquently stated, "*I regard impaired health and vitality not merely as a cause of pain and suffering but as a loss of a good thing in itself*" (see ***Rose v Ford*** [1937] A.C. 826, 859). The tortfeasor must compensate her for this.

8. The claimant used to be able to walk around free from pain and free from the fear of the onset of pain. Even though she had employed a helper before the injuries she could perform her household chores. She could have dispensed with the services of a helper if necessary but now she must have one.

9. Her evidence is that before the accident she used to work, attend church and purchase her supplies at the market. These pleasures she no longer enjoys because of the injury. Even driving in a motor vehicle is uncomfortable. She is constantly on pain medication. There is no doubt that her life has changed irrevocably.

The effect on pecuniary prospects

Loss of earning capacity

10. One of the issues that has arisen in this case is the question of whether there should be an award for loss of earning capacity and if

yes, how should it be computed. I have come to the conclusion that the law as it presently stands in Jamaica does not prohibit an award under this head of damages if the person is unemployed at the time of the trial. This conclusion is not new. Courtney Orr J came to the same conclusion in the lamentably uncelebrated case of ***Mark Scott v Jamaica Pre-Pack Ltd*** Suit No. C. L. S 279 of 1992 (delivered October 26, 1993). His Lordship rested his decision on the judgment of Browne L.J. in ***Cook v Consolidated Fisheries Ltd*** (The Times, January 17, 1977). This citation of ***Cook*** is from the judgment of Orr J. Orr J did not have the benefit of the full transcript of the ***Cook*** case. Despite this he correctly discerned that Browne L.J. had decided that an award can be made under this head even if the person is unemployed at the date of trial.

11. It is my view that when one traces the history of the matter, the Court of Appeal of Jamaica must have come to the same conclusion despite the suggestion by some that the Court did no such thing. I now demonstrate why I have formed this view. ***Gravesandy v Moore*** (1986) 40 WIR 222 approved and applied ***Moeliker v Reyrolle & Company Ltd*** [1977] 1 All ER 9. After citing the head note of ***Moeliker*** Carey J.A. said that "*the claim for loss of earning capacity is* ***more likely than not*** *to arise in cases where the plaintiff is in employment at the time of trial or assessment*" (see page 224) (my emphasis). It is to be noted that Carey J.A. never said that loss of earning capacity **only** arises if the claimant was working at the time of the trial. No judgment from the Court of Appeal since ***Gravesandy*** has doubted or modified the way in which Carey J.A. expressed the principle. This is so even taking into account the phraseology of Harrison P (Ag) (as he was at the time in ***Dawnett Walker v Hensley Pink*** SCCA NO 158/01 (delivered June 12, 2003). At pages 35 – 36, Harrison P dealt with the question of loss of earning capacity. He cited ***Moeliker*** but not ***Gravesandy***.

The passage extracted by Harrison P (Ag) from ***Moeliker*** referred to the two stage test. At stage one the question is whether there is any evidence of risk that the claimant will lose his job. If the answer is yes then at stage two, the issue is quantifying that risk. It is obvious that framing the issue in this way is predicated on the claimant working at the time of the trial. Even so, Harrison P (Ag) never said that a necessary precondition of the award is that the claimant had to be working at the time of trial. In the case before him the claimant was working at the time of trial, so there was no need for him to formulate the test in any other way. The plain fact of the matter is that to date our appellate court, as far as reported and available unreported decisions go, have not had to deal with the a case in which the claimant was unemployed at the time of the trial.

12. There is a difference between the report of ***Moeliker's*** case in the All England Reports and the Weekly Law Reports on the one hand and the Industrial Court Reports on the other. ***Moeliker*** was first published at [1976] I.C.R. 253. The version of ***Moeliker*** found at [1976] I.C.R. 253 has these words at page 262

> *This head of damage **only** arises where a plaintiff is at the time of the trial in employment, but there is a risk that he may lose this employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job.*(my emphasis)

His Lordship says later on the same page 262

> *As I have said, this problem **only** arises in cases where a plaintiff is in employment at the date of the trial.* (my emphasis).

13. The word ***only*** does not appear in the version reported in the All England Reports and the Weekly Law Reports. It was replaced by ***generally*** (see ***Moeliker*** at [1977] 1 All ER 9, 15b, f and [1977] 1 W.L.R. 132, 141G). This emendation came about because Browne L.

J. corrected the proof presented to him for publication in the All England Report and changed ***only*** to ***generally***. Let him speak for himself. In ***Cook v Consolidated Fisheries Ltd*** at page 640 he said firstly

> *I agree that this appeal should be allowed and the figure increased from £500 to £1,500 for the reasons given by Lord Denning M.R. I only add anything because I was a party to the decisions in Moeliker and Nicholls to which Lord Denning M.R. has referred, and this gives me a chance of correcting something which I now think is wrong which I said in Moeliker's case.*

Then he at pages 640 - 641 these vital passages appear

> *This case differs in one respect on the facts from any of the three previous cases cited. In all those cases the plaintiff was in fact in work at the date of the trial. In fact, in all the cases he was still in the employment of his pre-accident employer. This case is different because at the date of the trial the plaintiff was not in work at all, although his previous employer would have been willing to employ him and he could have continued to work as a deckhand if he had ignored (sic) the advice of his doctor.*
>
> *In my view, it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial. The trial judge said: "Looking ahead as best I can with the information before me, I expect that [the plaintiff] will obtain employment pretty well immediately." The judge turned out to be quite right, because he did.* ***In Moeliker's case at p. 261 of the report in [1976] I.C.R. 253, I said: "This head of damage only arises where a plaintiff is at the time of the trial in employment." On second thoughts, I realise that is wrong. That was what I said, but on second thoughts I realised that was wrong; and, when I came to correct the proof in the report in the All England Reports, I altered the word "only" to "generally," and that appears at [1977] 1 All E.R. 9, 15.*** (my emphasis)

14. Thus the version of the ***Moeliker*** case approved by Carey J.A. in ***Gravesandy*** was indeed the corrected version. This should now put to rest the proposition that an award for loss of earning capacity can **only** be made if the claimant is working at the time of the trial. It is significant to note as well that in ***Cooke's*** case, the trial judge

found that although the claimant was almost sure to find immediate employment his earning capacity was reduced because in 10 – 15 years the injury would provoke the early onset of osteoarthritis. The award for loss of earning capacity was not only upheld but increased from an already substantial figure of £500 but increased to £1500. This emphasises the point that awards for loss of future earning capacity for that is really what the award is in appropriate cases must be substantial.

15. In the case before me, the evidence is that Miss Osbourne has lost her job because she could no longer carry out the duties and responsibilities of a practical nurse. Her employers told her that that was the reason for not continuing her employment. So the risk materialised within six weeks of the accident. She is handicapped. Ordinary activities are painful.

16. Her work history is that she worked at other nursing homes for three years before going to Hopefield where she worked for four years. Before her stint in the care industry she did, in her words "general work". I understood this to mean odd jobs including household chores such as cooking, washing and cleaning.

17. She went out to seek work after two years, at a nursing home on Old Harbour Road, Spanish Town, St. Catherine but her back would not allow her to continue. This was in January 2006. She successfully negotiated the interview but the physical effort required to lift the patients got the better of her. She admits that she did not attempt to work before January 2006, because of the pain in her back. At the time of the accident she was 57 years old with approximately eight years left to work assuming she retired at age 65. She said that she graduated from sixth form but when questioned further it turned out that her educational attainments did not equip her for jobs far removed from manual work. What is clear is that she can no longer work at jobs that require much lifting,

bending or sitting. She can no longer work as a practical nurse or even a household helper. She testified that even when she stands for long periods she experiences much discomfort. Miss Osbourne testified that although she has the skills of a seamstress she cannot utilise them because she suffers pain in her neck and back. If she sits up for long periods, she says, pain comes along. I am satisfied that Miss Osbourne should receive an award for loss of future earning capacity.

18. The remaining issue is the method of calculation. The Court of Appeal has indicated that there are three methods of calculating this award (see Gordon J.A. in ***George Edwards v Dovan Pommells*** SCCA 38/90 (delivered March 22, 1991)). These are (a) the multiplier/multiplicand method; (b) the lump sum method or (c) increasing the award for pain, suffering and loss of amenities to include an unspecified sum for loss of earning capacity. It would seem to me that with the increasing trend towards itemising each head of damages the third method identified by the Court of Appeal ought not to be applied very often if at all. One of the reasons for itemising the award under each head is that it makes it easier for litigants and appellate courts to determine whether a particular award is satisfactory in the event of a challenge (see ***August v Neptune*** (1997) 56 W.I.R. 229).The cases suggest that the choice of method is influenced by the information available to the court, that is to say, where the claimant has been working for some time before the accident so that the court has some reliable data concerning her income, her remaining working life and so on then the multiplier/multiplicand method may be used (***Campbell v Whylie*** (1999) 59 WIR 326).

19. Another reason why the third method identified by the Court of Appeal may not prove appropriate is that there is the danger that the award under this head may be compressed by the fact of an

award for pain and suffering. The English Court of Appeal has suggested, a suggestion that I unreservedly adopt, that the award for loss of future earning capacity should be separately assessed and not affected or reduced by the sum awarded as general damages. I intend to make a substantial award for loss of future earning capacity and for that reason I set out, at the risk of lengthening an already long judgment, the full passage from judgment of Lord Denning M.R. in ***Cooke*** at pages 639 – 640:

> *In this case Lane J. awarded him for general damages -- pain, suffering and loss of amenities -- the sum of £3,000. For the loss of future earning capacity she awarded £500. There is an appeal to this court on the ground that the item of £500 was much too small. The judge thought that £3,500 was the right total but as to the items she said:*
>
> > *"Were I to make a larger award than I have in mind for loss of earning capacity, I should probably have been slightly less generous with the pain and suffering part of my award."*
>
> *In other words, she said: "I'm aiming at £3,500 altogether. I think my £3,000 might be on the generous side for the pain and suffering and my £500 on the low side for loss of earning capacity but, together, £3,500 is about right."*
>
> *I think we should consider the two items separately. The sum of £3,000 for pain, suffering and loss of amenities may have been on the generous side, but there is not any appealable error in it. It may be on the top line of the bracket (the bracket may be between £2,500 and £3,000) but it is not an appealable excess. So the £3,000 must stand.*
>
> *The other item of £500 must also be considered on its own merits. The law on ""loss of earning capacity" has been developed in three cases in the last two or three years: see Smith v. Manchester Corporation (1974) 17 K.I.R. 1; then two cases in which Browne L.J. gave reserved judgments: Moeliker v. A. Reyrolle & Co. Ltd. [1976] I.C.R. 253 and Nicholls v. National Coal Board [1976] I.C.R. 266. In Moeliker's case Browne L.J. said, at p. 262:*
>
> > *"Where a plaintiff is in work at the date of the trial," -- and this case is comparable -- "the first question on this head of damage is: what is the risk that he will at some time before the end of his working life lose that job and be thrown on the labour market? I think the question is whether this is a ' substantial' risk or is it a 'speculative' or 'fanciful' risk ... But if the court decides that there is a risk which is 'substantial' or 'real,' the court has somehow to assess this risk and quantify it in damages."*
>
> *There is no doubt in this case that the risk is substantial. In 15 or 20 years' time this man, because of the state of his arm, may be unable to do his work and may be out of employment or at less well paid employment. It will be some years before the end of his working life because he will then only be in his middle forties.*
>
> *The question then is how to quantify now the amount of the loss which will not occur until many years ahead. We were told that if £500 is invested now, in 20 years' time at 10 per cent., it would increase to £5,000 or something of that order.*

That is a warning not to give big sums on this head. The compensation has to be the present value.

In the previous cases the injured men were in their forties. In Smith's case the figure was increased from £300 to £1,000. In Moeliker's case the sum of £ 750 was not disturbed because there was a very good chance that the man would keep his employment and would not lose it. In Nicholls' case £2,000 was given to a man in his late forties.

Looking at the whole circumstances of this case and remembering that £3,000 is on the generous side for the pain, suffering and loss of amenities, there is no reason why this figure should be generous. It seems to me that £500 was too low. A better figure would be £1,500. I would allow the appeal accordingly and increase it to £1,500.

20. Browne L.J. agreed expressly with the analysis and reasons of the Master of the Rolls. Sir John Pennycuik, the other member of the court, agreed with the judgments of the Master of the Rolls and Browne L.J.

21. This leaves me with two methods. Unfortunately the case law both here in the West Indies and England does not provide much help in determining which method is used. ***Campbell's*** case comes closest to suggesting a criterion, namely, the type of information about the claimant that is available to the court. It seems to me that the matter has to be resolved by taking in to account that the aim of assessment is adequate compensation and not over compensation. What this means is that it is permissible for the judge to use the two methods and then look at it in the context of the global award on general damages to see if the total figure on general damages is appropriate for the harm suffered. The impact of special damages is ignored because the claimant must recover these once they are properly proved. I should make it clear that for the purposes of this discussion general damages excludes loss of future earnings and cost of future assistance, medical care and such like. Although they are not losses incurred before trial and so would not fall within special damages, as the expression is commonly understood, these damages are quantifiable future losses that are independent of any award for pain and suffering. Thus if these awards are in fact

substantial that cannot serve to depress the award for pain, suffering and loss of amenity and neither should they serve to depress the award for loss of future earning capacity because loss of future earning capacity is an actual loss in itself that occurs regardless of whether the claimant can recover any other award for general damages. These are my considerations that have guided this aspect of the award in this case.

22. In this case an award for loss of future earnings will be made. I will therefore award a lump sum but as a differentiated figure from pain, suffering and loss of amenities. I award a sum of $500,000 for loss of earning capacity.

Loss of future earnings

23. It is well established that loss of future earnings is an item of general damages and is separate from loss of earning capacity (see Carey J.A. in ***Gravesandy v Moore***). There is no principle of law that says that both cannot be recovered in an appropriate case. It is instructive to note that the Court of Appeal of England upheld an award of loss of earning capacity, loss of future earnings and loss of pre trial earnings in ***Zielinski v West*** [1977] C.L.Y. 798.

24. From the evidence before me but for the accident the claimant would quite likely have worked to at least age 65. Her injuries will prevent her from working again. The claimant has no history of any chronic illness that might have shortened her working life, that is to say, she had no history of asthma, diabetes, hypertension, allergies or known cardiac problems. She is now for all practical purposes a retiree. The evidence before the court, which has been accepted by the defendant, is that the claimant received the net figure of $15,000 per month. She said that her statutory deductions and taxes were calculated and withheld by her employers. This evidence was not challenged. The multiplicand works out to $180,000 per year. I

take into account that a lump sum is being awarded to the claimant. It is well known that persons in these jobs work beyond age 65 up to 70 years old. However, I will assume that she would have retired at age 65. In looking at Khan's volume 5 there is a list of multipliers for claimants of different ages. I believe that an appropriate multiplier, having regard to the uncertainties of the future is 3. This produces an award of $540,000.

Loss of pre-trial earnings

25. Miss Osbourne has claimed net loss of income from November 1, 2002 to October 28, 2005 at $15,000 per month. The evidence is that the accident occurred on October 12, 2002. She was off for two weeks, returned, off for two weeks, returned and then her services were terminated. Her evidence is that she was not paid for the whole month of October 2002 because her employers told her that she could not work, meaning, she was not performing satisfactorily after the accident. This she was told on her return after the first two-week break that immediately followed the accident. The amount claimed, proved and therefore awarded is $536,250.

Cost of future assistance

26. I accept the overall evidence in this case that the claimant will need assistance for the rest of her life. She says that since December 2005, she is assisted every day. There is no evidence of the weekly salary of the assistant. The evidence spoke to a maximum of $1000 per day one day per week. I therefore make an award of $1000 one day per week. This produces a figure of $4000 monthly and $48,000 per year. Life expectancy of women in Jamaica is said to be approximately 72 years. I shall use a multiplier of 8. The figure is $384,000.

Damages for pain, suffering and loss of amenity

27. A number of cases was cited by both attorneys. The ones I have selected are the ones of greatest assistance. In ***Candy Naggie v The Ritz Carlton Hotel Company Jamaica Ltd*** Claim No. HCV 00503 of 2004 Sinclair-Haynes J (Ag) awarded the sum of $1,750,000 for pain, suffering and loss of amenity. The assessment was done on December 13, 2005. The injuries of Miss Naggie arose from a fall at her work place. She experienced sudden severe lower back pains. The medical evidence showed that the lower back pains were precipitated by standing and bending. Miss Naggie had no chronic diseases. The prognosis was similar to that of Miss Osborne, namely that the lower back pains will be aggravated by activities of daily living such as prolonged sitting, standing, bending and attempting to lift objects. The difference between the two is this: whereas Miss Naggie's pains were brought on by **prolonged sitting, standing, bending** Miss Osbourne's lower back pains are aggravated just by sitting, bending or lifting. Additionally, Miss Osbourne has neck pains while Miss Naggie had none. Miss Naggie had a ten percent disability of the whole person. I should add that the hearing before Sinclair-Haynes J (Ag) both sides were represented.

28. There is another assessment of Sinclair-Haynes J (Ag) done on April 8, 2005, in the matter of ***Dawn Vernon v Paulnor Sea Port Company Limited*** HCV 2282 of 2003. The sum of $1,900,000 was awarded for pain, suffering and loss of amenities. Ms Vernon had mild mechanical lower back pains and whiplash injury. The prognosis was that she would have intermittent neck pains and mild lower back pains which would be precipitated by activities of daily living such as doing household chores, driving and **prolonged sitting** and **walking**. There was a ten percent permanent partial disability of the whole person.

29. The cases above were cited by Miss Rose-Green. I should point that the cases relied on by Miss Rose-Green are not reported in either *Harrison's* or *Khan's*. I was provided with copies of the final judgments and medical reports. Of the cases relied on by Mr. Nicholson the most helpful was that of ***Merlene Nelson v Edgar Cousins*** Suit NO. C. L. N 078 of 1986 (assessed between December 16, 1991 and November 29, 1996) reported at *Khan's Volume 5 at page 162*. The claimant suffered neck and back injuries. She complained of pains down her right shoulder. There was tenderness over the lower cervical and mid dorsal region of the spine as well as cervical spondylosis C3 – 6 but no abnormality in the dorsal spine. She was assessed at not having more than ten percent permanent partial disability. The general damages there were $525,000. The most recent CPI is December 2005 (2293.8). The CPI at the time of the assessment was 1006.9. The current value of the award is $1,195,922.65.

30. Mr. Nicholson submitted that an appropriate award was $1,000,000. I don't agree. The injuries received by Miss Osbourne while similar to the those in the ***Nelson*** case there is nothing in the report to indicate that Miss Nelson had the prolonged suffering, physical and mental, that Miss Osbourne has experienced, is experiencing and will continue to experience. In the ***Dawn Vernon*** case the injuries to the back were described by the doctor as mild whereas Miss Osbourne's is chronic. I have already noted the differences between ***Naggie's*** case and Miss Osbourne. It seems to me that an appropriate award is $2,500,000.

Special damages

31. Both counsel agreed items 3 – 5 of the claim for special damages. These are transportation ($1600), visit, consultation and medical report of Mr. Rose ($12,000) and transportation to and from Mr.

Rose ($600).

32. The other items were not agreed and so will have to be assessed. There is also a claim for $22,350 for medical expenses, visits to doctors and medication. The evidence is not the best but she testified that she paid Dr. Robinson $1500 for the report and $2,000 for the visit to him. No receipts were tendered but there is no challenge that she did these things. The amounts indicated are reasonable and therefore recoverable. She also went to a Dr. Chin. She paid him $3,000 for the visit. She received a prescription from him that cost $1500. This is also recoverable.

33. Miss Osbourne said that her daughter in law employed a lady to assist her at the rate of $800 per day. The lady came one day per week. The first period is from October 13, 2002 to December 31, 2002. This is a period of twelve weeks which makes the sum $9,600. This is recoverable. The second period of fifty two weeks from January 5, 2003 to December 31, 2003. The amount pleaded for this period was at $900 per day. The evidence speaks to $1000. The sum recoverable is fifty two weeks at $900 per week. This is $46,800. The third period is from January 4, 2004 to October 28, 2005. The sum claimed is $109,200 at $1200 per day. There is no evidence that $1200 were paid for this assistance. Thus the sum recoverable is at the rate of $1000 per day, one day per week for 91 weeks which is $91,000.

Conclusion

34. My award is as follows

a. General damages

i. Pain, suffering and loss of amenities - $2,500,000 at six percent interest from June 4, 2005, to February 17, 2006;

ii. Loss of earning capacity - $500,000 – no interest;

iii. Loss of future earnings - $540,000 – no interest;

iv. Cost of future assistance - $384,000 – no interest;

b. Special damages

i. Pre – trial loss of earnings - $536,250;

ii. Medicines, medical reports and visits to doctors, transportation - $22,200;

iii. Pre-trial cost of assistance - $147,400;

iv. The total special damages of $705,850 attract interest at the rate of six percent from October 12, 2002 to February 17, 2006.

Costs to the claimant agreed at $52,000.