IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. P-18 OF 2000

BETWEEN	**NEKEISHA PORTER**	**CLAIMANT**
AND	**CONSTANTINE PORTER**	**1ST DEFENDANT**
AND	**MINISTRY OF HEALTH**	**2ND DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD DEFENDANT**

Miss Tania Mott instructed by Marion Rose Green and Company for the claimant.
Miss Marlene Chisholm Instructed by the Director of State Proceedings for the Defendant.

Heard: November 16, 17 and 19 2010 and February 16, 2011.

Assessment of damages-Multiple injuries-Novus actus interveniens-Failure to mitigate-Burden of proof-Future medical care-Basis of claim for nursing care and future care and assistance-Handicap on the labour market-Pain and suffering and loss of amenities

Edwards J (Ag)

1. On or about the 9th November 1995, the claimant Nekeisha Porter was a pillion rider on a Honda Motor Cycle which was hit by a Toyota minibus being driven by the 1st defendant Constantine Porter (no relation). She was a thirteen year old school girl at the time. Mr. Porter was an employee of the 2nd defendant, The Ministry of Health. The 2nd defendant was also the owner of the Toyota minibus.
2. Nekeisha Porter suffered severe and extensive injuries as a result of the accident and in 2000 brought a claim against the driver of the Toyota

minibus and the owner of the bus. The Attorney General of Jamaica was joined as the third defendant under and by virtue of the Crown Proceedings Act.

3. Liability was not contested and judgment was entered against all three defendants. The first defendant has since died. The third and second defendants, however, challenged the quantum of damages to which the claimant is entitled as a result of her injuries.

THE ASSESSMENT

Special Damages

4. The claimant's injuries were primarily to the head, lower limbs and right hand. She suffered cerebral concussion and received several lacerations over the body resulting in scars. She lost some of her teeth and the vision in her left eye. She suffered a fracture to her jaw bone as well as to her right wrist, hip and leg. She spent approximately three months in hospital and was seen and treated by a slew of medical doctors of varying specialties.
5. The claimant sought compensation for numerous out of pocket expenses arising from her injuries. In the further amended Particulars of Claim filed October 26, 2010, she claimed for transportation costs to and from the hospital and the doctors' offices in the sum of $157, 300.00. There was no further specificity pertaining to transportation costs.
6. At the assessment hearing, however, the claimant sought to recover two separate sums for transportation totaling $244,000.00. The first sum of $132,000.00 was for transportation costs for her visits to the doctors and the hospital as well as a short period of travel to school after her discharge from hospital. There was also a claim for the cost of transportation for her mother's travel by taxi to and from hospital at a

cost of $500.00 each way for a period of four months. There was no documentary proof of this claim.

7. It is trite law that for a claim under this head the claimant is to be held to strict proof unless the parties agree. In support of this claim and the lack of proof thereof, the claimant cited the case of ***Ezekiel Barclay and Another v Kirk Mitchell*** Suit No. C.L. B. 241/2000, judgment of Anderson J delivered July 13th 2001. Anderson J in **Ezekiel Barclay** took the view that it would be uncommon for a driver of hired transport to have provided receipts. I respectfully agree with this commonsense approach taken by the learned judge. But Anderson J in taking this approach was not laying down any hard and fast rule. Indeed, he went on to make it clear that the more substantial the claim, the stricter the proof which would be required. He also further emphasized that the principle of strict proof remained sacrosanct.
8. In this case, the defendants accepted that in the circumstances of the injuries sustained by the claimant, a certain leeway could be granted by the court in respect of transportation costs after her discharge from the hospital. The defendants made no such concessions in respect of the mother. It is their contention that the mother's evidence that she took taxi at the cost of $500.00 each way for four months, without strict proof, is to be rejected.
9. The claimant's mother gave evidence that at the suggestion of her son, who was residing in the Cayman Islands at the time, she started taking taxi to the hospital. There is no evidence of payment in support of these sums claimed. There is no evidence of any real necessity for the mother to have done this except for her own convenience, comfort and peace of mind. There is evidence that there was a regular bus service and an

executive bus service at the time. The evidence of the mother is that her house was not adjoining the main road and she would have had to walk from the bus stop to her home at nights after returning from the hospital. Even so, this does not explain the need for taxi service in the morning. Her evidence is that ordinarily she would take the regular bus or the executive bus service to and from work or to conduct her business.

10. A claimant may choose the most expensive means of mitigating loss and alleviating pain and suffering and discomfort. But she may not do so at the expense of the defendant. I am all together certain that the defendants are not expected or required to bear the burden of the cost of the mother's extraordinary travelling comfort and her son's peace of mind.

11. The court accepts that as a result of her daughter's accident the mother had to travel to the hospital each day, twice per day. The evidence of the mother is that at the time bus fares in Portmore, St. Catherine was between $40 and $60 dollars; the executive bus service at the time cost $60. Allowing for the higher rate offered by the executive bus service, even in the absence of any proof, the court will award a sum of $120.00 per day for transportation costs for the mother for 94 days, from the date of admission to the date of discharge. This totals the sum of $11,280. Therefore, a total sum of $143, 280.00 is awarded for transportation costs for the claimant and her mother.

12. There is some controversy as to when the claimant was discharged from hospital. The medical report from Doctor Preshy Varghese, Registrar of the Department of Orthopaedics at the Kingston Public Hospital, tendered in evidence by the claimant herself, indicated that the claimant was discharged on February 13, 1996. In her oral evidence the claimant said she was discharged one day before March as it was the happiest day

of her life. In her witness statement she said it was February 25, 1996. The mother's evidence is that it was the 25th or 26th of February.

13. In the report of Doctor R. C. Rose, Consultant Orthopaedic Surgeon who saw and treated the claimant, he indicated a discharge date of the 27th February 1996. This date would have come from the history given by the claimant and her mother. The claimant's attorney conceded to the submission by Miss Chisholm, on behalf of the defendants, that in the agreed bundle of documents the invoice from the hospital indicated the cost of hospital stay up to February 13, 1996.

14. Based on the contradictions in the claimant's own case as to her discharge date, I am constrained to accept the evidence from the hospital which discharged her and find that she was discharged on February 13, 1996.

15. There was also a claim for loss of earnings for the claimant's mother for the period she had to cease working to care for the claimant. The evidence from the mother is that upon her first visit to the hospital to see her daughter and viewing the severity of her injuries, she did not return to work. Her evidence was that at the time she was working as a security guard with Bull Security at a salary of $2,800.00 per fortnight. She had been working at Bull Security for a little over a year and had already received her vacation leave for that period. She told the court that after her daughter's accident, she stopped working for approximately a year and a half.

16. Her documentary evidence of employment came not from Bull Security but from some other unrelated source which was not accepted into evidence. She told the court that Bull Security no longer existed as the

owner had since died. She had no pay slips, claiming that they were given to her previous attorney.

17. The claim was amended under further amended particulars of claim to 39 fortnights at a rate of $2,800.00 per fortnight. The attorney for the claimant cited the case of ***Donnelly v Joyce*** (1971) D No. 618; (1974) 1QB 43. This case held that since the loss to the plaintiff caused by the defendant's wrongdoing included the existence of the need for nursing services provided by his mother, he was entitled to recover her loss of wages as the proper and reasonable costs of supplying that need.

18. In **Hunt v Severs** (1994) 2 AC 350, Lord Bridge described the entitlement as;

> **"the reasonable value of services rendered to him gratuitously by a relative or friend in the provision of nursing care or domestic assistance of the kind rendered necessary by the injuries the plaintiff has suffered".**

19. The burden is on the claimant to establish the need for care and the extent of the care which was required. The claimant is entitled to what is reasonably necessary to alleviate the consequences of her injuries and diminish the inconveniences caused by her temporary or permanent disability.

20. However, the House of Lords in **Hunt v Severs** went further than **Donnelly v Joyce** to hold that if the care was provided then the claimant had a duty to claim the cost on behalf of the care giver. The Law Lords also held that the loss was the carer's loss and the sum recovered was to be held in trust by the claimant for the carer. The case of **Woodrup v Nichol** (1993) PIQRQ 104, CA is also authority for the proposition that the claim may be based on the loss of earnings by the caregiver. This is

also supported by the case of **Evans v Pontypridd Roofing Ltd** 2001 EWCA Civ 1657 (2001) ALL ER (D) 13 cited in Munkman on Damages for Personal Injuries and Death, eleventh edition at page 114.

21. Lord Justice May in **Evans** considered the history of claims for gratuitous care in detail, including **Donnelly v Joyce** and **Hunt v Severs.** In his view the court's task was to enable the volunteer caregiver to receive recompense for services rendered. Lord May said inter alia;

> **"Circumstances vary enormously and what is appropriate and just in one case may not be so in another. If a caring relation has given up remunerative employment to care for the claimant gratuitously, it may well be appropriate to assess the proper recompense for the services provided by reference to the carer's lost earnings. If the carer has not given up gainful employment, the task remains to assess proper recompense for the services provided."**

22. The evidence of the claimant is that after her discharge from hospital she did not return to school until a year after the accident. This is supported by the evidence of the mother that her daughter returned to school approximately one year after the accident sometime in November 1996. Her evidence was that she began working again after her daughter went back to school. In those circumstances I am prepared to accept that the claimant's injuries were such that she required care at home.

23. The mother who provided the care is entitled to her recompense. Although she has not provided any acceptable proof of employment at the time, I believe the sum of $1400 per week for 52 weeks is a reasonable rate for the care she provided. The court will award to the claimant the sum of $72, 800 for the cost nursing care provided to her by her mother.

24. That only leaves, under this head of damages, the costs of medical expenses incurred following a laser surgery done by Doctor K. Mannie as well as surgery and other medical expenses done and incurred by the claimant in Canada. The defendants submitted that they should not be made to bear the cost of this surgery as this was not the surgery suggested by Doctor Donovan Calder, Consultant Ophthalmologist.

25. As a background to this, it is to be noted, that as a result of the injury to the left eye, the claimant lost 99% vision in the eye leaving her with only gross hand movements. Doctor Calder, whom she had seen as an outpatient had recommended cornea grafting and anterior segment reconstruction, in 1997. She did not do this procedure claiming a lack of funds to do so. However, in March 2001 she went to the Cayman Islands to do the laser surgery on the left eye. She did not consult Doctor Calder before this surgery was done.

26. The medical report of Doctor Calder dated October 13, 1997 indicated that the claimant was left with hand-movement vision in her left eye after the accident. She was assessed as having a left cornea scar with a fairly disorganized anterior portion. It was his suggestion that there was a possibility that more useful vision could be obtained from the eye by performance of a cornea graft and anterior segment re-construction.

27. In his report dated January 28, 2003 he indicated that the injury to the eye was permanent and even with the best of surgery she would have limited vision, if any in that eye. He also indicated that the prognosis for that eye was very poor.

28. The mother's evidence was that Doctor Calder had told her that the claimant had lost vision in the left eye and that the eye needed to be removed before it became problematic. She agreed he had suggested a

cornea graft. However, she was of the view that if the vision was gone then a cornea graft would serve no useful purpose. To her mind (sic) the eye needed to be removed. She told the court that removing the eye at the time cost money which she could not afford so she instead asked Doctor Calder to treat the eye. She said the eye later developed a pressure and he began treatment with eye drops and tablets.

29. In March 2001 the eye began leaking fluid. She took the claimant to see Doctor K. Mannie about the leaking fluid. She was advised by Doctor Mannie that the eye needed laser surgery to stop the fluid. She said he told her that the pressure in the eye was contributing to the fluid; the operation was necessary to stop the fluid in the eye. She admitted that she did not get a second opinion from Doctor Calder. She said her daughter was in pain with the fluid leaking from the eye and the pills and eye drops prescribed by Doctor Calder was not working.

30. The medical report of Doctor Mannie dated March 28, 2001 was tendered into evidence by the claimant. The report indicated he saw the claimant in January at the Portmore Health Care Complex. He found that the left eye had corneal opacity with an area of perforation. The only vision in the eye at that time was light perception. He did a crycudrial flap to cover the perforation and prescribed cosmetic contact lens. He also advised an ultrasound be done to see if the post segment was intact so that corneal grafting could be done. There is no evidence that this ultra sound was ever done. The cost of the surgery and contact lenses was a total of $70,000.00.

31. Doctor Mannie's recommendation for contact lenses for the left eye, apparently, was not to aid in vision but for cosmetic and aesthetic purposes.

32. The claimant's mother also gave evidence that she later took her daughter to see Doctor Kevin Scarlett who she said told her the laser surgery was a good thing as it would stop the pain. He told her the fluid from the eye was the cause of the pain. She gave further evidence that between 2001 and 2007 the claimant's pain decreased and she had only a little problem with her eye, nothing great (sic).

33. The mother's evidence here is to be viewed in light of the referral letter by Doctor Kevin Scarlett to the University Hospital regarding the condition of the claimant when he saw her in 2002. That letter dated September 9, 2002 and tendered into evidence by the claimant, indicated that she was seen by Doctor Scarlett after developing acute severe left eye pain associated with vomiting. The letter indicated that the pain had persisted with no relief. His examination of the eye revealed that she had hand movement acuity, infection and corneal opacification with neovasculanization. He questioned whether she may have developed acute glaucoma of the left eye.

34. Now this visit to Doctor Scarlett for pain in the eye would have been after the laser surgery done by Doctor Mannie, after which the mother declared the daughter pain free until 2007. In his answers to the court to questions posed by the defendants' attorney, Doctor Scarlett indicated that the claimant had presented with a one day history of sudden left eye pain and vomiting which was suggestive of acute glaucoma.

35. Acute glaucoma, according to the doctor, is an uncommon ophthalmic disorder where there is sudden obstruction of the outflow of aqueous humor from the eye resulting in severe pain, elevated eye pressure and quick loss of vision if not treated in a timely manner. He also indicated that trauma was a cause of glaucoma. He indicated that her vision was

poor at the time but there was also preexisting severe corneal damage. Acute glaucoma was only a possible diagnosis for the pain.

36. She was also seen by Doctor Calder in March 2002 when she was found to have a scarred and disorganized left eye with light perception vision.

37. It appears certain therefore, that the reasons and necessity for the procedure done by Doctor Mannie was independent of the cornea graft. The claimant had suffered pressure in the eye and fluid leakage for which she was being conservatively treated by Doctor Calder. Despite treatment she continued to suffer from fluid leakage and pain. The operation done by Doctor Mannie was to alleviate this situation and had nothing to do with the cornea graft or the need for it. Indeed, Dr. Mannie indicated that if the post segment was still intact corneal grafting could still be done. At that point she had no vision in the eye and only light perception. There was a perforation to the eye, pressure, leakage and pain all directly attributable to the accident. The perforation and leakage was to have been corrected by Doctor Mannie's procedure.

38. I award the sum of $70,000.00 to the claimant as reimbursement for the sums paid to Doctor Mannie.

39. The defendants also objected to the sums claimed in Canadian dollars for items expended by the claimant whilst in Canada. The evidence is that the claimant and her mother now reside in Canada. The mother's evidence is that after 2001 up to 2007 the claimant was relatively free of pain in the eye. After migrating to Canada in the winter of 2007, the problem returned. The claimant experienced severe pains. She took her daughter to the doctor for tests. She was told the eye had to be removed. They were referred to a Doctor Yasser Khan in Canada and after consultation, Doctor Khan removed the eye.

40. By order of the Master dated October 26. 2010, Doctor Yasser A Khan MD FRCSC was certified as an expert witness and his medical report dated September 17, 2010 ordered tendered into evidence without need to call him to the hearing.

41. Doctor Khan is an ophthalmologist specializing in ophthalmic plastic and reconstructive surgery. His expertise is in the removal of eyes for various medical reasons and ocular trauma. He is a clinical assistant professor at McMaster University Faculty of Health Sciences and Director of undergraduate ophthalmology and oculoplastics fellowship.

42. He saw the claimant on March 7, 2008. She presented with a blind, painful and disfigured eye. After discussion on how to manage her disfigured eye it was decided that the best solution would be an evisceration of the blind eye.

43. According to Doctor Khan, evisceration is a procedure whereby the internal contents of the eye are removed and a spherical implant is placed in the empty shell. A custom built ocular prosthetic is then fitted into the eye socket.

44. The claimant underwent this surgery May 8 2008. The blind eye was removed and was followed by a reconstructive procedure where an implant was placed in the cavity and repaired. This surgery required hospital stay but was not life threatening. She was later fitted with an ocular prosthesis.

45. The defendants' argument, which was very tentatively put by Miss Chisholm, as I understood it to be, was that; the claimant having not followed Doctor Calder's advice to do a corneal grafting, the laser surgery done by Doctor Mannie was a supervening cause which resulted

in the need to remove the eye. In the result the defendants should not be made to bear the costs of the removal and incidental medical treatments.

46. It is trite that although the accident may be caused by the defendant's negligence some of the consequential losses and expenses may not be. One incident of this is where the claimant has incurred expenses from medical advice which proves to be mistaken. This issue was discussed by Lord Patrick in **Rubens v Walker** (1946) SCT 200 where he said;

> ***"It is a reasonable and probable consequence of a wrongdoer's breach of duty that a person hurt will incur expenses in following the treatment prescribed by reputable experts employed by him to cure him. Each case must be decided on its own merits."***

47. Obviously the situation would be different if further damage resulted from negligence on the part of the doctor. Intervening treatment necessitated by the defendant's tort would not amount to novus actus; it would be within the risk of the original accident.

48. The question here is whether the treatment in Canada and subsequent removal of the eye became necessary as a result of intervening damage. The answer, in this case must be no. The damage to the eye caused by the accident was severe. Doctor Calder gave no guarantee of recovery.

49. In his report dated January 28, 2003 he indicated the injury to the left eye was permanent and that the claimant had lost 99% vision in that eye. There was only hand movement vision in the left eye with no guarantee of any significant improvement even with a cornea grafting. In his answers to the court to questions posed by counsel, Doctor Calder indicated that the surgery would not have restored full vision and he was unable to say what percentage vision would or could have been restored

by the procedure. Her injury would have remained permanent and he also highlighted the risk of secondary glaucoma.

50. There was pressure and leakage in the eye for which Doctor Calder's treatment proved ineffective. The mother's evidence is that Doctor Calder himself had suggested the removal of the eye, but that at the time it was expensive. She opted to treat the eye instead. When this proved ineffective the claimant was entitled to seek relief.

51. In his response to questions posed to him on his report dated January 28, 2003, Doctor Calder indicated that the claimant may still have had to remove her eye even if the corneal graft and anterior segment reconstruction had been done. He agreed that it was the injury to the left eye which eventually led to the removal of that eye for cosmetic reconstruction. He also indicated that the type of surgery done in Canada by Doctor Khan was not performed in Jamaica.

52. I find that the claimant is entitled to reimbursement for the cost of treatment in Canada as proved, totaling Canadian $3531.78. The attorney for the defendants objected to the tendering of the receipt for the cost of the prosthesis. However, the evidence of Doctor Khan and the claimant herself is that she was fitted with an ocular prosthesis following the evisceration. She was wearing it at court. The report of Doctor Khan gave an estimate of the range of costs which I accept and will award a further sum of $1,500.00 Canadian currency for the cost of the prosthesis.

53. Total Special damages awarded amounts to $472,589.39 Jamaican currency and $5031.78 Canadian currency.

General Damages

Future Losses

54. The medical report of Doctor Khan indicated that the claimant would require replacement prosthesis every five years. The claimant is now twenty-eight (28) years old. Khans volume 5 cited by the claimant's attorney, carries a table listing the life expectancy of males and females in Jamaica. It claims that females have a life expectancy of 78 years.

55. The claimant is a healthy 28 year old female, so that accepting and using the table as a guide, she would have at least a life expectancy of a further fifty (50) years. During those 50 years the prosthesis would have to be changed 10 times. Doctor Khan estimated that the prosthesis would cost between $1500-2000 Canadian dollars. Using an average cost of $1700 for the first five changes and $2000 for the remaining five changes, I will make an award of $18,500 Canadian currency for future prosthesis.

56. Doctor Khan, Doctor Calder and Doctor Scarlett all recommended protective lens to protect the remaining good eye. Doctor Khan gave an estimate of cost ranging from a low of $200 dollars to a high of $ 800 Canadian currency. There was an indication that this depends on the style and frames chosen. The claimant's attorney suggested that the lens would have to be changed every two years over a life span of 50 years. She suggested a median cost of $500.00. At a cost of $500.00 per lens for 25 years, I make an award of $12, 500.00 Canadian currency for future lens.

57. I also make an award of $340, 000 for future orthopeadic surgery based on the report of Doctor R. C. Rose dated November 26, 2007. This report indicated that Doctor Rose first saw the claimant in 2001. She was last evaluated by him on October 24, 2007. At that time the claimant reported continued pain in the right wrist with a weakened grip and pain in the

right thigh after walking for half an hour. Her left hip occasionally had a clunking sound whist walking. Examination revealed an obvious deformity of the wrist with prominence of the distal ulna and shortening of the distal radius. There was also prominence of the carpus dorsally.

58. The doctor gave an impression based on review of plain radiographs of the right wrist, right femur, pelvis and right hip. There was dorsal intercalated segmental instability secondary to malunion of the distal radius; malunion of the midshaft right femur with 17% of valgus angulation and a limb length discrepancy of 1.5cm. He recommended a distal radial osteotomy to correct the dorsally angulated distal radius. This would prevent the development of radiocarpal osteoarthritis. He also recommended a distal femoral osteotomy to realign the mechanical axis of the right lower extremity; the former at a cost of $107,000.00 and the latter at a cost of $133,000.00. This estimate did not include the cost of hospital stay and the sum of $100,000 was suggested and accepted as a reasonable cost for hospital stay for 2 days.

59. The medical report of Doctor Leighton Logan dated June 18, 1997 indicated that the claimant was examined by him on the 14th of June 1997. Upon examination he found multiple scarring as follows:-

Face: Upper lip on the right side in its entirety (3cms. long) with scarring and contracture;
Right ala base (2cms. long) scar;
Right face (2cms. long) scar;
Central forehead (2cms. long) scar;

Right Upper Limb: Scarring of upper posterior arm/shoulder area 3 (3 1/2 cms x7 cms);

Right Chest: Scar measures 4 cms x 3 cms;

Right breast: Upper Portion x 2 scars, 5cms and 2cms long;

Left medial epicondyle region (2cms x 1 ½ cms);

60. He suggested further management involving a combination of surgery, intralesional steroid therapy and superficial irradiation. It was expected that at least two surgeries would be necessary with an overall improvement of 70-80%.

61. Although Doctor Logan suggested two surgeries would be necessary to give the claimant a 70-80 % recovery on her facial scars, it is clear that the scarring that was evident when the claimant was a teenager have ameliorated over time, and as bad as they were previously, they are hardly noticeable now, at least at first glance. Doctor Logan's assessment was done thirteen years ago. There was no updated assessment. The court is left in the dark as to whether there would be any change to his original assessment in light of the significant improvement in the claimant's appearance. There was also no admissible costing on this surgery. However, the court will award a figure of $300, 000 as a reasonable sum for future plastic surgery.

62. The claimant's attorney submitted that award be made for future care and assistance. It is not certain whether counsel as made any distinction between future care and future household assistance. The authorities suggest there is a difference between the two. Damages are awarded under this head on the basis of whether when and for how long the cost will be incurred. The burden is on the claimant to establish when and if care and or assistance will be needed.

63. The claimant came and gave evidence in person. She presents as a healthy, attractive and confident female with no visible disability. Her gait was upright with no visible sign of a limp or gimp. She did present with a tendency to sit or stand at will, which indicated a discomfort with either for long periods. There is no evidence or indication she will require any future care or assistance.

64. According to the medical evidence her right wrist carries a slight deformity and her grip is weaker than in the left but it is not debilitating. There is no indication she will not be able to take care of herself by loading clothes into a washer dryer or pushing a vacuum cleaner or broom in Canada. There is no indication that it prevents her from bathing, combing her hair or otherwise dressing or attending to her needs. There is no evidence that the claimant requires assistance at this time to take care of herself or her house old or that anyone is currently providing any such assistance.

65. In his answer given to the court to question 7 posed by the attorney for the defendants regarding whether the claimant can work with the deformity to her wrist, Doctor Rose said this:

> **"It depends on the type of work which Miss Porter performs. If her occupation involves using her right hand to lift heavy objects as well as perform household chores e.g. cooking and cleaning, she might be able to work but her activities would be accompanied by pains in the wrist. In addition, the deformity has changed the anatomy of the distal radius and wrist thereby decreasing the grip strength in that hand."**

66. The medical evidence of Doctor Rose is that surgery to the wrist will address this problem. However, accepting that the claimant may undergo future orthopaedic surgery that may incapacitate her for a short period, I

will award a sum of $2,500.00 per day for six weeks of nursing care. I will therefore award a sum of $105,000.00 for future care.

67. The Medical report of Doctor Donald Burke dental surgeon indicated he examined the claimant on January 8, 2002. On examination he found her to have multiple facial scars, loss of vision in the left eye, malocclusion and multiple missing and/or fractured teeth. He recommended a treatment plan involving (a) root canal with post and crowns to restore fractured lower canines at a cost of $26,500 per tooth (b) comprehensive orthodontic treatment followed by fixed dental prosthesis (bridge) to replace missing teeth, at a cost of 9x16=$144,000 per jaw.

68. The claimant's evidence is that she lost nine teeth. Four came out and five fractured teeth were removed in surgery. She has five teeth on the right side but no upper teeth to bite down on. The two lower canines at a cost of $26,500 per tooth amounts to $53,000.00. Costs to fix the upper jaw estimated at $144,000.00. Based on the estimated costs of dental work recommended by Doctor Burke the court awards a sum of $197,000.00 for future dental care.

69. A sum of $3, 760 US dollars is also awarded for orthodontic treatment based on the estimate provided from the offices of Doctor Jeffrey Meeks, Orthodontist under the signature of the Office Manager dated December 6, 2001.

Handicap on the Labour Market.

70. It is a question of fact in the individual case whether there is any chance of a loss of earning capacity. No one case can be used as a guide to another. This claim covers the risk that, at some future date during the claimant's working life, she will lose her employment and because of her disadvantage on the labour market will suffer financial loss.

71. The claimant's attorney cited several authorities in support of this claim. These included **Moeliker v Reyrolle and Co Ltd** (1977) 1 ALL ER 9, **Andrew Ebanks** and **Elijah Buchanan** and **Cecelia Buchanan** v **Seacoast Trucking Service Limited**, Claim No 2008/HCV 00638. I believe the principles expounded in these cases are sufficiently notorious for me to be excused from reciting them here. In applying those principles to this case however, I must turn to the evidence of the claimant herself.

72. The claimant's evidence is that before the accident she wanted to be a flight attendant. In her teens she sought to do cosmetology and managed to finish the course. Although she has an interest in the course because of the chemicals she did not wish to take chances with her one good eye. She was cognizant that cosmetology involved the use of chemicals. She also gave evidence that when she worked in hair salons patrons were turned off by her appearance. She also gained employment as a store clerk but again her appearance proved to be a distraction. She also said that when she sought employment she would be called for interviews but when she presented herself she would be told she was not suitable.

73. In 2008 she began working as a temporary cashier at Wal-Mart in Canada. This was shortly after the evisceration to her left eye and before her prosthesis was implanted. The cash registers are computerized and she was trained on the job. She said people stared at her mostly because of the scars. Her prosthesis is not evident and she wears glasses, so that as she said, any staring from members of the public would be on her scars.

74. The job involves packing and she told the court that her right hand pains her at nights after work. She works approximately three to four days a

week or when she is given a shift. This is usually for four to five hours each day. She also suffers occasional swelling in the upper right thigh, right foot and buttocks. This is where she had suffered the broken leg. She has not been to see a doctor in Canada about this occasional pain and swelling. She had not been prescribed any medication for it. She admitted to taking Tylenol and Advil for pain.

75. The claimant indicated that she intended to go back to school and her wish is to become a nurse. There is no indication that the claimant will lose her current job as a cashier because of her injuries. Indeed, the evidence is that she was hired after her injuries and directly after her eye removal before the prosthesis was implanted. Though she entertains a desire to return to school her reason for not going is her wish to work to earn and is not related to her injuries. There is no indication that her injuries will prevent her from studying to be a nurse.

76. Her attorney submitted that nurses are required to lift people, carry equipment, and run if necessary. She pointed out that she suffered pain from excessive walking and is not able to sit or stand for long periods. That she walks with a limp and that as per the report of Doctor Khan she will not be able to do jobs which require binocular vision and normal depth perception.

77. I am altogether certain that by this Doctor Khan meant she could be a pilot or work as an astronaut at NASA or maybe even join the army or navy but certainly if she is qualified she can become a nurse. If she wishes and has the qualification and aptitude she may even become a doctor. See the case of **Margot Thompson v Fosters Trucking and Ors** Suit C.L. T 113T 1992 where despite injury to the right eye resulting in 80% loss of vision, the expert medical evidence (Dr. Calder) which was

accepted by the court was that she would not be handicapped in any way in medical school.

78. There are many different types of nurses working in varied areas. Not all lift persons or objects and run and carry large objects. As Doctor Rose noted in his answer to question 17 as to whether the pain in the wrist were such that the claimant could not work, the weakness and pain in the wrist would make lifting heavy objects difficult. It is not impossible or debilitating. The opportunities open to the claimant in Canada are vast and varied.

79. Furthermore, the Doctor's medical evidence is that the instability caused by the deformity in the wrist and the problems caused by the limb length discrepancy would be alleviated with the surgeries recommended by him. He also indicated that if she had done the surgery in 2001 the condition of the wrist would have improved then.

80. Miss Mott submitted that the claimant felt pain to the eye whenever she used the cash register at work. I am not sure to which eye this refers, as the left eye is prosthetic and the right eye is normal. She is slightly short sighted in the right eye for which she wears glasses, but that is so for many persons who have never been in an accident. There is no evidence to support an assertion of pain in the right eye. The claimant's evidence at trial is that she gets dizzy sometimes and the monitor gives her problems sometime. She said she gets blurry and her eye runs water sometimes. It is unclear from the claimant's evidence what caused the dizziness and which eye runs water but she gave no evidence of pain to the eyes since the evisceration.

81. Dr. Khan was of the view that the loss of the claimant's left eye should not impact her social status and marriage prospects. It was his expert

opinion that nearly all patients with ocular prosthetics lead normal and very productive lives. In a vast majority of persons only a trained person can determine which eye is the prosthetic eye and which is the normal eye.

82. There is no indication that she will be hampered in her use of computers or prevented from being a secretary or a clerk using computers, as suggested by the attorney.

83. It is expected that the claimant will do the surgeries which have been recommended to improve or ameliorate her disability. If so, the slight limp will be alleviated and the problem with her wrist will be ameliorated. Her scars which have already begun to fade naturally with time, will also be 80% eradicated.

84. However, she does only have one functioning eye. Although it is not obvious because of the prosthesis and the glasses it may prove to be a handicap if and when divulged and may hamper her ability to compete with persons on the labour market who have two eyes. This competition may be less in some fields than others but the risk is there even though very slight. Counsel for the defendant submitted that the sum awarded should be no more than $350,000. I will make an award of $400,000 for handicap on the labour market.

Pain and Suffering and Loss of Amenities.

85. The medical report of Doctor Preshy Varghese dated August 12, 1997 was tendered as exhibit 1. Doctor Varghese's report indicated that the claimant spent 3 months in hospital and was discharged February 13, 1996. The claimant suffered;

(a) cerebral concussion;

(b) right chest injury with lung contusion and haemopneumothorax;

(c) fracture of maxilla with abrasions on face and lips,

(d) left eye injury with corneal ulcer;

(e) pelvic fractures (right bone/right pubic rami);

(f) fracture of right radius;

(g) fracture of right femur.

86. She was treated with intravenous antibiotics and the haemopneumothorax was drained. The fractures were treated with traction.

87. The report also indicated that the claimant visited orthopaedic out patient department several times after her discharge. On her last visit she was seen to have a slight limp while walking and her right wrist had a deformity with dorsal angulations. Her right lower limb was shortened by 2cm. Range of movement of right wrist and right hip and knee joints were normal.

88. In her witness statement the claimant stated that at the time of the accident she lost consciousness and remained unconscious for three weeks. It was her evidence that she awoke to severe pain all over her body. She claimed the pain was unbearable. Several of her teeth were missing and her left eye was stitched shut. Her face was covered in bandages. There were cuts on her shoulder, feet and face. She was treated by several doctors and received several injections. She received medication three times per day whilst in hospital. She was on her back in hospital for almost four months. She developed bed sores on her right heel. The hair on the back of her head fell out. She was unable to go to the bathroom and had to wear pampers whilst in hospital. She could not eat hard food. Her mouth and face were disfigured and she lost vision in

her left eye. She had to receive counseling from the medical staff about her condition.

89. She further stated that two weeks before her discharge she did physiotherapy sessions. After her discharge she could not move around for several months and had to be assisted by her mother and sister. She continued to feel pain and the medications which were prescribed provided little relief. She continued to feed on soft foods for several months. She was unable to return to school until a year after the accident. Even then she could not participate in school activities and was stared at, mocked and ridiculed because of her injuries. She was forced to change schools.

90. The medical report of Doctor S. H. Ornstein Consultant Faciomaxillary Surgeon dated March 26, 1998 indicated that he examined the claimant on March 18, 1996 when she was noted to have multiple healed facial abrasions; burn injury with scar contracture of the right upper lip; displaced healed right maxillary fractures involving anterior and posterior segments with loose teeth, exposed necrotic bone and infected gingiva. On September 11, 1996 she underwent debridement of the necrotic maxillary bone, extractions of hopeless teeth and flap surgery to close bony defects in the right maxilla.

91. She was referred to an orthodontist for evaluation of her remaining misaligned teeth and jaws as well as to a plastic surgeon for a review of her multiple facial scars. In his report the doctor noted that as a result of her injuries she would require:-

    i. Right maxillary osteotomy to realign the malunited jaw followed by full orthodontic

treatment to straighten the teeth, followed by prosthetic tooth replacement.

ii. Corneal transplant

iii. Facial plastic surgery to improve scarring.

92. On March 19, 2002 she was again admitted to the Kingston public Hospital for the second of the two surgeries to her jaw. She spent three days in hospital. She was placed on liquid diet for eight weeks following this surgery.

93. The evidence of the claimant is that throughout her teenage years she had no social life. Those years were extremely painful. She suffered stares and jeers from strangers on the street. She has had no intimate relationship with men as she felt they were not interested in her because of her looks.

94. The medical report of Doctor Rose dated May 28, 2002 indicated that he saw the claimant September 20, 2001. Upon examination the Doctor pronounced the following prognosis:-

> **"Miss Porter will continue to experience pains in the right wrist as a result of the moderate carpal instability. If this problem is not addressed surgically, she will develop degenerative changes at the radio carpal joint. She will also continue to experience discomfort in the right hip as a result of the mild damage to the articular cartilage of the hip joint. In addition, the 2cm limb length discrepancy will manifest itself as a limp.**
>
> **I have assessed her permanent partial percentage disability as it relates to the moderate carpal instability of the right wrist to be twelve percent of the upper extremity that is equivalent to seven percent of the whole person. The limb length discrepancy of 2cm and the restriction in range of motion of the right hip has left her with a ten percent impairment of the lower extremity which is equivalent to four percent of the whole person. Her total percentage disability is therefore eleven percent of the whole person"**

95. In the medical report of Doctor Rose dated November 26, 2007, he indicated that he last saw and evaluated the complainant on October 24, 2007. At the time she complained of continued pain in the right wrist when lifting heavy objects and carrying out household chores and that her right grip was weaker. She continued to experience pain in the right thigh when walking for more than half an hour.

96. She was physically examined and her radiographs reviewed. Physical examination showed a healthy female in no obvious painful distress. Examination of the right wrist revealed an obvious deformity of the wrist with prominence of the carpus dorsally. Grip strength in the right was weaker than in the left wrist. Her radiographs revealed a malunion of the distal radius with shortening of the radius relative to the distal ulna. There was a loss of radial angulation with nonunion of the ulna styloid process. Dorsal angulation of the distal radius of 20%; malunion of the mid-shaft of the right femur with 17% of valgus angulation. The cartilage space of the right hip measured 2cm which was equal to the left hip. There was irregularity of the right iliac crest. His impression was dorsal intercalated segmental instability secondary to malunion of the distal radius as well as malunion of the mid-shaft right femur with 17% of valgus angulation. There was limb length discrepancy of 1.5 cm.

97. He recommended the following treatment:

a) A distal radial osteotomy to correct the dorsally angulated distal radius to prevent radio carpal osteoarthritis.

b) Surgical correction of the 17% valgus angular deformity to realign the mechanical axis of the lower extremity.

98.He explained that the mechanical axis of the right lower extremity was lateral to the right knee joint and would result in increased physical load in the lateral compartment of the knee leading to early degenerative changes. He also pointed out that this limb length discrepancy would be corrected once the angular deformity of the femur had been addressed (with surgery).

99.He evaluated her permanent partial percentage disability of the distal radius as 16% of the upper extremities equivalent to ten percent whole person. The malunion of the shaft of the right femur he evaluated as 25% of the lower extremity equivalent to 10 % of the whole person. Total permanent partial percentage disability he estimated at 20%."

100. In answers to questions posed by the defendants' attorney dated April 22, 2010, question 22 and answer thereto indicated that her overall injuries were not debilitating but have affected her quality of life. In his answer to question 5 of the questions posed to his report of November 26, 2007, the doctor indicated the reason for the increase in percentage disability since his first report was the inclusion of the 17% of valgus angulation at the mid-shaft of the right femur and the evaluation of the malunion of the distal radius increasing to 10% of the whole person since the 2002 report.

101. In the answer to question 6, the doctor noted that the percentage disability of the whole person in the 2007 report would decrease should the corrective femoral osteotomy be performed before degenerative changes developed in the lateral component of the right knee.

102. The medical report of Doctor Calder dated August 1, 2007 indicated that he first saw the claimant May 15, 1997. When she was examined by him she had a visual acuity of the right eye 20/15 and the left eye hand

movements. Her left eye was disorganized. He saw her again March 2002 when she was found to have a scarred and disorganized left eye with light perception vision. On January 2007 she was seen again and found to have a visual acuity of the right eye 20/25 and no light perception in the left eye. She was found to be blind in the left eye by January 2007. Her right eye was normal. He assessed her at an approximate impairment of 16% of her visual system and the whole person.

103. Dr. Khan who performed the evisceration, in his report, stated inter alia that;

> **"The loss of Ms. Porter's left eye should not impact her "social status" and "prospects of marriage". Nearly all patients with ocular prosthetics lead normal and very productive lives. In my experience, in the vast majority of patients, only a trained person can determine which eye is the prosthetic and which is the normal eye.**
>
> **I recently examined Ms. Porter's right eye. She has a healthy and unremarkable eye examination. She is slightly nearsighted and wears spectacle to correct this. Ms. Porter has been advised to have her right eye checked on an annual basis by a primary eye care professional, as is my standard practice...**
>
> **Ms. Porter should not require any further surgery for the foreseeable future. The majority of patients do quite well for life with their prosthesis as long as their eye prosthesis is maintained well, replaced as per scheldule and they have regular eye examinations. Her normal eye is healthy and should remain so. It is hard to quantify the percentage of her "whole person" disability represents. As mentioned earlier, most patients with an ocular prosthesis live normal productive lives. Any professions and tasks that require binocular vision and normal depth perception are contraindicated in Ms. Porter's situation. Beyond these specific circumstances, she is able to do anything within her capability."**

The Submissions

104. How can the court place a fair value on the loss of an eye, loss of a flawless skin, a strong wrist and perfect gait? Regardless of the seeming impossibility of this feat, this is exactly what the court must do. Damages are intended to be an equivalent in money of the injuries sustained. It is meant to be compensation in monetary terms for the pain and loss suffered as a result of those injuries.

105. I think it is important here, to remind myself of the words of Mr. Justice Wolfe in **Pogas Distributors Ltd v Freda Claire Mclatty and others** SCCA 13/94 where he said;

> "**Primarily, what we are looking for in an award such as this is pain and suffering and loss of amenities not necessarily resultant disability. No doubt resultant disability is a factor to be considered in an award for pain and suffering and loss of amenities, but it does not necessarily speak to the extent of pain and suffering an injured person endures.**"

106. Forte J in the same case said that the court must assess the injuries and the period of total incapacity and the permanent partial incapacity.

107. The claimant's attorney pointed to the terrible condition of the claimant after the accident. She noted that the claimant was unconscious for three weeks. However, the defendants' attorney pointed out that this was unsupported by any medical evidence. In fact Doctor Rose's medical report indicated that the claimant was unconscious when taken to the Spanish town Hospital where she was resuscitated and then transferred to the Kingston public hospital.

108. She also pointed out the fact that the claimant had bed sores on her heal and experienced loss of hair at the back of her head; that she could not eat hard food and had to wear pampers. She was subjected to several

surgeries, had to do physiotherapy and was scarred. She lost one of her eyes. She also pointed to the loss of amenities; that she had no social life during her teenage years, could not go out much and had no intimate relationships as men were not interested.

109. She suggested that a figure of fifteen million dollars for pain and suffering and loss of amenities was appropriate in the claimant's case.

110. In support she cited the cases of:

(a) **Michael Campbell v Earnest Allen** reported in Khan Vol.3 p.5; (SCCA No. 112/89 December 2, 1991).

(b) **Lindo Harris v Baron Mckenley** reported in Khan Vol. 3 p.8.

(c) **Roy Reid v Forest Industries Development Co. Limited** reported in Khan Vol. 5 p.1.

(d) **Margaret Dunn v Linwood Howell and ors**. Reported in Khan Vol. 3 pg.66.

111. Michael Campbell was a 24 year old male; his injuries included shock and concussion, fracture of the left tibia near the ankle, fracture of the right femur, fibula and tibia, fracture of the mandible and nasal bones, laceration of the left ear, and fracture of the skull. His disabilities included backward bowing, left leg recurvation, right leg 1inch shorter than left leg, scar to temple, headaches. He was assessed at 20% PPD in each leg.

112. Miss Mott took the view that Miss Porter's injuries were much greater than Mr. Campbell's. According to her, this is so because Mr. Campbell did not lose an eye; he had no lacerations to his face and body only to his ear; he suffered no fractured hip or lung contusion and was in hospital less than a month. On the other hand she noted Miss Porter was left with

a deformed wrist. Mr. Campbell was assessed at 20% PPD in each leg. Miss porter is 20% orthopaedic and 16% in the eye. He had no hair loss and no loss of teeth. The award made to him in September 1989 of $297, 250.00 when the CPI was 5.06 when updated using a CPI in September 2010 of 162.8 amounts to $9,563,695.65.

113. Note is to be taken that this case went on appeal and was heard December 2 1991 in SCCA No. 112/89 when the award made was increased to $400,000.00.

114. If I were to take the same approach as Miss Mott in itemizing the injuries sustained by both, then it could reasonably be said that Miss Porter did not have multiple fractures to the right leg, or a fracture to the nose or skull or ankle. She also did not suffer shock. She does not now suffer from backward bowing of the right leg or recurvation of the left leg or headaches. This in my view makes the Campbell case not much of a guide in this excercize.

115. Lindo Harris was a 36 year old male. His injuries included swelling of the middle and lower third of both thighs. Puncture wound to left tibia. He also had fractures to both femora and shortening of both legs resulting in bowing. He was hospitalized 48 days and had follow-up for five months. He was assessed at 10-15% disability of the lower limbs; 20-25% to left lower limb. He suffered pain and discomfort after 4-5 hours driving. His award when updated amounts to $9,781,974.25.

116. Miss Mott again submitted that in the case of Lindo Harris his injuries were restricted to his legs and he was only hospitalized for 48 days. He suffered no unconsciousness, had no broken jaw bone, no loss of teeth, eye or facial scarring and no broken hip. His was assessed at 25% PPD; the claimant in the instant case was 36%. She claimed that Miss Porter's

injuries were more significant. Again, Lindo Harris is not in my view a useful guide due to the significant differences in the injuries and there permanent effects.

117. In the case of Roy Reid he had mostly lacerations and contusions, deformity of the left thigh and fracture of the left femur, fracture of the right tibia and fibula and fracture of the left malletus. He also suffered depression, anxiety, phobic responses, negative self-image, sexual dysfunction, extensive scarring. He was assessed at 31% PPD of the whole person. Roy Reid was a 29 year old male. His injuries included a 2 cm laceration to left forehead; tenderness to left clavicle; 2 cm contused wound to dorsal aspects of proximal inter phalangeal joint of right index finger; 2cm laceration to joint of right thumb; laceration to left ear; three large lacerations of 5 cm, 8 cm and 20 cm with bone protruding from medial aspect of largest wound. He also had multiple lacerations to the left lower limb; deformity of the left thigh; fracture of distal 1/3 of left femur; fracture of mid-shaft of right tibia and fibula and fracture of the left lateral malletus. The award made to him updates to $11,426,566.06

118. In the case of Margaret Dunn, the attorney pointed out that she did not lose an eye neither did she fracture her jaw. Miss Dunn's PPD was 30% whilst Miss Porter's was 36%. Margaret Dunn suffered injuries to the liver and the kidneys. She was diagnosed with clinical jaundice and liver dysfunction.

119. She was left with a 15 inch vertical scar to chest and abdomen, 8 inch horizontal scar to the abdomen, a 7 inch scar to the right leg. 2 and ½ inch scar to right knee with tendency to keloid and numerous small scars on lower right thigh and scalp. She was also left with a ½ inch shortening of the right leg and a 30% PPD.

120. She also had temporary sexual dysfunction and an inability to bear children. Margaret Dunn was unconscious from head injuries suffered with cerebral concussion. She had multiple right rib fractures, fractured pelvis and right iliac, fractures of the right tibia and fibula, blunt trauma to the abdomen with lacerations and maceration of the liver. Laceration with total contusion of the right kidney with retro-peritoneal hemorrhage. She had to have emergency surgery and suffered amnesia. Miss Mott claimed the injuries were in the same region as Miss Porter's. Her award when updated amounts to $16, 477,732.79. I do not find this case to be comparable.

121. Although Jamaican courts have been using broadly comparative awards in other Jamaican cases and no longer rely on Kemp and Kemp on Damages, it seems to me that the sum suggested by Miss Mott is a sum reserved for quadriplegics and claimants with serious brain injuries or total blindness. In England such awards range from £150,000- 250,000 pound sterling. An application of the exchange rate of the day to those figures or a calculation by equiperation will show that a sum in that range is out of all proportions to the injuries and resulting disabilities suffered in the instant case.

122. Miss Chisholm submitted that the defendants accepted that Miss Porter suffered the orthopaedic injuries disclosed. However, they asked the court to reject the evidence that the claimant was unconscious for three weeks, as this is unsupported by the medical evidence.

123. She also pointed to the fact that the corrective surgeries recommended by Dr. Rose suggest a full recovery from the orthopaedic injuries and ask that the court take that into consideration in assessing the sum for pain and suffering and loss of amenities. She noted that the claimant had

progressed over the 15 years and had significantly improved. She also noted that based on the claimant's appearance there was no evidence that Doctor Logan's assessment would be the same taking into account the obvious improvements.

124. In terms of the injury to the eye the attorney noted that there was no evidence as to the treatment given in hospital for the eye up to the time of discharge from the clinic. Indeed, there is no evidence of any treatment to the eye except for sewing it shut, prior to her discharge from the hospital. There is no evidence that Doctor Calder treated her before 1997. His medical report suggested he first saw her in 1997.

125. Miss Chisholm also noted that Doctor Ornstein had suggested a corneal transplant which the claimant failed to do. The court was reminded that she had also failed to do the cornea graft and anterior segment reconstruction which had been recommended.

126. The attorney also raised the question of mitigation and asked the court to take into account the claimant's failure to mitigate. She pointed to the history of the injury as outlined in the various reports which showed the eye had deteriorated over time. She suggested that the court had to determine two questions: (a) whether the claimant's failure to perform the cornea graft resulted in the worsening of the injury to the eye and (b) Whether the claimant's actions were reasonable in declining to do surgery.

127. The defendants' attorney submitted that the injury to the eye would not have reached the stage of acute glaucoma if she had done the cornea graft surgery. I should however, make it clear here that there was no positive diagnosis of acute glaucoma only a quaere and there was no

evidence to show that any medical investigation had been done to confirm this impression.

128. Miss Chisholm also pointed out that the claimant had made matters worse by failing to wear protective glasses as recommended and doing cosmetology which exposed the eye to chemicals and further injury. She asked the court to reduce the award based on the claimant's conduct. She noted that whilst she accepted that the cornea grafting surgery offered no guarantees, the failure to do it was a factor the court ought to take into account.

129. It is trite law that a claimant must take all reasonable steps to mitigate the loss to him consequent on the defendants wrong and cannot recover damages for any such loss which she could have avoided but failed to, through unreasonable action or inaction to avoid. This simply means that the claimant cannot recover for avoidable loss.

130. Where the claimant takes reasonable steps to mitigate her loss, she can recover any loss incurred in doing so even if the resulting damage is greater than what it would have been if she had no taken mitigating steps. If the claimant takes steps to mitigate her loss and is successful the defendant is entitled to benefit from the lessening of the loss.

131. The defendants' attorney cited the case of **Geest plc v Lansiquot** (2002) UK PC 48 which disapproved **Selvanayagam v The University of the West Indies** (1983) 1 ALL ER 824, where the Privy Council said then, that the burden lies on a plaintiff who had refused medical treatment to prove that his refusal was reasonable. The Board in **Geest** declared that that proposition was against the weight of authority. The Board cited McGregor on Damages 16th edition 1997 page 190 where it was stated that the onus of proof on the issue of mitigation is on the

defendant, approving a statement of Donaldson MR in **Sotiros Shipping Inc. v Sameiet Solholt, The Solholt** (1983) 1 Llyods Rep. 605 at 608. In **The Solholt** Donaldson MR said;

> **"A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase "duty to mitigate". He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendant's breach".**

132. The Privy Council went on to hold that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damages, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable that plaintiff to prepare to meet it. If there are no pleadings such notice should be by letter.

133. In my view the defendants have failed to prove that the claimant acted unreasonably in not performing the surgery recommended by Doctor Calder. The damage to the claimant's eye was severe and permanent. The long term prognosis was poor. The best of surgeries and the best care guaranteed no improvement.

134. In any event the defendant gave no notice to the claimant of their intention to raise the issue of mitigation in order to place the claimant in a position to adequately respond to this contention.

135. The defence offered the court five cases for consideration. These were:

(a) **Shiela Campbell v Sharon Kiem and others** suit no. CL. 1987/C263, reported "Harrison's Assessment of Damages for Personal Injuries".

(b) **Janice Locket v Gladstone Williams and another**, reported in Khan's volume 5 at page 274.

(c) **Donald Russell v Bruce Bryan**, reported in Khans volume 5 at page 13.

(d) **Alexander Garwood v Lincoln Quinland** reported at Khan's volume 6 at page 190.

(e) **Mavado Wilson v Caribbean Apparel Group** reported in Harrison's "Assessment of Damages for Personal Injuries" at page 238.

136. Sheila Campbell was a 40 year old flight attendant who, as a result of an accident, suffered the following injuries; fracture of the pubic rami, widening of the right sacro-iliac joint, multiple lacerations and gouged out area above the right hemiface, partially avulsed right upper eyelid, receded right eye, right lateral canthal ligament torn from its bony attachment, contusion and haematoma of musculies levator palpebrae superioris, fracture of the right molar bone with right autral haematoma, minor lacerations and abrasions of the upper and lower limbs and right arm and loss of consciousness. She was assessed at having a 20% impairment of the whole person even after corrective surgery. The award of $200,000.00 made in February 1991, updates with a September 2010 CPI of 162.8 to $4,585,915.50. The attorney for the defendants conceded that the injuries in this case at bar, is more severe in terms of the eye injury.

137. She further submitted that the case of **Sheila Campbell** provided a reasonable guide to the court based on the similarities in the injuries sustained. Whilst conceding the severity of the loss of the eye (even though maintaining her stance that this was due to the claimant's own

action) she noted that the resulting deformity in the wrist and shortening of the limb will be alleviated by corrective surgery. There is no evidence of complication from her head injuries or chest injuries. Miss Chisholm suggested that an adjustment could be made to cover the injury to the eye.

138. She also pointed to the case of **Mavado Wilson** who suffered injury to the eye resulting in severe blepharitis, muco-purulent discharge, severely chemosed conjunctiva, opaque, white neovascularized cornea, central corneal ulcer with mucous plug. His left eye was removed and he was referred for left socket prosthesis. He was unable to read or watch television as before. He suffered pain when soap got into the socket. He had to wear protective glasses. In December 1989 he was awarded the sum of $60,000 for pain and suffering and loss of amenities. That award now updates using the CPI, to $1,832, 645.40.

139. Alexander Garwood was a 34 year old pillion rider who was injured as a result of a motor vehicle accident. He suffered lacerations, teeth loss and a fractured right jaw. Damages assessed in March 2008 of $950,000.00 updates to $1,258,421.

140. Janice Lockett was a 10 year old infant who was hit from the handle bar of a bicycle. She spent three months in hospital. She suffered degloving injury to the right leg, shoulder, fracture of the right tibia and right tibial plateau. She was left with permanent scarring and deformity of the lower limb, leg shortening and a limp as well as frequent ulceration over right tibia. The award made July 2000 of $1,200,000.00 updates to $3,549,418.60

141. Donald Russell was a 26 year old male who was thrown from a moving vehicle in February 1988. He suffered fractures of the right and

left humerus; comminuted fracture of upper 1/3 of shaft of left femur; fracture of left patella, lacerations over forehead, chest, right thigh, right calf, left knee and left lower leg; fracture of left pubic ramus, urinary infection and infection in the skin of the left patella fracture site. He spent five months in hospital. His resulting disabilities included wasting of thigh muscles; left side 2cm shorter; left patella shorter with crepitus present on flexion. He walked with a limp. He was left scarred and also had multiple surgical scars over right knee and leg. He was totally disabled until December 1988. He reached maximum medical improvement April 1989 with a total whole person disability of 22%. He was awarded $1,200,000.00 in June 1999 which now updates to $3,893,184. 50.

142. The attorney for the defendants submitted that, taking into consideration the eye injury, the sum of $7,200,000.00 was a fair sum to award in this case.

143. There is no doctrine of precedent in awarding damages. No two cases are ever alike. However, fairness between one claimant and another requires that there be some amount of consistency if this is at all possible. See **H West and Sons Ltd v Shepherd** (1964) AC 326 and **Singh (Infant) v Toong Fong Omnibus Co Ltd** (196 4) 3 All ER 925. The underlying principle in all this is that the sum awarded to one should not be out of all proportion to the sum awarded to another in respect of similar physical injuries. The court must therefore only use the cases as a general guide to the current range of damages for a particular injury.

144. Certain cases may offer a good illustration of the range of damages for certain injuries, certain other cases may not. Of course there is no precise figure set for any particular injury. There may be what the ordinary

sensible man in hearing of the award would consider that to be a reasonable minimum or a reasonable maximum and a judge who made an award anywhere between these limits could not be faulted. See **Hunt v Severs** (1994) 2 AC 350 and Salmon LJ in **Fletcher v Auto Car and Transporters Ltd.** (1968) 1 ALL ER 726 at 750

145. Singleton LJ in **Waldon v War Office** (1956) 1 ALL ER 108 at 110 - 111 speaking of the use trial judges may make of cases cited to them on awards in comparable cases, said;

> **"I do not think a judge is bound to consider such cases. If counsel on one side or the other tenders such material, it is for the judge to say whether, in his discretion, he thinks it will be of help to him or not..A judge in assessing damages draws on his own experience, which he acquired from knowledge of other judge's decisions as to amount, from knowledge of what is said in this court and the House of Lords and from his ordinary experience of life."**

146. In this regard, I respectfully concur with this view in concluding that this inevitably means that a judge may take judicial notice of the current levels of damages and is free to inform himself from any reliable data.

147. The object of assessment is to ascertain the claimant's medical history since the accident and to assess the claimant's continuing symptoms and long term prospects, with a view to putting a money value on the claimant's pain and suffering and loss of amenities.

148. The court is always anxious to do what is necessary to ensure damages are adequate for the injury suffered and is a sum which is fair to the claimant whilst not punitive to the defendant.

149. I am reminded of the words of Bingham J in **Hernal Bennett v Clive Richards and ors v Daniel Edwards** Suit no. C.L. 1990/ B 182, C.L.

1990/L 091 delivered March 25, 1994 reported in Harrisons at p.170. Speaking about the approach of the court in making awards for pain and suffering and loss of amenities he said that "this falls to be considered on the basis of the nature of the injuries suffered by the plaintiff, the period of his disabilities with some discounting to allow for full compensation for medical procedures".

150. The court does not value a leg, eye and arm in isolation, instead it will value the totality of the harm which the loss as entailed such as the infliction of pain and suffering and the loss of the good things of life, if any. Where there are multiple injuries such as in this case, the court will not try to assess damages by attributing different sums for the different injuries; instead it will try to find a global sum which it considers fair and reasonable having stepped back and assessed the impact of the injuries with a rational and objective eye. Of course comparability also matters.

151. The loss of an eye has a general effect on well being which would be increased by an additional injury to the hand or feet, for example but would not necessarily be doubled by it. On the other hand, injuries to both feet may be more debilitating than the loss of one eye.

152. As I said no two cases are alike. Some are just barely broadly comparable. Somewhere in the mix of cases lies the correct award. I do not find the cases cited by the claimant's attorney to be my sole guide. In the case of **Sheila Campbell and Mavado Wilson** whilst the injuries are somewhat comparable, the awards are far too low for the injuries sustained by Miss Porter. There is no doubt on either side that the claimant suffered as a result of the accident.

153. With respect to the orthopaedic and orthodontic injuries the claimant will be fully compensated for the medical procedures aimed at putting

her as nearly as possible in the same position as she would have been had she not been injured. The cosmetic scars and the loss of an eye are losses which the claimant as a young, unmarried woman is to be considered as deserving a high award in those circumstances.

154. Despite her injuries she has grown into a remarkably poised and confident young woman. I am impressed with her dignity and fortitude. She is neither dependent nor depressed. These good qualities do not inure to the benefit of the defendant. It is hoped that her suffering is behind her and her pain will be a thing of the past.

155. I believe that an award of $9,000,000.00 is a reasonable compensation, in this case, for pain and suffering and loss of amenities.

AWARDS

Special Damages: $472,589.39 Jamaican currency, with interest at 6% from November 9, 1995 to June 21, 2006 and 3% from June 22, 2006 to February 16, 2011.

AND

-$5031.78 Canadian currency

General Damages:

a. Pain and suffering and loss of amenities;

-$9,000,000.00- with interest at 6% from April 15, 2002 to June 21, 2006 and 3% thereafter from June 22, 2006 to February 16, 2011.

b. Cost of future medical care-no interest;

-Future orthopaedic surgery-$340,000.00

-Future plastic surgery-$300,000.00

-Future care and assistance-$105,000.00

-Future Dental Care-$197,000.00

-Future Prosthesis-$18,500.00 Canadian currency

-Future Protective Lens-$12,500.00 Canadian currency

-Future Orthodontic Work-$3,760.00 US currency

c. Handicap on the Labour Market;

-$400,000.00-no interest

Costs to the claimant to be agreed or taxed.