



[2015] JMSC Civ. 51

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2010HCV03779

BETWEEN JANET STEWART - EARLE CLAIMANT

AND JAMAICA URBAN TRANSIT COMPANY LTD DEFENDANT

**Mr. David Henry instructed by Ms. Winsome Marsh for the claimant
Mr. Andre Wedderburn instructed by Dorothy Lightbourne and Hamilton for the
defendant**

HEARD: 10th February 2015 and 27th March 2015

***Negligence - Public Passenger Vehicle - Passenger falling while bus in motion - No Emergency
- Duty to Passenger - Skill and care of a reasonable driver***

CORAM: Dunbar-Green J (Ag)

The Claim

[1] The claimant, Janet Stewart-Earle, claims against the defendant, Jamaica Urban Transit Company Ltd (JUTC), in negligence and/or breach of statutory duty to recover damages for injuries allegedly caused to her on Sunday 16th December, 2007 as she travelled on a JUTC bus from Half Way Tree to Havendale in St. Andrew.

[2] The particulars of negligence are as follows:

- (a) driving at an excessive and/ or improper speed;
- (b) failing to keep any or any proper look out;

- (c) failing to take any or any reasonable or proper care to ensure that the claimant would be safe whilst being a passenger in the said motor bus;
- (d) driving without due care and attention and without any or any adequate regard for the passengers including the claimant;
- (e) failing to heed and/or observe the presence or disembark the motor bus;
- (f) driving in an unsafe manner and failing to exercise and/or maintain any or any proper effective control over the motor bus;
- (g) executing or attempting to execute a manoeuvre at a time when, at a place where and in a manner in which it was manifestly unsafe so to do thereby causing the claimant to fall and sustain injuries;
- (h) in the circumstances, failing to discharge the common duty of care towards the claimant; and
- (i) failing to stop, slow down and/or otherwise manage and/or control the said motor vehicle so as to avoid the said fall.

[3] The claimant also relies on *res ipsa loquitur*.

[4] The particulars of injuries are set out below:

- (a) blunt trauma to left buttock and left thigh;
- (b) bruising on the lateral aspect of the left thigh;
- (c) difficulty weight bearing and sitting down;
- (d) tenderness on palpation over the coccyx;
- (e) fracture of the coccyx;
- (f) lower back strain;
- (g) lower back pain radiating to the left leg;

- (h) posterior displacement by the terminal segment of the coccyx;
- (i) post traumatic osteoarthritis;
- (j) future hip replacement; and
- (k) 8% whole person disability and 15% whole person disability if hip replacement is required.

[5] The special damages agreed are as follows:

- (a) medical expenses of \$248, 768.53;
- (b) transportation of \$85,000;

[6] Additional claims for damages are set out below:

- (a) loss of income of \$787,000.00 and continuing;
- (b) future medical care; and
- (c) handicap on the labour market.

The Amended Defence

[7] The court allowed the amended defence to stand although it breached the **Statute of Limitations**. It did so on the basis that the amended defence disclosed no new cause of action and had introduced no new element.

[8] The defendant admits that the claimant was a passenger on the bus and that an incident occurred involving the defendant's motorbus on the 16th December, 2007. However, the defendant denies that its driver/servant and/or agent is liable as alleged or in negligence. The defendant states that the incident was caused solely or in the alternative, contributed to by the negligence of the claimant.

[9] By consent, the following documents were admitted into evidence:

Exhibit I – Medical report of Dr. Rory Dixon dated March 3, 2008.

Exhibit II – Medical report of Dr. James Peart – dated February 14, 2008.

Exhibit III – Medical report of Dr. Rory Dixon dated May 1, 2011.

Exhibit IV – Medical report of Dr. Clarke Lofter dated September 7, 2011.

Exhibit V - Medical report of Dr. Mark Minott dated November 22, 2014.

Exhibit VI – Medical report of Dr. Rory Dixon dated February 5, 2015.

Exhibit VII – Receipts for medical expenses (85).

Exhibit VIII – Receipts for transportation (82).

Exhibit IX – Letter of employment from Autumn Gold Adult Care dated
November 7.

Exhibit X – Letter of employment dated November 19, 2014

Exhibit XI – Letter from Dr. Sandra Chambers dated February 3, 2015

Statement of Issues

[10] This court will have to determine the following issues:

- I. whether the defendant owed a duty of care to the claimant as a passenger; and if so, whether there was breach of that duty and whether harm was foreseeable;
- II. whether the doctrine of *res ipsa loquitor* applies;
- III. whether the claimant was the author of her own injuries or contributed to them;
- IV. the nature and extent of the claimant's injuries; and

V. the quantum of damages, if any, to be awarded to the claimant.

Statement of Facts

[11] The claimant's witness statement filed 26th September, 2014 was ordered to stand as evidence in chief.

[12] Her statement reveals that at the time of the incident, she worked as a practical nurse in Jamaica at Autumn Gold Adult Care Nursing Home at 32 Park Avenue, Havendale, St. Andrew. It was while on her way to work on the 16th December, 2007, that this unfortunate set of circumstances unfolded.

[13] According to the claimant, she boarded a number 44 bus in Half Way Tree, sometime after 5 pm. Whilst on Swallowfield Avenue, in Havendale, she rang the passenger bell and stood in preparation to alight. She held on to the overhead passenger rail with her right hand, and with the left, held on to the back of the seat, which was directly in front of her. In her left hand, she carried a small gift bag which contained her dinner. She also carried a bag which was hung over the right shoulder.

[14] At the intersection of Park and Swallowfield Avenues, there was a huge pothole. The bus swung around the pothole causing her to fall between the seats, hitting various parts of the body as she fell to the floor.

[15] In describing the manner of driving, she said:

The swerve of the bus around the pothole was so violent that my hand twisted around over the head rail while I lost my grip and I fell to the ground with my left shoulder hitting the side of the bus and my hip, tail bone my whole bottom part hitting the iron bar that holds the seat.

[16] According to the claimant, when she exited the bus she could hardly move so she crossed the road and waited for the return of the bus. The bus returned in ten (10) minutes and she re-boarded it.

[17] She spoke to the conductress and then made a complaint to the bus inspector in Half Way Tree, in the presence of the driver.

[18] She was examined and treated at the Medical Associates Hospital.

[19] Two days later she was seen by Consultant Orthopaedic Surgeon, Dr. Rory Dixon. She was also seen by him on 21st December, 2008, January and March 2009 and February 2015. She was examined and treated as well by Doctors Palmer, Minott, Peart, Cheeks, Golding and Lofter.

[20] She has undergone numerous sessions of physiotherapy and claims to have had overseas treatment, for which no supporting evidence was provided.

[21] As a result of her injury and associated level of pain, Dr. Dixon prescribed future care which may include arthroscopy or hip replacement.

[22] She said the pain was so debilitating that it was difficult for her to carry out normal duties, and to walk, sit or stand. As a consequence, she did not return to work as a practical nurse at Autumn Gold Nursing Home because she was unable to stand for long or to lift patients.

[23] She earned forty three thousand dollars (\$43,000.00) monthly but was paid for only two months after the incident. Between then and October 2009 she had no earnings. She started a bag juice business in October 2009 from which she earned about thirty two thousand dollars (\$32,000.00) monthly. This business closed in January 2012. Between January 2012 and October 2013 she was unable to work because of the incident and also because of another illness. Since 2013 she has been working as a part time nursing administrator at a nursing home in St. Ann at a salary of forty thousand (\$40,000.00) per month.

[24] The Claimant was allowed to amplify her witness statement to correct the date in paragraph seventeen (17) to 21st December, 2007. She also expanded paragraph twenty (20) to include the dates – 13th November, 2014 and 18th November, 2014. To paragraph twenty eight (28), she included the cost of the injection - one hundred and eighty United States dollars (US\$180).

[25] During cross-examination, the claimant said that prior to this incident she had no physical problems. She agreed there were handrails and overhead rails for passengers.

She did not agree that she fell because her hands were occupied and/or that she had failed to hold on to the rails and had been walking in the bus while it was still moving. She denied that she fell when the bus was negotiating a corner from Swallowfield Avenue onto Havendale Drive.

The Defence

[26] Evidence for the defence was given by Mr. Richard Reid. His witness statement was ordered to stand as his evidence in chief.

[27] His was a terse account of the incident. In his witness statement he said:

“3. While proceeding to Havendale the passenger bell rang for a stop. There was about less than ten (10) passengers in the bus. I was on Swallowfield Avenue negotiating a right hand corner onto Havendale Drive when a female passenger choose(sic) to get up out of her seat hence she was pitched back on a seat and according to her she hit her side. However, I did stopped (sic) at the next available stop which was on Havendale Drive where the lady exited the bus.

4. While heading back to Half Way Tree I observed the lady stopped (sic) and took the bus in the said vicinity.

5. On reaching Half Way Tree I was informed by the Customer Service Agent (CSA), Mrs. Stewart, that the lady was going to make a complain (sic) to the point inspector. I went over to hear when she told the inspector that she got up from her seat and fell and hit her side and that she want to go the doctor.

6. The inspector in a professional manner informed her of the steps she should take if she wished to report the matter. It is (sic) was then I decided to make my report on the matter.”

[28] The defendant also stated that its driver/servant and/or agent was proceeding to Havendale along Swallowfield Avenue when a passenger bell rang. The claimant immediately got up from her seat and proceeded to walk into the bus aisle while the bus was negotiating a right hand corner from Swallowfield Avenue unto Havendale Drive. The claimant failed to hold onto the available bars in the bus while the bus was turning the corner and as a result the claimant fell back into the seat. At the next available bus stop, the claimant exited.

[29] In cross-examination, Mr. Reid testified that he was working on the route for the first time. He had become aware of the incident only on his return to the Half Way Tree terminus. He denied that he had demonstrated a poor manner and attitude while executing his duties at the time of the incident. He denied that there was any pothole which had been negotiated at the time. He insisted that he had negotiated a corner in the vicinity of where the claimant said he had manoeuvred around a pothole.

[30] Contrary to his witness statement, he said he had not seen the claimant get up from her seat. He also denied that he had seen her while the bus was turning a corner. According to him, "I was paying attention to the road". He didn't know whether she was standing and if she got up when he was negotiating a corner. She was seen for the first time, disembarking the bus some ninety (90) feet or so from the intersection of Swallowfield and Havendale Drive.

Findings of Fact

[31] The claimant rose from her seat while the bus was in motion. She held a gift bag with dinner in the left hand and also had a bag over the right shoulder. I accept that she held onto the overhead passenger rail with her right hand, and to the rail in front of her with the left hand, but I find that her left hand was somewhat encumbered.

[32] There is no evidence of a rate of speed at which the bus was travelling. However, I find that the claimant fell because of a sudden or sharp swing or swerve of the bus. The nature and extent of her injuries are consistent with a fall in those circumstances. I

believe her that there was a “violent swerve” which caused her hand to “twist around over the hand rail until she lost her grip and fell to the ground”.

[33] There is a dispute whether the bus swerved to negotiate a pothole or was negotiating a corner at the time the claimant rose. In my view, it is not material which of those scenarios obtained. Clearly, she fell due to the motion of the bus.

[34] I also find that the bus driver did not witness the incident and was therefore not in a position to say, as he alleged, that the claimant was walking in the aisle at the time and failed to hold on to the handrails. I make this finding because in cross-examination he told the court that he never saw the claimant when she got up out of her seat, and had seen her for the first time when she was disembarking. He also admitted to not knowing whether she was standing in the bus when, according to him, a corner was being negotiated.

Analysis

[35] Harris, JA in ***Glenford Anderson v. George Welch*** [2012] JMSC Civ. 43 at paragraph 26, enunciated the relevant principle in these terms:

It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty. It is also well settled that where a claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities.

[36] Lord Griffiths in ***Ng Chung Pui and Ng Wang King v Lee Chuen and Another*** Privy Council Appeal No. 1/1988 delivered on 24 May 1988, pp. 3,4 dealt with the burden of proof and role of the court. His lordship said:

The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an incident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on a balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred.

... it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established.

[37] The learned authors of **Bingham and Berrymans' Motor Claim Cases** 11th Edition, page 421, stated the standard of care which is expected of the driver of a public passenger vehicle:

... a person who undertakes to carry another person in a vehicle either gratuitously or for reward will be liable to that other party if he causes him damage by negligence. The duty is to use reasonable care and skill for the safety of the passengers during the period of carriage. There is no absolute duty. (para 12.1).

[38] In **Parkinson v. Liverpool Corporation [1950] 1 ALL ER 367**, Pritchard, J found the test to be: "...Did the driver act reasonably or unreasonably by doing something which a reasonable person would do?"

[39] In that case, the defendant bus driver braked suddenly and stopped the bus to avoid hitting a dog which had crossed in front of it, at a distance of some 18 feet. A forty-five year old male passenger who had risen from his seat to alight and had been walking along the aisle was thrown to the floor and broke two ribs. The conductor was also injured. The seated passengers were unaffected.

[40] The trial judge found that the driver had acted as a reasonable person would, in an emergency, and there was no negligence. The Court of Appeal, upheld the decision and said that if there were no explanation of how the incident occurred, a *prima facie* case of negligence would have been found.

[41] In ***Wooler v. London Transport Board*** [1976] RTR 206 n, CA, cited in **Bingham and Berrymans'** page 442, the Court of Appeal held that the driver was not liable to the passenger who was not holding on and was thrown over by the sudden stop of the bus. The incident had occurred at rush hour and the defendant's bus was travelling at 25 miles per hour behind a lorry at about half a bus length. The plaintiff was among some standing passengers in the bus, in preparation to alight. Suddenly, a pedestrian stepped off the pavement in front the lorry. The lorry pulled up suddenly and the bus driver braked hard to avoid a collision. The court seems to have placed great weight on the fact that the driver had acted in response to an emergency and was therefore not negligent.

[42] In ***Barry v. Greater Manchester Passenger Transport Executive*** (19th January, 1984 unreported: taken from full transcript) CA, cited at page 443 in **Bingham and Berrymans'** the defendant was driving slowly as the bus approached a stop. He saw three girls with two dogs, one on a leash. Just as he was about to pass them, one of the dogs dashed out into the road in front of the bus. The driver braked suddenly and the passengers who had risen from their seats in preparation for alighting, were thrown to the floor and injured. The driver was found not to blame as he had acted on instinct to preserve life. This decision was confirmed on appeal.

[43] In ***Gardner v. United Countries Omnibus Co. Ltd*** [1996] **CLY 4477**, cited at page 443 in **Bingham and Berrymans'**, a seventy-eight (78) year old passenger was thrown from her seat and sustained injuries as the bus negotiated one of a number of corners. The court found that she had not been properly seated. It was held that it would have been an impossible burden on the defendant if its bus driver owed a duty to ensure that passengers did not sit inappropriately and without properly safeguarding themselves prior to the commencement of the journey. The plaintiff could not recover because she did not ensure her own safety.

[44] I have distilled from these cases that a driver will not be liable for injuries caused by a sudden movement or braking, where an emergency justifies his action and that in a case where the claimant is proved to be the author of his own injury, the bus driver will not be held liable, without more.

[45] In the instant case, the defendant denies the presence of a pothole but gave no explanation as to what might have caused the claimant to fall. It is common knowledge that these buses are designed to carry standing passengers. The claimant gave evidence of the presence of overhead rails and seat rails. Something must have caused the claimant to be thrown off balance. There was no emergency. There is no credible evidence that the claimant was standing improperly. She spoke to having a handbag over her right shoulder and a small gift bag containing her dinner in her left hand and that she held on to the rails. This does not seem an abnormal situation for the user of a public passenger vehicle.

[46] The cases establish that the law imposes upon the driver of a public transport vehicle a duty of care towards the passengers being carried. The test applied is whether the driver of the bus acted reasonably, as would be required of an ordinary reasonable and careful driver. Upon being faced with an extra-ordinary or exceptional situation, the driver is required to apply his mind to how he ought to act without endangering any of his passengers (*Perkinson v Liverpool*).

[47] In the circumstances of this case, I find that the driver ought to have had, in his contemplation, that it is normal for passengers to rise from their seats in preparation for alighting and that they will not always be in a position to hold the rails with both hands, firmly. Therefore, the bus should be manoeuvred such that a passenger would not be put in a state of imbalance, to occasion a fall. The driver in the instant case did not manoeuvre the bus with the "skill and care of a reasonable driver" (*Glasgow Corporation v Sutherland* (1951) 95 S.J. 204 cited in *Bingham and Berrymans*', p. 442).

[48] I find that there was no explanation given to rebut the *prima facie* evidence of negligence. The bus was under the management of the defendant's servant, and in the

ordinary course of things the accident could not have happened without negligence (*Jamaica Omnibus Services Limited v Hamilton* (1970) 12 JLR).

Contributory Negligence

[49] The principle of contributory negligence is that the damages awarded to the claimant should be reduced to the extent that her fault contributed to the injury or damage. The test is whether the claimant had taken proper care for her own safety (*Jones v Livox Quarries Limited* [1952] 2 QB 608).

[50] On the facts of this case, as I have found them to be, the issue of contributory negligence has not been proved.

[51] For these reasons, I find that the driver did not act as a reasonable, prudent and careful driver. I therefore hold that the defendant is liable to the claimant in negligence. I will now assess the damages to which she is entitled.

Assessment of Damages

[52] The claimant was 41 years old at the time of the accident and a practical nurse in Jamaica. Her evidence of pain and suffering was supported by a number of medical reports.

Report of Orthopaedic Surgeon, Dr. Rory Dixon dated 3/3/10

[53] Dr. Dixon examined the claimant two days after the accident i.e. 18th December 2007. The complaint was that she was a standing passenger in a bus that went around a corner, and in the process, she fell hitting her left buttock and left thigh.

[54] She complained of pain in the left hip and buttock with difficulty weight bearing and also difficulty sitting down. The pain persisted despite taking analgesics.

[55] Dr. Dixon's findings were as follows:

- pain
- bruising on the lateral aspect of left thigh consistent with the fall
- tenderness on palpation over the coccyx (tail bone)
- straight leg raise test difficult to assess because of pain
- x-rays of the pelvis appeared normal
- a possible fracture of the tail bone
- lower back strain
- x-rays of lumbar spine and sacrum ordered

[56] The claimant was seen again by Dr. Dixon on 2st December 2007. He noted:

- complaint of pain in lower back radiating to the left leg
- straight leg raise test positive
- bowstring test negative
- x-rays showed degenerative changes in lumbar spine
- slight posterior displacement of the tsmual segment of coccyn
(suggestive of a fracture)

[57] He recommended physiotherapy and prescribed analgesics.

[58] The claimant was reviewed on 31st January 2008 and reported that the pain in the buttock was less and that she had done 5 sessions of physiotherapy.

Assessment

[59] ...[It] is expected that pain in her buttock should decrease as the coccyx (tailbone) heals...no comment can be made on her extent of impairment at this time.

Report by Dr. Rory Dixon dated 1st May, 2011

[60] The claimant was examined again on 8th March 2008. She reported worsening pain in the left hip (aggravated by movement of hip joint).

[61] X-rays showed decrease in joint space in the posterior medial compartment of the left hip. She was assessed as having post traumatic osteoarthritis of the left hip, for which she was referred to K.P.H for an injection in the left hip under fluoroscopy, and further physiotherapy was recommended.

[62] She was next seen on 27th April 2011, still complaining of worsening pain in the hip, and was now using crutches to ambulate. She was taking morphine for pain. Pain in the back was now less and intermittent. There was restriction of movement of the left hip; flexion limited to 45° (normal = 90°).

[63] X-ray of the hip showed persistence in decrease in the posterior medial compartment of the left hip

Assessment of permanent impairment

[64] Dr. Dixon reported as follows:

She has shown significant improvement with respect to the lower back and now has only intermittent lower back pain which is not debilitating. She is expected to have recurrence of low back pain but the frequency and severity is not expected to be severe. A regular home exercise program to strengthen the core muscles will minimise the recurrence of low back pain.

She has developed progressive worsening pain in the left hip which has been shown to be post traumatic osteoarthritis. It involves the posterior medial aspect of the left hip joint which has severely incapacitated her till now. This is not the

major weight bearing surface of the joint but because of the severity of the fall there was damage to the cartilage of the joint at the time of the initial injury. This was not seen on the x-ray initially but some arthritic changes (narrowing of the joint) were noted subsequently. She continues to have pain due to the narrowing of the joint space and she now has to use a crutch to support her walking. If there is progression of the arthritis, she would eventually need hip replacement ... Arthroscopy of the hip would demonstrate the extent of the narrowing of the joint ...The pain has limited her level of activity such as walking and she also has difficulty bending down. If she eventually requires hip replacement, the impairment would increase to about 15% whole person. Overall the level of impairment with respect to the hip pain is about 8% whole person.

If she eventually requires a hip replacement, the impairment would increase to about 15% whole person.

Report by Dr. Mark Minott, Consultant Orthopaedic Surgeon, dated 22nd November, 2014

[65] The claimant was examined on 6th November 2013 at the defendant's request. Dr. Minott had the benefit of the report of the radiographs of her hip and pelvis, but no films. He was also provided with Dr. Dixon's medical reports.

[66] Dr Minott found as follows:

- full painless range of motion in the spine in all plains
- range of forward flexion was limited by tightness in hamstring tendons rather than difficulties of the lumbar spine
- the sacro-iliac joint seemed uncomfortable with the Faber Test and on springing her pelvis

- there was tenderness over the adductor attachment on the pubis
- discomfort in her back and groin area with full abduction
- internal and external rotation of the hips were normal

[67] Dr Minott accepted the prior medical findings of tenderness in the coccyx with a suggestion of a fracture of the coccyx as the only abnormal finding. These, he said, were consistent and seemed causally related to the accident. He noted that the discomfort attributable to this injury settled progressively over three months following the injury. He suggested that the low back pain is likely due to a lumbar strain, reasonably causally related to the accident. He noted Dr. Dixon's conclusion that the lower back pain was not significant anymore.

[68] Dr. Minott found that the degenerative changes in the lumbar spine, noted 3 days after the accident, were not uncommon in people of the claimant's age.

[69] He concurred with Dr. Dixon that there was no permanent impairment of the lumbar spine.

[70] Dr. Minott concluded that the hip pain was the cause of the claimant's disability and opined that the source of the pain was the sacro-iliac joint. For this, he recommended S-I joint injections.

[71] In relation to whether the arthritis was causally linked he said:

My difficulty is accepting the mechanism of injury and natural history of the arthritis. If her point of contact with the bus was in her buttock area with sufficient force to fracture her coccyx and avoid her sciatic nerve, it is very unlikely that she received any blow to the hip which would result in traumatic arthritis of the hip. In other words, the line of force at the time of impact was not directed at the femoro-acetabular joint. If we therefore accept that she has arthritis of the hip it is reasonable to conclude that this is not causally related to the accident but merely part of her own intrinsic natural history as a person. I therefore will not evaluate

her impairment of hip-joint arthritis as part of her permanent impairment estimation from the accident...therefore, impairment rating is 1% as for class 1 impairment of the sacro-iliac joint. Her other injuries were considered but do not have any impairment.

Report by Dr. Rory Dixon dated 5th February 2015

[72] Dr Dixon examined the claimant twice after Dr. Minott's examination. This was done on 14th and 18th November 2013. He found persistent pain in the hip and agreed with Dr. Minott that some of the pain was due to strain in the sacro-iliac joint.

[73] He concluded: "I still maintain that the osteoarthritic changes in the left hip can be attributed to the fall." However, he found that the x-rays did not show any worsening of the osteoarthritis and that she had full range of motion of the hip.

[74] He recommended a steroid injection to the hip joint at a cost of approximately US\$1000.

[75] Mr. Wedderburn submitted, for the defendant, that there was conflicting medical evidence as to whether:

- (a) the incident was the cause of the claimant's osteoarthritis of the hip as stated by Dr. Dixon or whether the claimant had this pre-existing condition prior to the incident as stated by Dr. Minott; and
- (b) the claimant suffered 8% whole person disability as stated by Dr. Dixon or whether the claimant suffered 1% whole person disability as stated by Dr. Minott.

[76] I find the inconsistency to be whether the persistent pain in the left hip is a consequence of a dysfunction of the sacro-iliac joint, as found by Dr, Minott, or as a consequence of post traumatic osteoarthritis and pain in the sacro-iliac joint (combined), as found by Dr. Dixon.

[77] I recognise that Dr. Dixon would have seen the claimant as early as two days after her injury and during the period of approximately seven years after. He was also the last doctor to have seen her. He maintained that the osteoarthritic changes in the left hip could be attributed to the fall. He also found that the osteoarthritis had not progressed. He agreed with Dr. Minott's finding, a year prior, that there was pain in the sacro-iliac joint due to a strain.

[78] The time-frame within which the claimant was observed by respective practitioners is one of the considerations in resolving inconsistencies in the medical evidence. However, in this case, it is the quality of the medical analysis which makes the difference.

[79] I should say, at the outset, that although Dr. Minott did not have the benefit of the radiographs of the pelvis or the MRI films of the lumbar spine, his analysis was no less sound, since he had utilised the reports of the radiographs and the findings of Drs. Dixon and Peart, in arriving at his conclusions.

[80] On the important question of whether the osteoarthritis or the osteoarthritic changes in the left hip can be attributed to the fall, I prefer Dr. Minott's evidence. I have arrived at this position because Dr. Minott was comprehensive in his explanation that physiologically it was "very unlikely" that the nature of her injury to the coccyx, that is fracture of the coccyx which avoided her sciatic nerve, caused osteoarthritis in the hip. Dr. Dixon, on the other hand, seemed to have concluded that the causal link to the osteoarthritis in the hip was established by evidence of bruising to the left hip.

[81] In relation to the degenerative changes in the lumbar spine, as found by Dr. Dixon, I accept Dr. Minott's attribution to normal degenerative progression for someone of the claimant's age. In contrast, Dr. Dixon interpreted the x-ray but did not provide an explanation for the degenerative changes.

[82] In the circumstances of such glaring inconsistencies, the claimant needs to discharge her burden, on a balance of probabilities, that Dr. Dixon's finding of 8% whole person disability is to be preferred to Dr. Minott's 1%.

[83] That burden has not been discharged because I am not satisfied on the medical evidence that the osteoarthritis in the left hip is causally linked to the accident. On the converse, I am satisfied that pain in the sacro-iliac joint is attributable to the accident. I have arrived at that finding because both Drs. Dixon and Minott are agreed on it. However, whereas Dr. Minott has attributed an impairment rating of 1% to pain in the sacro-iliac joint, Dr. Dixon has not rated that injury separately from the pain in the hip which he said was caused by osteoarthritis.

[84] For these reasons I find that the claimant has suffered a 1% Class 1 impairment of the sacro-iliac joint in addition to the injuries outlined below:

- (a) blunt trauma to left buttock and left thigh;
- (b) bruising on the lateral aspect of the left thigh;
- (c) difficulty weight bearing and sitting down;
- (d) tenderness on palpation over the coccyx;
- (e) fracture of the coccyx;
- (f) lower back strain;
- (g) lower back pain radiating to the left leg; and
- (h) posterior displacement by the terminal segment of the coccyx .

[85] I must observe that the court might have been better aided, had the doctors been called to clarify their findings.

[86] Mr. Henry, for the claimant, relied on the cases of ***Marcella Clarke v Claude Dawkins & Leslie Palmer***, Claim No. C.L. 2002 C 047, reported in Khan 6 at p. 54; ***Eric Buchanan v Elias Blake***, SCCC No. 2/93, reported in Harrisons 2nd ed. at p. 261; ***Michiko Bahadur & Anor v Donald Jones & Anor***, Claim No. 2005 HCV 2761, unreported; ***Suzette Campbell v Wilbert Dillon***, reported in Khan 5 at p. 50; and

Kimesha Thomas v Sylvester Sydney Rose (t/a Classic Food Wholesale), Claim No. 2012 HCV 02716, [2014] JMISC Civ. 85.

[87] In ***Marcella Clarke v Claude Dawkins & Leslie Palmer***, the claimant, 18 years old at the time of the accident and 20 at the date of assessment, suffered a fractured left humerus and a fractured shaft of pelvis. She was hospitalized for almost one (1) month. X-rays revealed fractured left humerus and shift of the pelvis from its normal position. She underwent surgery and could not move without assistance. On discharge she had to be lifted and taken home where she remained for six (6) months. She could not move around and became frustrated. She had physiotherapy and used a stick to ambulate for almost one (1) month.

She testified of her left hand being “hook up” and that she had to fight to straighten it out. When she walked, the pain was so severe, that she had to rest after ½ mile. She could not stand continuously for long periods.

Dr. Melton Douglas, Consultant Orthopaedic Surgeon, found her left hemipelvic subluxation was the main cause of the pain and disability. Radiological evidence supported the genuineness of the pain and showed ½ cm shortening of the left lower limb. He assessed her Permanent Partial Disability (PPD) as 8% of the whole person. Damages were assessed in June 2004 (CPI: 76.81) and the claimant was awarded the sum of \$1,400,000.00 for pain and suffering and loss of amenities which today would yield the sum of \$4,064,574.93 using the current CPI of 223.0.

[88] In ***Eric Buchanan v Elias Blake***, the claimant, 34 years old at the time of the accident and 39 years old at the time of the trial, suffered a fracture of the right hip with a dislocation and a cup of acetabulum fracture. There was evidence of a high probability of developing osteoarthritis in the joint at around age 45 as well as lower back pain. The claimant was assessed with a 12% whole person disability and total hip replacement was recommended. Damages were assessed in October 1992 (CPI: 17.15) and the claimant was awarded the sum of \$400,000.00 for pain and suffering and loss of

amenities which today would yield the sum of \$5,201,166.18 using the current CPI of 223.0.

[89] In ***Michiko Bahadur & Anor v Donald Jones & Anor***, the claimant suffered lacerations to her scalp and ear, a fracture of her left clavicle and a fracture of her pelvis. She was hospitalized for 3 weeks. The fracture to the left clavicle healed after 7 weeks but with some misalignment. Dr. Delroy Fray, who assessed her on 18th April 2005 (11 months post-accident), described it as “an unsightly malunited fracture of the left lateral clavicle with no functional deficit.” Dr. Fray reported that the claimant’s left hip elicited mild crepitus but had full pain-free movement. He also reported that she had an antalgic (pain-relieving) gait due to a 1 ½” shortening of the left leg with a 9% whole person disability. Damages were assessed in June 2006 (CPI: 97.59) and the claimant was awarded the sum of \$2,300,000.00 for pain and suffering and loss of amenities which today would yield the sum of \$5,255,661.44 using the current CPI of 223.0.

[90] In ***Suzette Campbell v Wilbert Dillon***, the claimant, 29 years old at the time of the accident and 31 at the time of assessment, suffered abrasions to face; swelling over forehead; severe bony tenderness involving right hemipelvis; multiple fractures involving right hemi pelvis; fracture of the rami of the ischium; and fracture of pubic bone without significant displacement and fracture of the acetabulum. She was admitted to the St. Ann’s Bay Hospital conscious, but in painful distress. The fracture in the acetabular cavity of the right hip joint required complete bed rest and a skin traction of the right lower limb for one month. Physiotherapy was commenced to slowly mobilize the limb in the bed and she was afterwards allowed partial weight bearing with the help of a walker over the next 2 weeks and then to crutches. On 2nd June 1999 she was examined by Dr. Emran Ali, Consultant Orthopaedic Surgeon, who found:

- (i) 3.4” scar over the right eyelid;
- (ii) healed abrasions over right zygoma;
- (iii) 1 ½ ”shortening of the right limb-causing a limp;
- (iv) subluxation of the right sacro iliac joint with upward shift of the hemipelvis;
- (v) dislocation of the pelvis ring;
- (vi) that she experienced pain over right side on walking;

- (vii) that the distortion of the pelvic ring might affect normal delivery (at childbirth); and
- (viii) 10% whole person disability.

Damages were assessed in June 2000 (CPI 54.51) and the Plaintiff was awarded \$1,300,000.00 in general damages for pain and suffering and loss of amenities, which when updated equates to \$5,318,290.22.

[91] ***Kimesha Thomas v Sylvester Sydney Rose (t/a Classic Food Wholesale)***, the claimant suffered severe swelling and tenderness to the lower back from the thoracic vertebrae to the coccyx (tail bone), with radiation to the left and right gluteus maximus (buttocks) accompanied by multiple bruises on the lower back. Further examination revealed a healing abrasion of 5 x 4 cm to the lower back with swelling and tenderness over the right side of the lower back and it was the opinion of Dr. Sangappa that she “would likely experience occasional episodes of lower back pain for the next 3-6 months.” The claimant was treated with analgesics and physiotherapy. Damages were assessed in January 2014 (CPI: 211.8) and she was awarded the sum of \$1,200,000.00 for pain and suffering which today would yield the sum of \$1,263,456.09 using the current CPI of 223.0.

[92] Mr. Wedderburn cited the cases of ***Kimesha Thomas*** (ibid); ***David Prince v Jamaica Urban Transit Company Limited***, Claim No. 2011 HCV 03579, [2014] JMSCV Civ 107; ***Barbara Brady v Barlig Investment Co. Ltd & Vincent Loshusan & Sons Ltd***, Suit No. C.L. 1996 B 081, Khans Vol.5 page 252; and ***Collette Brown v Dorothy Henry & Rescue Enterprises Limited***, page 42, Khan Volume 5.

[93] In ***David Prince v Jamaica Urban Transit Company Limited***, the claimant suffered back strain with underlying degenerative changes in the lumbosacral spine. X-rays also showed a possible fracturing of transverse process of the L-3 and scoliosis of mid thoracic region. The court concluded that the claimant’s back strain was related to the trauma but the degenerative changes were unrelated to the trauma. Damages were

assessed in July 2014 (CPI: 218.9) and the claimant was awarded the sum of \$700,000.00 for pain and suffering which today would yield the sum of \$716,628.61 using the current CPI of 224.1.

[94] In ***Barbara Brady v Barlig Investment Co. Ltd & Vincent Loshusan & Sons Ltd***, the claimant suffered loss of consciousness, severe lower back pain and marked tenderness along the lumbar-sacral spine as well as both sacro-iliac joints. X-ray of the lumbar sacral spine revealed degenerative changes but no obvious fractures and she was treated by way of physiotherapy and analgesics. She continued to complain of pain in the lower back and thigh and was assessed with 5% disability of the whole person. Dr. Rose attributed this disability to osteoporosis with facet of osteoarthritis and was of the view that the degenerative changes were not caused by the accident. However, the onset of severe intermittent lower back pains which were not present prior to the accident were directly related to the mechanical lower back pains. Damages were assessed in November 1998 and the claimant was awarded the sum of \$300,000.00 for pain and suffering which today would yield \$1,377,099.55.

[95] In ***Collette Brown v Dorothy Henry & Rescue Enterprises Limited***, the claimant suffered minor bruises and laceration of legs and fracture of the right and left superior and inferior pubic rami without displacement. She was treated with bed rest, physiotherapy and analgesics. She was assigned a PPD of 5% of the whole person. The sum of \$500,000.00 was awarded in June, 2000 which would today yield \$2,055,586.14.

[96] Of the cases cited by both parties, I find ***Kemesha Thomas*** and ***Barbara Bailey*** to be most helpful. However, neither case takes account of the full range of injuries endured by the claimant. ***Barbara Bailey*** comes closest to the instant case but there was no fracture to the coccyx and the pain in the back did not radiate to the leg as in the instant case. There is a 5% disability of the whole person yet it seems that the injuries to the claimant in the instant case are more severe.

[97] Bearing these factors in mind and making the necessary adjustments, I am of the view that an award of two million five hundred thousand dollars (\$2,500,000.000) is appropriate for the injuries in the instant case.

Damages for future medical care

[98] The claim for US\$19,000 for future medical care cannot be sustained in light of the following findings:

- I. the pain associated with osteoarthritis is not attributable to the accident;
- II. the only permanent impairment is 1% to the sacro-iliac joint;and
- III. the future recommended treatment is steroid injection at an approximate cost of US\$1000. Neither doctor said how many injections would be required so I will make an award for one (1) treatment.

[99] In the circumstances, I make an award of US\$1000 under this head.

Loss of Earnings

[100] It was the claimant's evidence in cross-examination that at all times she was capable of working and is still capable of doing so, despite her injuries. On the medical evidence, most of the pain associated with the accident would have been resolved within the first 6 months.

[101] It was proved that at the time of injury, her salary was \$43,000 monthly. She gave evidence that she had been paid for two months, post-accident. It was also proved that the nursing home at which she worked, ceased operating as of June 2008.

[102] I find that she is entitled to loss of earnings up to June 2008, the point at which her employment would have terminated.

[103] Accordingly, she will be awarded \$172,000.

Loss of Future Earnings/Handicap on the labour market

[104] To succeed in a claim under this head there must be evidence of the claimant's earnings at the time of the trial, evidence of loss of these earnings, evidence of difficulty finding alternative employment and evidence that any subsequent employment would result in diminution of earnings (***Dovan Pommells v George Edwards et al Khans Vol 3***, pp.138-144).

[105] The requirement was expressed in these terms by Rowe, P in ***Allen and Anor v Watt***, SCCA 74/88:

...a plaintiff is not entitled to ask the Court for damages for loss of future earnings without bringing some evidence on which that assessment, however speculative, can be made. Secondly, to encourage trial judges to make awards based on some principle rather than upon plucking figures out of the air supported only by submission of counsel.

[106] I accept Mr. Wedderburn's submission that the claimant has not provided any credible evidence as to the following particulars:

- (i) the name of the Nursing Home in St. Ann where she now works as a part-time Nursing Administrator;
- (ii) the number of hours she is required to work per week as a part time Nursing Administrator;
- (iii) her monthly salary as a part-time Nursing Administrator in the form of a letter of appointment or pay slip;
- (iv) the number of hours a full time Nursing Administrator is required to work per week; and
- (v) the salary commanded by a full time Nursing Administrator at a Nursing Home.

[107] I accept that she is currently employed and is capable of finding suitable alternative employment should the need arise. The claimant's evidence therefore falls short of the proof that is required to succeed in a claim under this head.

Special Damages

[108] I make an award of \$333,768.53, as agreed by the parties.

Orders

[109] Accordingly, I make the following orders:

1. General Damages in the sum of \$2,500,000 with interest at a rate of 3% per annum from the date of service of the claim to the date of judgment.
2. Loss of Earnings in the sum of \$172,000.
3. Future medical care in the sum of US\$1000.
4. Special Damages in the sum of \$333,768.53 with interest at a rate of 3% per annum from the date of the accident to the date of judgment.
5. Costs to the claimant to be agreed or taxed.