

vehicle. As a result, he collided with the right driver side of the motor vehicle in which she was travelling, bearing registration number 0071GD.

- [2] Having been served with the Claim Form and Particulars of Claim, the Defendant failed to file an Acknowledgement of Service and Defence to the claim. Therefore, an Interlocutory Judgment was entered against the said Defendant on January 3, 2023. The matter now comes up for assessment of damages and the Defendant is absent and unrepresented.

ISSUE

- [3] What is the quantum of damages to be awarded to the Claimant for the injuries suffered and consequential losses as a result of the Defendant's negligence?

THE CLAIM FOR SPECIAL DAMAGES

- [4] In relation to special damages claimed, details of the Claimant's Special Damages are set out in the Amended Particulars of Claim filed on December 8, 2023 as follows:

PARTICULARS OF SPECIAL DAMAGES

(i)	Medical Reports	\$115,000.00
(ii)	X-Rays and MRI	\$ 53,250.00
(iii)	Doctor Visits	\$ 22,600.00
(iv)	Medication	\$180,043.77
(v)	Transportation	<u>\$ 50,000.00</u>
		<u>\$420,893.77</u>

- [5] The Claimant's evidence as contained in her Witness Statement filed on July 12, 2024 is that she received a medical report from Medical Associates Hospital & Medical Centre dated April 11, 2019 and that the cost of this report was Twenty Thousand Dollars (\$20,000.00). The total cost of the X-rays she received at the Medical Associates & Medical Centre was Fifteen Thousand Two Hundred and

Fifty Dollars (\$15,250.00). The total cost of the MRI scan she received at the said hospital was Thirty-Eight Thousand Dollars (\$38,000.00). She was examined by Dr. Akshai Mansingh who prepared a medical report and the cost of that report was Fifteen Thousand Dollars (\$15,000.00). She did a consultation with Dr. Ian Neil which cost One Thousand Dollars (\$1,000.00). She also went to Dr. Michael Harvey, Jr., a Chiropractor and the cost of the treatment was Five Thousand Five Hundred Dollars (\$5,500.00).

[6] She was also treated by Dr. Ballin, a Consultant in Anaesthetics, Critical Care & Pain Management who recommended that she take Yoga classes and join a weight loss programme. She joined the gym at Eden Gardens in St. Andrew. The cost of the gym membership was Four Thousand Dollars (\$4,000.00). The cost of the medical report dated October 19, 2017 was Seventy Thousand Dollars (\$70,000.00) and the cost of the medical report dated January 21, 2019 was Ten Thousand Dollars (\$10,000.00). The total cost of medications and treatment was One Hundred and eighty Thousand Dollars and Seventy-Seven Cents (\$180,043.77)

[7] The receipts evidencing these expenses and payments were tendered and admitted into evidence as follows:

- i. Receipt for Medical Report dated April 3, 2019 in the sum of \$20,000.00 – **Exhibit 6.**
- ii. Receipt for Medical Report from Dr. Mansingh dated May 30, 2016 in the sum of \$15,000.00 – **Exhibit 7;**
- iii. Receipt of Dr. Neville Ballin dated January 13, 2017 in the amount of \$10,000.00 – **Exhibit 8.**
- iv. Receipt prepared by Dr. Neville Ballin dated February 12, 2018 in the amount of \$70,000.00 – **Exhibit 9.**

- v. Receipt from Medical MRI services dated October 12, 2015 in the sum of \$38,000.00 – **Exhibit 10.**
- vi. Receipt from Dr. Ian Neil dated July 11, 2016 in the sum of \$1,000.00 – **Exhibit 11.**
- vii. Receipt from Dr. Michael Harvey dated May 30, 2017 in the sum of \$5,500.00 - **Exhibit 12.**
- viii. Receipt dated May 30, 2017 from Eden Gardens in the sum of \$4,000.00 for gym membership – **Exhibit 13.**
- ix. Receipts from West Bay Pharmacy in Portmore for Medications:
 - a) Receipt dated February 14, 2017 in the sum of \$3,693.36 – **Exhibit 14 (a);**
 - b) Receipt dated July 20, 2016 in the sum of \$3,878.00 – **Exhibit 14(b);**
 - c) Receipt dated August 3, 2016 in the sum of \$4,878.00 – **Exhibit 14(c);**
 - d) Receipt dated August 14, 2016 in the sum of \$3,575.00 – **Exhibit 14(d);**
 - e) Receipt dated February 4, 2017 in the sum of \$5,821.36 – **Exhibit 14(e);**
 - f) Receipt dated March 12, 2017 in the sum of \$2,890.00 – **Exhibit (f);**
 - g) Receipt dated April 6, 2017 in the sum of \$8557.44– **Exhibit 14(g);**
 - h) Receipt dated august 11, 2017 in the sum of \$8,101.20 – **Exhibit 14(h);**
 - i) Receipt dated September 21, 2017 in the sum of \$6,847.36 – **Exhibit 14(i);** and
 - j) Receipt dated September 21, 2017 in the sum of \$1,492.36 – **Exhibit 14(j).**

- x. Receipts from Vineyard Town Family Pharmacy for Medications:
 - a) Receipt dated July 14, 2016 in the sum of \$2,183.62 – **Exhibit 15(a)**;
 - b) Receipt dated October 26, 2017 in the sum of \$14,868.44 – **Exhibit 15(b)**;
 - c) Receipt dated November 13, 2017 in the sum of \$7,634.22 – **Exhibit 15(c)**; and
 - d) Receipt dated November 22, 2017 in the sum of \$15,063.02 – **Exhibit 15(d)**.

- xi. Receipts from York Pharmacy for Medications:
 - a) Receipt dated May 21, 2015 in the sum of \$5,956.69 – **Exhibit 16(a)**;
 - b) Receipt dated November 28, 2015 in the sum of \$3,657.00 – **Exhibit 16(b)**; and
 - c) Receipt dated February 11, 2016 in the sum of \$10,171.00 – **Exhibit 16(c)**.

- xii. Receipts from ValuDrug Pharmacy for Medications:
 - a) Receipt dated December 2, 2015 in the sum of \$3,640.23 – **Exhibit 17(a)**; and
 - b) Receipt dated December 2, 2015 in the sum of \$1,774.75 – **Exhibit 17(b)**.

- xiii. Receipts from Everybody's Pharmacy for Medications:
 - a) Receipt dated August 8, 2018 in the sum of \$3,308.42 – **Exhibit 18(a)**; and

- b) Receipt dated August 8, 2016 in the sum of \$7,487.00 – **Exhibit 18(b)**.
- xiv. Receipt from Clock Tower Pharmacy dated May 21, 2018 in the sum of \$1,242.00 – **Exhibit 19**.
- xv. Receipt from Island Pharmacy dated February 25, 2015 in the amount of \$3,743.01 – **Exhibit 20**.
- xvi. Receipt from Total Care Pharmacy dated March 25, 2015 in the sum of \$2,756.67 – **Exhibit 21**.
- xvii. Receipt from Ashbiz Pharmacy dated October 18, 2016 in the sum of \$3,273.88 – **Exhibit 22**.

Submissions on Behalf of the Claimant

[8] Counsel for the Claimant asked the Court to consider the case of **Owen Thomas v. Constable Foster & The Attorney General of Jamaica** Claim No. CL T 095 of 1999 where Sykes J (as he then was) at paragraphs 16 and 17 of the judgment allowed a claim for transportation without strict proof of same and stated that the relaxation of strict proof for special damages in some circumstances is permissible. Mr. Thomas had incurred the expense during the period of incapacity and, therefore, Sykes J (as he then was) stated that it is *“well known in Jamaica that many of our transport operators do not provide receipts to passengers and the cost seems reasonable”*. Similarly, there is evidence that the Claimant sought medical treatment some distance from her home on several occasions, as noted in her medical report and as such, she submitted that the total sum of Fifty Thousand Dollars (\$50,000.00) as pleaded, should be allowed.

[9] Counsel for the Claimant also referred the Court to the case of **Ackelie Burrell v. Raymond McLeod** [2021] JMSC Civ 74 at paragraphs [35] to [44] of the judgment where Thomas J stated that any payments made by the Claimant through insurance or a third party should be part of the Claimant’s claim for special damages. She indicated that the learned Judge further stated that insurance

premiums would have been paid by the Claimant as an expense to the Claimant and as such, there is no legal justification for allowing the Defendant to take advantage of payments made on behalf of the Claimant whether by his insurers or of another third party (see paragraph [39] of the judgment).

The Court's Position

[10] It is trite law that special damages must be specifically pleaded and proved (see **Bonham-Carter v Hyde Park Hotel** 64 LTR 177, **Ratcliffe v Evans** (1892) 2 QB 524 per Bowen LJ and **Akbar Limited v. Citibank NA** [2014] JMCA Civ 43 at para. [61]). In the case of **Julius Roy v Audrey Jolly** [2012] JMCA Civ 53, Harris JA stated at paragraph [38] of the judgment that this is not an inflexible principle. She further pointed out that:

*“Although specific proof is required for special damages, there may be situations, depending on the circumstances of the case, which accommodate the relaxation of the principle. In some cases, the incurring of some expenditure may not be readily capable of strict proof. As a consequence, the court may assign to itself the task of determining whether strict proof is an absolute prerequisite in the making of an award.... In its endeavour to arrive at a reasonable conclusion, the court seeks to satisfy the demands of justice by looking at the circumstances of the particular case: see **Ashcroft v Curtin**. Therefore, to demand strict adherence to the principle laid down in **Bonham-Carter** may cause some injustice to a claimant who had legitimately suffered damage.”*

[11] In the case of **Akbar Limited v Citibank NA**, Phillips JA stated at paragraph [61] of the judgment that:

*“... the requirement that special damages must be specifically pleaded and strictly proven is not inflexible and depending on the circumstances of the case, an award may be made where strict documentary proof has not been forthcoming – see for example **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173 and **Attorney General of Jamaica v Tanya Clarke** SCCA No 109/2002, delivered 20 December 2004.”*

[12] In the recent case of **Trudy-Anne Silent Hyatt v Rohan Marley and Anor** [2023] JMCA Civ 24, Straw JA pointed out at paragraph [27] of the judgment that, *“The authorities are not indicating any relaxation of the need for specific pleadings in relation to special damages, but rather, the possibility of relaxation of the requirement for proof.”* The Court also had regard to the case of **Owen Thomas v Constable Foster and Attorney General of Jamaica** (unreported), Supreme Court, Jamaica, Claim No CLT 095 of 1999, judgment delivered 6 January 2006 (on which Counsel for the Claimant relied), where Sykes J (as he then was) at paragraph 17 of the judgment stated that:

“[It is] well known in Jamaica that many of our transport operators do not provide receipts to passengers and the cost seems reasonable.”

[13] The Court considered further the case of **Shaquille Forbes v Ralston Baker** Claim No. HCV 02938 of 2006, in which Fraser J (as he then was) held that the Claimant was entitled to costs for transportation, and stated as follows:

“It is not hard to fathom that at the time of taking the claimant to the doctor for treatment and check-ups, the need to obtain receipts to prove that expenditure would not have been uppermost in the mind of the Claimant.”

[14] The Claimant in this case has provided no receipts in proof of her claim for transportation costs. The Claimant’s evidence as contained in her Witness Statement is that she spent a total of Fifty Thousand Dollars (\$50,000.00) travelling on public transportation and chartering taxis for doctor appointments and commuting to work. She could not provide the exact figure or receipt due to the passage of time. She has forgotten the exact amount and did not save her receipt from public transportation for her commute from her mother’s residence where she went to reside after the accident in order to obtain her assistance. She had to make visits to Kingston and St. Andrew, the border of Kingston and Spanish Town and Portmore for the purposes of her work without the use of her car. She was unable to handle the jerk of the coaster buses and as such she had to charter taxis which

cost approximately \$3,000 each time from her home in Spanish Town to the office and then charter a taxi from the office to the different locations.

[15] The Court noted that based on the Claimant's evidence, it was during the period of the first year of the accident that she was without a car and incurred transportation costs. The Court considered her occupation as a Probation Officer which requires that she does home visits that involved some amount of travelling. While the Claimant stated the rate of a taxi from her home in Spanish Town to the office, there is no indication of the rate of a taxi from where she was staying at that time to the office and the average rate from the office to any of the locations to which she travelled. Also, the Court was not given any indication as to the number of times that she had to make these home visits for work purposes. Additionally, there was no indication as to the rate of a taxi or the bus fare from where she stayed in Hellshire to the different doctors' offices. However, the Court took into account that of the thirteen (13) doctors' visits that were mentioned in the Claimant's Witness Statement, at least eight (8) of those visits fell within the first year after the accident. These visits were confirmed by the medical reports. The exact number and dates of the physiotherapy sessions she attended were not stated and as such, the Court will not utilise this as part of its consideration in relation to transportation costs. Having regard to the evidence, the Court is of the view that a claim for transportation costs is justified. The question then is whether the sum of \$50,000 should be awarded. The Court finds that the Claimant should at the very least be awarded an amount to cover the transportation costs associated with the eight (8) doctors' visits in the first year. The Court is of the view that the Claimant should be awarded half of the amount claimed. Therefore, the Court finds that an award of \$25,000.00 is reasonable and just in the circumstances of this case.

[16] In relation to the claim for medical related expenses which included the costs of medical reports, X-rays and MRI, doctors' visits and medication, a number of receipts were provided in support of these expenses. In relation to the sum of \$15,000.00 claimed for the Medical Report from Dr. Mansingh dated May 30, 2016

(as per **Exhibit 7**), Counsel for the Claimant indicated that she could not properly rely on this document as it is an invoice and not a receipt for an amount expended as it indicates that a balance of \$15,000.00 is outstanding. However, the existence of Dr. Mansingh's report which has been tendered into evidence is sufficient proof that the sum was expended in order for the report to be obtained, and so the Court will also include that cost in the award.

- [17] In relation to the inclusion in the claim of payments using the Claimant's health insurance card, the Court had regard to the case of **Ackelie Burrell v. Raymond McLeod**, which was relied on by Counsel for the Claimant in this regard. The Court took particular note of paragraph [39] of the judgment where Thomas J stated that:

"[39] ...the total sums for these expenses may not have been immediate out of pocket expenses but they were not free of cost to the Claimant. Under his contract he would have been paying his weekly, monthly or annual premiums which in essence are expenses to him. Additionally, there is no legal justification for allowing the Defendant to benefit from his negligent acts by seeking to take advantage of payments made on behalf of the Claimant whether by his insurers or any other third party. The issue of reimbursement would be a matter between the Claimant and his insurers. This should not concern a third party such as the Defendant, nor should it concern the court, unless a separate action is brought by the insurers seeking reimbursement."

- [18] The Court shares the view expressed by Thomas J in the **Ackelie Burrell v. Raymond McLeod** case and will adopt a similar approach which includes such payments in the award for special damages.

- [19] The Court notes that no receipts were tendered evidencing payments amounting to Fifteen Thousand Two Hundred and Fifty Dollars (\$15,250.00) which was stated as the total cost of the X-rays that were done at the Medical Associates & Medical Centre. Therefore, that amount will be discounted from the amount pleaded for X-Rays and MRI. Additionally, there are no receipts tendered evidencing payments for doctors' visits apart from the receipt from Dr. Ian Neil dated July 11, 2016 in the

sum of \$1,000.00(**Exhibit 11**) and the receipt from Dr. Michael Harvey dated May 30, 2017 in the sum of \$5,500.00 (**Exhibit 12**). Therefore, the total sum for doctors' visits amount to \$6,500.00. Gym membership cannot be classified as a doctor's visit. Neither can it be classified under any of the categories pleaded by the Claimant under "Particulars of Special Damages". Therefore, the cost of gym membership not having been pleaded, cannot be awarded. There are four (4) receipts that were issued by West Bay Pharmacy to which discounts were given to the Claimant namely:

- 1) Receipt dated July 20, 2016 in the sum of \$3,878.00 – **Exhibit 14(b)**;
- 2) Receipt dated August 14, 2016 in the sum of \$3,575.00 – **Exhibit 14(d)**;
- 3) Receipt dated April 6, 2017 in the sum of \$8557.44– **Exhibit 14(g)**; and
- 4) Receipt dated august 11, 2017 in the sum of \$8,101.20 – **Exhibit 14(h)**.

[20] In relation to these receipts, the sums of \$465.36, \$7.15, \$140.25 and \$150.00 were discounted respectively from the total sums due. The total discount amounts to \$762.76. Based on the receipts that have been tendered into evidence, the total cost of medication amounts to \$133,164.03. When the total discount is subtracted from that sum, the final figure is \$132,401.27.

[21] Therefore, the Court's review of the documents revealed that the sum of \$291,901.27 was spent by the Claimant regarding medical related expenses. The Court is satisfied that these expenses were incurred as a result of the accident and as such the Court finds that this award can properly be made. To this sum, the amount of \$25,000.00 will be added representing an award for transportation costs. The total amount that will be awarded for special damages is \$316,901.27.

THE CLAIM FOR GENERAL DAMAGES

The Claimant's Evidence

- [22]** The Claimant's evidence is that on February 23, 2015, after the accident, she was taken to the Casualty Department of the Medical Associates Hospital & Medical Centre. She was feeling pain in her chest and neck. An X-ray done revealed that she had a musculoskeletal injury to the cervical spine and anterior chest wall. She was given intramuscular analgesics, muscle relaxants and anti-inflammatory medications for the pain. On her follow-up visit on March 9, 2015, she was experiencing pain in the right hip going down to her right thigh and leg. On her follow-up visit at the said hospital, she was examined for her persistent neck pain and assessed as having cervical spasms. An MRI done showed a central disc protrusion of the third and fourth cervical vertebrae. She was referred to a Physiotherapist for pain management and advised to have an Orthopaedic consultation. She also did physiotherapy at the hospital.
- [23]** On October 30, 2015, the Claimant went to see Dr. Akshai Mansingh, an Orthopaedic Surgeon. She had difficulty turning her neck to her shoulder. She was also experiencing a shooting pain in her neck that ran down the entirety of the right side of her body and she struggled to stand upright for an entire day. She was not getting over two (2) hours sleep per day as she could on the right side of her body which she was accustomed to. She was unable to do household chores such as sweeping or cleaning. She experienced pain once anything touched her body. Dr. Mansingh diagnosed her with prolapsed intervertebral disc (C3-C4) of the cervical spine. She was advised to continue physiotherapy and was prescribed medication.
- [24]** On her first follow up visit with Dr. Mansingh, she had severe pain when she tried to rotate her neck and right leg. She was prescribed a neck collar and placed on sick leave. On December 14, 2015, she was assessed as having 8% whole person impairment. On her subsequent visits, she was noted to have stiffness in the neck and pain in her right leg and head which worsened on each visit. She was given an epidural injection and advised to continue physiotherapy. A further MRI

revealed loss of cervical lordosis (possibly due to muscle spasm) and was assessed as having a whole person impairment of 2%.

[25] She later saw Dr. Ian Neil, an Orthopaedic Surgeon who recommended that she saw a pain specialist as traditional medicine was not working. On August 15, 2016, she was treated by Dr. Ballin, a Consultant in Anaesthetics, Critical Care & Pain Management. Upon examination, she was found to have mild swelling over her right shoulder which was sensitive to touch, moderate swelling in both legs and the range of motion in her upper limbs was limited due to pain. She was diagnosed with whiplash injury manifested as musculoskeletal pain with trigger points. The pain was neuropathic characterized by burning, hypersensitivity to touch with moderate allodynia and swollen shoulder. Dr. Ballin prescribed a stronger medication which was more helpful with the pain. Her treatment included analgesics, anti-neuropathic pain medications, topical analgesics and desensitization medications. She was advised not to sit for more than thirty (30) minutes at work without a standing break. He recommended that she did Yoga classes and join a weight loss programme and so she joined the gym.

[26] The Claimant stated that since the accident, she has difficulty writing for more than five minutes at a time without feeling pain in her shoulder, arms and lower back. She is unable to lift shopping bags and needs assistance to climb stairs. After climbing four (4) flights of stairs her feet become swollen and she needs to remove her shoes. Her further evidence is that she has superseded her allotted sick days because she has been unable to get out of bed due to extreme pain. She also stated that the accident has caused her emotional distress and anxiety.

The Medical Evidence

[27] By Order dated the 18th June 2024, the Honourable Ms. Justice P. Mason (Ag.) certified Dr. Akshai Mansingh, Dr. Neville Ballin, and Dr. Tricia Giraud-Spence as expert witnesses and their reports were certified as expert reports. The said reports were tendered and admitted into evidence as follows:

- (i) Medical Report prepared by Dr. Tricia Giraud-Spence dated April 11, 2019 – **Exhibit 1**;
- (ii) Medical Report prepared by Dr. Akshai Mansingh dated June 10, 2016 – **Exhibit 2**;
- (iii) Medical Report prepared by Dr. Akshai Mansingh dated December 9, 2018 – **Exhibit 3**;
- (iv) Medical Report prepared by Dr. Neville Ballin dated October 19, 2017 – **Exhibit 4**; and
- (v) Addendum Medical Report prepared by Dr. Neville Ballin dated January 21, 2019 – **Exhibit 5**.

- *Dr. Tricia Giraud-Spence*

[28] Based on the Medical Report prepared by Dr. Tricia Giraud-Spence dated April 11, 2019 (**Exhibit 1**), her findings on examination of the Claimant were as follows:

1. Tenderness over the cervical spine with decrease range of motion;
2. Tenderness over the sternum and anterior chest wall; and
3. Mild tenderness over the lumbosacral spine and pelvis with full range of motion at all joints.

[29] Dr. Giraud-Spence stated in her assessment of impairment of the Claimant that:

“[The Claimant] was incapacitated for five (5) days. She was assessed as Severe Whiplash Type Injury to the cervical spine. Recovered over a period of nine (9) months. She has not sustained any permanent disability as a result of the injuries.

She is at an increased risk of developing early degenerative changes in the cervical spine as these are weight bearing joints.”

▪ *Dr. Neville Ballin*

[30] Dr. Neville Ballin, a Consultant in Anaesthetics Critical Care and Pain in his medical report dated January 21, 2019 indicated that he first saw the Claimant on August 15, 2016. She was referred for management of chronic neck, right shoulder and upper back pain. He stated that she has been seen and continues to be seen and managed for pain resulting from the accident. In his medical report dated October 19, 2017, Dr. Ballin further stated that on examination, the Claimant had mild swelling over her right shoulder which was very sensitive to light touch. There was moderate swelling to both legs. Range of motion in the upper limbs was limited by pain.

[31] A MRI scan of the cervical spine which was done on October 9, 2015 showed small central disc protrusion at C3-C4 but no compromise of the spinal cord. She was diagnosed with Whiplash associated pain. The pain was neuropathic in nature and characterized by burning, hypersensitivity to touch and moderate allodynia to the area; increased activity also caused swelling of the shoulder. Treatment included analgesics, anti-neuropathic pain medications, topical analgesics and desensitization medications. An exercise programme including Yoga and a weight loss programme was discussed. She was advised not to sit for more than thirty (30) minutes without a standing break.

[32] When he saw her on October 19, 2017, Dr. Ballin stated that the Claimant's progress had been moderate with some reduction in pain but no prolonged pain free intervals. Activities continue to exacerbate the pain. She still has significant limitations to movement involving her upper limb. Her ability to perform "house work" is limited, as it results in pain. He further stated that the Claimant can complete tasks but very slowly and needs frequent rest time. Additionally, at work she is unable to sit and type for more than five (5) minutes as she would develop pain in her shoulder, arms and lower back. She has to constantly stand and move

around. He also indicated that she is unable to lift objects, unable to carry shopping bags and has to be assisted in climbing stairs as this increases in pain.

[33] Dr. Ballin's prognosis was that the Claimant has musculoskeletal pain secondary to the accident. He stated further that she has chronic neuropathic pain with trigger points and hypersensitivity to touch. There was no surgically correctable problem. He indicated that due to altered processing of the central and peripheral nervous system, this type of pain causes abnormal reactions to a normal stimulus, for example, light touch is perceived as pain. He indicated that treatment involves medication, cognitive behaviour therapy, exercise including stretching and yoga. He opined that increasing physical activity will also help in reducing pain. Interventional procedure such as a cervical facet steroid block may help in relieving pain.

[34] He also indicated that pain reduction and improvement in function can occur over a period of three (3) to five (5) years. Some may persist and become chronic. He stated that lifestyle changes will have to be undertaken and care to avoid trauma and stressful situations as this can trigger pain. He assigned her a disability rating of 3% whole person. However, he pointed out that there is deficiency in the current guidelines as the pain impairment rating does not consider the long term issues which may occur with this type of injury. It does not consider disability of repetitive activity such as writing, typing or the ability to perform household tasks.

- Dr. Akshai Mansingh

[35] Dr. Akshai Mansingh in his Medical Report dated June 10, 2016 indicated that the significant findings were in relation to the Claimant's neck. The cervical spine was stiff and tender to palpation. She had nerve root impairment. She was diagnosed with Prolapsed intervertebral disc (C3C4) of cervical spine. Medications were prescribed as part of the Claimant's treatment and physiotherapy was commenced. She complained of intermittent pain on her follow-up visit on November 27, 2015 and of severe pain when she returned on December 4, 2015. She was forced to wear a collar and her neck was stiff on examination. Treatment

was continued and she was placed on sick leave. Dr. Mansingh opined that the Claimant had not attained Maximum Medical Improvement (MMI) and would need further assessment after physiotherapy. She was diagnosed with a disability rating of 8% whole person impairment.

- [36] When he saw her again on July 26, 2018, on examination, the Claimant's neck was stiff and tender to palpation. She was sent to do an MRI which later revealed loss of cervical lordosis (possible due to muscle spasm). He last saw her on September 21, 2018. He opined that the Claimant has attained Maximum Medical Improvement (MMI). She was assessed as having a whole person impairment of 2%. However, like Dr. Ballin, he stated that her disability due to the chronic pain is not adequately documented by any rating.

Submissions on Behalf of the Claimant

- [37] Counsel for the Claimant has submitted two (2) authorities for this Court's consideration:

- 1) **Yanique Hunter v Conrod George Clarke & Kirk Beckford** [2014] JMSC Civ 83; and
- 2) **Kathleen Earle v George Graham** Suit no. C.L. 1990 E 025.

- [38] Counsel for the Claimant submitted that the Claimant's injuries are quite similar to those of the Claimants mentioned in both authorities, although they are far more severe than that of **Yanique Hunter** and like **Kathleen Earle**, the Claimant's injuries have persisted after alternative treatment such as physiotherapy and pain management treatment. However, unlike any of the Claimants in those cases, the Claimant's injury profile in this case, is much more extensive having sustained injuries to her chest and sternum, both legs, her right hip, her shoulder and armpit and anterior chest wall, which show that her entire body was afflicted with pain; both her upper and lower limbs, in addition to her entire musculoskeletal region, neck and back. The Claimants in the cited authorities have not suffered from a

prolapsed intervertebral disc C3-C4, chronic neuropathic pain with trigger points and nerve root impingement. She submitted that the Claimant was also first assessed by Dr. Mansingh as having 8% whole person impairment in 2015 which only decreased to 2% in 2018, three (3) years after the accident, which would indicate that her injuries are more severe than **Kathleen Earle** and it is her constant treatment and pain management which has caused such an improvement.

[39] She further submitted that the Claimant's injuries have had a continued impact on her daily life, including her ability to perform household chores and to interact with her young daughter and husband. Her work life has been significantly impacted as she is unable to stand, walk or sit for prolonged periods, which impeded her ability to comfortably conduct home visitations and prepare the reports for each visit, which are important tasks as a Probation Aftercare Officer. As stated in the medical reports, she has been experiencing anxiety issues due to her inability to work efficiently.

[40] Counsel for the Claimant also submitted that the Claimant is struggling with significant challenges at work. She is unable to sit and type or write for more than five (5) minutes as she develops pain in her shoulder, arms and lower back. She must constantly stand and move around. This has had an adverse effect on her job, and she has been written to in regards to loss of 'man hours' and as a result of her absence from work due to her pain; this pain does not subside despite the Claimant having been treated by a pain management specialist. She submitted in conclusion that based on the severity of the injuries and whole person impairment, having regard to both awards cited with an increase for the severity of the Claimant's injuries and her extensive injury profile, she submitted that the sum of \$5,000,000.00 is an appropriate and reasonable sum for general damages.

The Court's Position

[41] The Claimant is seeking to recover general damages for pain and suffering and loss of amenities. The Court is guided by the general principle stated by Lord

Blackburn in the case of **Livingstone v Rawyards Coal Co.** (1880) 5.A.C. 25 in relation to how damages in tort should be assessed. At page 39 of the judgment, he stated as follows:

“I do not think there is any difference of opinion as to its (sic) being a general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation or damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting compensation or reparation.”

[42] The case of **Cornilliac v St. Louis** (1965) 7 WIR 491 is also instructive regarding the factors that the Court should take into account in order to arrive at an appropriate award under this head of damages. The Court adopts the guidelines formulated by Wooding CJ at page 492 of the judgment and will consider the following:

- i. The nature and extent of the injuries sustained;
- ii. The nature and gravity of the resulting physical disability;
- iii. The pain and suffering which had to be endured;
- iv. The loss of amenities suffered; and
- v. The extent to which the Claimant’s pecuniary prospects have been materially affected.

[43] The Claimant’s evidence in relation to the injuries sustained and the impact of such injuries are consistent with the evidence provided by the three (3) doctors in the medical reports which have been admitted into evidence. Therefore, the Court accepts the evidence of the Claimant and that of the expert witnesses and place reliance on same for the purpose of assessing the quantum of damages to be awarded. When the Court examined the evidence adduced by the Claimant on her

own behalf, coupled with the evidence contained in the medical reports, the nature and extent of the injuries sustained by the Claimant as a result of the accident may be summarized as follows:

- i. Pain in neck, upper back, shoulder and armpit;
- ii. Moderate swelling to both legs;
- iii. Upper limbs range of motion limited by pain;
- iv. Whiplash injury to cervical spine;
- v. Cervical spine stiff and tender on palpation;
- vi. Central intervertebral disc protrusion at C3-C4;
- vii. Prolapsed intervertebral disc at C3-C4;
- viii. Nerve root irritation;
- ix. Numbness in muscles;
- x. Musculoskeletal pain;
- xi. Chronic neuropathic pain with trigger points;
- xii. Hypersensitivity to touch;
- xiii. Weakness to right leg;
- xiv. Loss of cervical lordosis;
- xv. Musculoskeletal injury to the cervical spine and anterior chest wall;
- xvi. Pain in right hip radiating to right thigh and leg;
- xvii. Cervical spasm;
- xviii. Decreased range of motion at cervical spine;

- xix. Tenderness over the sternum and anterior chest wall; and
- xx. Mild tenderness over the lumbosacral spine and pelvis.

[44] The Court also had regard to and accepts the Claimant's evidence, which is buttressed by the medical evidence adduced regarding the residual effects of the accident on the Claimant and her functional disabilities. These include the following:

- a) Difficulty standing upright for an entire day;
- b) Difficulty sleeping on the right side of the body;
- c) Unable to do household chores such as sweeping or cleaning;
- d) Difficulty writing for more than five (5) minutes at a time without feeling pain in her shoulder, arms and lower back;
- e) Unable to lift shopping bag and needs assistance to climb stairs (her feet become swollen after climbing four (4) flights of stairs and she has to remove her shoes; and
- f) Emotional distress and anxiety.

[45] The Court had regard to the submissions made by Counsel for the Claimant and in that regard, considered the case of **Kathleen Earle v. George Graham**. In that case, on September 22, 1989, the Plaintiff, a 22-year-old teacher was injured in a motor vehicle accident when her vehicle was hit from behind and pushed into the car in front. She sustained the following personal injuries and resulting disabilities:

1. Sudden onset of neck pains and headaches;
2. Marked spasms along the paracervical and Rhomboid muscles;
3. Exquisite tenderness along the above muscles; and
4. Marked restriction in range of motion of cervical spine due to pain.

[46] She was diagnosed with severe whiplash and placed in a soft cervical collar. She also started a physical therapy programme. A little over a month after the accident, her pains were somewhat less but she had developed lower back pains, had episodes of fainting spells. She also had full lateral rotation with pain on extremes of motion, marked restriction in flexion and extension and slightly tender swelling along the parotid glands. She continued to wear the cervical collar and to do physical therapy. On her last evaluation, six (6) years after the accident, she still complained of neck pains precipitated by sudden movement of the neck, prolonged sitting, dancing, lifting children and driving. Her neck was stiff and painful at the end of the day and she had to lie on the bed for relief. Her permanent disability on examination was assessed as 10% of the cervical spine which was equivalent to 6% whole person disability. She was awarded general damages for pain and suffering and loss of amenities in the amount of \$800,000.00 (using the CPI for December 1996 which was 16) which now updates to \$7,025,000.00 (using the CPI for September 2024 which is 140.5).

[47] The Court also considered the case of **Yanique Hunter v Conrod George Clarke & Kirk Beckford** where the Claimant claimed damages as a result of an incident which took place on October 10, 2009 along North Odeon Avenue in the parish of St. Andrew. The Claimant's evidence was that she was hit from behind whilst standing in the lay-by conducting transport inspections along the roadway. She started to feel pain in her lower back and was taken to the Medical Associates Hospital where she was treated. An x-ray was done and she was released with prescription and given three (3) days sick leave and a referral for physiotherapy. The Claimant continued having discomfort. She was seen by a doctor on October 10, 2009 and was assessed as having soft tissue injury/spasm to her middle back and was diagnosed on October 15, 2009 as suffering from musculoskeletal spasm to the lumbar spine. She was treated on both occasions with analgesics and muscle relaxants. She was seen by another doctor on March 4, 2011 and was diagnosed as having chronic sprain or strain to the lower back with non-specific lower back pain, soft tissue injury or spasm to the lower back. She was assessed with 2% whole person impairment. The Court awarded \$1,200,000.00 for pain and

suffering and loss of amenities (using the CPI for May 2014 which was 82.6) which now updates to \$2,041,162.23 (using the CPI for September 2024 which is 140.5).

[48] Like the Claimant in this case, the Claimant in the **Kathleen Earle** case had neck pain and spasms associated with the muscle. She too was diagnosed with whiplash which was stated to be severe. She also had persistent neck pain several years after the accident. Her range of motion was also somewhat decreased owing to pain. Additionally, she had physical and functional disabilities as the Claimant in this case, which related to prolonged sitting and lifting. Like the Claimant in this case, the Claimant in the **Kathleen Earle** case had to do physiotherapy for several years and had to wear a cervical collar. However, the Court notes that the impairment rating of the Claimant in the **Kathleen Earle** case was 6% higher than the Claimant in the case before this Court.

[49] The Court also noted that the **Kathleen Earle** case is of some antiquity and in this regard is mindful of the highly persuasive comments of the Judicial Committee of the Privy Council in the case of **Seepersad v. Persad & Anor (Trinidad and Tobago)** [2004] UKPC 19 as to the caution the Court should adopt in looking at old cases. At paragraph 15 of the judgment, their Lordships stated as follows:

“15. Their Lordships entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do more than demonstrate a trend in very rough and general terms.”

[50] In relation to the **Yanique Hunter** case, the Claimant in that case sustained injuries which also bear some similarity to the injuries sustained by the Claimant in the case before this Court. Like the Claimant in this case, Miss Hunter suffered pain in

her back, musculoskeletal injury with pain and spasm (albeit to the lower back). Two (2) years after the accident, she was still experiencing pain and discomfort and was referred to do physiotherapy.

[51] However, it is noteworthy that the Claimant in this case, suffered more extensive injuries than the Claimant in the cited cases. Unlike the Claimants in the cited authorities, the Claimant in this case suffered from prolapsed intervertebral discs at C3-C4, chronic neuropathic pain and nerve root irritation. She also experienced pain and tenderness in far more areas than the Claimants in the cited authorities. These areas included tenderness to her chest and sternum, both legs, her right hip, shoulder and armpit. There were also no functional disabilities noted in relation to the Claimant in the **Yanique Hunter** case. The Court considered that on December 14, 2015 when the Claimant in this case was seen by Dr. Mansingh, she was assessed as having an 8% whole person impairment. Dr. Mansingh opined that the Claimant had not attained Maximum Medical Improvement (MMI) and would need further assessment after physiotherapy. Two (2) years after (October 2017) when she was assessed by Dr. Ballin, her impairment rating had significantly decreased by 5% to 3%. There was still a further 1% reduction in her impairment rating when she was seen by Dr. Mansingh in July 2018. Importantly, he opined that the Claimant has attained Maximum Medical Improvement (MMI) and she was assessed as having a whole person impairment of 2%. However, the Court also took into account that both Dr. Ballin and Dr. Mansingh stated that her disability due to the chronic pain is not adequately documented by any rating. Therefore, this suggests that the extent and chronic nature of the Claimant's pain are not adequately reflected in the assigned disability ratings.

[52] Any award that is made to the Claimant has to take account not only of the injuries sustained but also the chronic pain which she experienced in the different areas of her body as well as the residual effects and functional disabilities caused by the injuries resulting from the accident. Regard also has to be had to the emotional distress and anxiety which she experienced as a result of the accident. The Court had regard to the Claimant's evidence as contained in her Witness Statement

regarding how her work has been impacted in terms of hours lost and her pending application for medical redundancy. However, this evidence in the Court's view would have been more supportive of a claim for loss of earnings/earning capacity. No claim has been made for loss of earnings or earning capacity. Therefore, the Court will place no reliance on the Claimant's evidence in relation to matters of that nature and in those circumstances, neither can the Court make any award relative to those heads of damages in this case.

[53] The Court is of the view that the award in this case should be lower than the award made in the **Kathleen Earle** case and somewhat higher than the award in the **Yanique Hunter** case. The Court finds that an award of Three Million, Five Hundred Thousand Dollars (\$3,500,000) is an appropriate award to the Claimant for General Damages for pain and suffering and loss of amenities.

ORDERS

[54] In all the circumstances of this case and having regard to the foregoing, damages are assessed and awarded to the Claimant against the Defendant as follows:

- 1) Special damages are awarded in the sum of Three Hundred and Sixteen Thousand Dollars, Nine Hundred and One Dollars and Twenty-Seven Cents (\$316,901.27) with interest at the rate of 3% per annum from the 23rd day of February 2015 to the date of judgment.
- 2) General Damages are awarded for pain and suffering and loss of amenities in the sum of Three Million, Five Hundred Thousand Dollars with interest at the rate of 3% per annum from the 22nd day of July 2022 to the date of judgment.
- 3) Costs are awarded to the Claimant to be agreed or taxed.