JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 158/01

COR: THE HON. MR. JUSTICE HARRISON, P. (AG.)
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (AG.)

BETWEEN	**DAWNETT WALKER**	**PLAINTIFF/ APPELLANT**
AND	**HENSLEY PINK**	**DEFENDANT/ RESPONDENT**

Leslie Campbell instructed by Campbell & Campbell for Appellant

Danesh Maragh instructed by Fay Chang-Rhule for Respondent

28th April & 12th June 2003

HARRISON, P (AG.)

This is an appeal from the judgment of Campbell, J on 7th December 2001, assessing damages for the appellant as follows:

Special damages	$277,600.00 and interest @ 6% from 7/9/98 – 7/12/2001
General damages Pain & Suffering & Loss of Amenities	$220,000.00 & interest @ 6% from 29/08/2000 – 7/12/2001

Handicap on the labour Market	$100,000.00

The appeal relates to the award of general damages.

The grounds of appeal are:

"1. That the Learned Judge erred in law in finding that the Plaintiff was not entitled to compensation for the inability to earn income being income not income related to her employment as a Police Officer.

2. The award of damages for pain and suffering was unreasonable and inconsistent with awards for similar types of injury and period of pain and suffering.

3. That the award of damages for handicap on the Labour Market was unreasonable and against the weight of the evidence."

The relevant facts are that the appellant, a police officer, 36 years old was driving a Toyota motor car, a police vehicle, on 7th September 1998 at 9.30 a.m. when it was involved in an accident with a motor vehicle driven by the respondent. The appellant was injured. She was treated at the hospital by a doctor. Her neck was x-rayed and she was referred to Dr. G. Dundas, an orthopaedic surgeon, on the said day. Dr. Dundas, after examination of the appellant and of her x-ray results, referred her to a physiotherapist, who treated her for over seven months. The appellant was in constant pain. Dr. Dundas referred the appellant to Dr. Randolph Cheeks a consultant neurosurgeon, seven months after the accident. The appellant suffered from extreme pain to her

neck, shoulder, upper back and right arm and numbness to the fingers of the right arm. An MRI was done.

The appellant was absent from work until December 1999 a period of about one year and four months after the accident. She was on sick and vacation leave for the said period. On the resumption of duties, the appellant, on medical advice, was "placed on light duties", in the investigation unit to which she had been assigned prior to the accident. The duties therein involved the investigation of sexual offences and was also concerned with juveniles, driving motor vehicles and lecturing. Because of her injuries, these duties, including numerous writing of statements caused her pain. She was therefore assigned, after one month, to the Mediation Unit. Because of the illness, she was summoned by a medical board of doctors in September 2000 and the said board confirmed the recommendation of light duties.

In March 2000 the appellant had applied for enlistment. She was granted one year instead of the usual five years. In March 2001 she again applied and was granted the additional four years.

At the date of the accident, the appellant was a constable. She had passed her promotional examination in 1995. At the date of the hearing in December 2001, she was of the rank of Corporal, having been promoted.

Prior to entering the Jamaica Constabulary Force, the appellant was a trained dressmaker and embroiderer. Working from home, she made drapes and sheets, earning about $30,000.00 per month. She continued this activity even

after entering the Jamaica Constabulary Force. She said at page 19 of the record:

> "I was still in pain when I took the vacation leave. I still continued dressmaking to supplement my salary, drapery making, machine embroidery, which I practiced prior to the accident."

She admitted that she did not have a registered establishment, kept no books, made no tax returns and therefore advanced no documentary proof of such earnings. She admitted that she was "not permitted to have secondary employment."

She was incapacitated to some extent as a result of the accident. She said at page 19:

> "After accident, pain in neck, etc. I was unable to take care of normal household chores. I had to pay to get them done. Washing, cleaning, ironing.
> Had to get someone to do it – had to pay – am still paying."

Dr. Cheeks saw the appellant on 5th March 1999 for the first time, having been so referred by Dr. Dundas. Dr. Cheeks, on examination found, on page 12, that:

> "There is painful restriction of left lateral rotation of the cervical spine and the left paraspinal cervical musculature is tender.
> Testing the sensory modalities in the upper extremities reveals some diminution of pinprick sensation at the right thumb, index and middle fingers.
> The deep tendon reflexes are all normal and symmetrical except for the right supinator jerk, which was marginally depressed.

> There is no evidence of impairment of spinal cord function.
> Muscle tone, power, and coordination are normal in all four extremities.
> An MRI of the cervical spine shows evidence of damage to the C3-4 cervical intervertebral disk which is herniating [bulging] posteriorly and indenting the thecal sac. No injury to the spinal cord is present."

Further physiotherapy with traction was recommended and medication prescribed. A review two months later revealed improvements.

Giving his opinion further, Dr. Cheeks said at page 13:

> "This injury is classified as a Class 2 cervical whiplash injury and she is currently still under treatment but it is anticipated that her symptoms will eventually settle. However from the prognostic standpoint she will be liable to experience bouts of neck and shoulder pains periodically since this is the usual natural history of mechanical intervertebral disk derangement. Should further deterioration of the disk occur it is possible that the herniation may progress leading to nerve entrapment and necessitating spinal surgery.
> Taking the above into consideration, this single level non-operated cervical disk derangement carries a PPD of five percent of the whole person according to the AMA guidelines."

There were nine neurological consultations with Dr. Cheeks thereafter, up to 21st May 2001. He reported on 13th September 2001 that she had reached her maximum medical improvement. He said further at page 14:

> "From the occupational standpoint this is expected to have a mild impact on her ability to function in her present occupation as a police officer.
> Prognostically this condition will undergo intermittent episodes of neck and shoulder pain particularly at times of heavy exertions. Should this individual in the

> future sustain a further neck injury (particularly one of the whiplash type) then she would be more vulnerable than a normal healthy person to suffer severe protracted pains. These factors are taken into account in her P.P.D. assessment as five percent of the whole person."

At the outset it must be noted that the learned trial judge gave no reasons for his award. This Court has repeatedly asserted that it is absolutely desirable that a trial judge reveal the reasons for his decision (***McKenzie v. Campbell*** (1992) 29 JLR 125). In the absence of reasons this Court is forced to operate in a vacuum and counsel is afforded the opportunity to speculate on the basis for the decision. The duty to give reasons depends on the subject matter in issue, and in that regard, in the absence of reasons a Court of Appeal may set aside the judgment and order a new trial (***Flannery et al v. Halifax Estate Agencies*** [2000] 1 WIR 377). In the instant case however, the printed record contained some material which revealed the manner in which the learned trial judge may have proceeded in arriving at his decision.

Ground 1

Counsel for the appellant argued that the claim for $30,000.00 per month loss of earnings as a dressmaker and draper, a skill the appellant acquired prior to and after her entry into the Jamaica Constabulary Force, should not have been disallowed. He attempted to base his arguments, in support of the appellant's right to engage in such an income earning activity without prior permission, on the wording of section 10 of the Jamaica Constabulary Force Act. Section 10 reads:

> "**10.** No person of any rank appointed to the Force shall, while he holds such appointment, hold any other public employment without the consent of the Governor-General signified in writing under the hand of the Minister."

The significance of the necessity for reasons to be advanced by a trial judge was starkly evident in this instance. There were no reasons to justify a claim that the learned trial judge based his rejection of that item of the claim on the interpretation of the said section 10. Counsel, accordingly acceded to the observation of this Court and did not proceed with his said arguments therein.

The principle that ~~an appellate~~ court is at large on the facts where the reasons ~~given~~ by the learned trial judge for his judgment are not satisfactory or the evidence does not support it (***Watt v. Thomas*** [1947] 1 All E.R. 582), is moreso evident in circumstances where there are no reasons, but the printed record affords some assistance.

This Court however is of the view that on the printed record, there was not sufficient evidence to substantiate such a claim for loss of earnings. Although a court must accord to a claimant fair and adequate compensation for all loss sustained as a result of an injury or wrong, such loss must be strictly proved. It has been repeatedly said that it is insufficient to "write down particulars and throw them at the head of the court" and expect a reciprocal award (***Murphy v. Mills*** (1976) 14 JLR 119, following ***Bonham-Carter v. Hyde Park Hotel Ltd*** (1948) 64 T.L.R. 177.) In an appropriate case however, a court may act on oral evidence.

In the instant case, the appellant in claiming $30,000.00 per month as loss of earnings was seeking to recover, a sum equal to her salary as a police officer. She said:

> "My net salary is $30,000.00 after tax and statutory deductions."

Curiously, she said on page 19 of the Record:

> "I was still in pain when I took the vacation leave. I still continued dressmaking to supplement my salary, Drapery making, machine embroidery, which I practiced prior to the accident."

This evidence that the appellant "... still continued dressmaking ..." is indicative of the fact that the injury did not incapacitate her. She therefore suffered no loss in that respect. For this reason there was no basis for an award. This ground therefore fails.

Ground 2

A court making awards for pain and suffering in personal injury cases does so on the basis of awards in comparable cases where the injuries are reasonably of the same nature and type. An appellate court will not disturb an award of damages unless it is either inordinately low or extremely high.

The material injuries to the appellant, based on the evidence of Dr. Cheeks were:

1. Damage to the C3-4 cervical intervertebral disk, herniating (bulging) posteriorly and indenting the thecal sac - a whiplash injury.

2. Severe neck and shoulder pain radiating to the right upper arm, with weakness and numbness in the right arm.

He concluded that her symptoms would eventually settle. He assessed her permanent partial disability as "five percent of the whole person according to the AMA guidelines," and it remained so on 13th September 2001, over two years after his first examination on 5th March 1999. The prognosis was that the appellant would experience "intermittent episodes of neck and shoulder pain particularly at times of heavy exertions."

Several cases detailing comparable injuries were submitted for examination by the learned trial judge and he consequently made an award for pain and suffering or loss of amenities of $220,000.00. In my view that award is inordinately low. The comparable cases were:

(1) **Dixon v. Geddes Refrigeration Ltd etal** (Suit No. C L 1991/DO27). The plaintiff suffered in a collision, a whiplash injury to cervical spine with a fracture of the 6th cervical vertebra. There was no permanent partial disability. Harrison, J (as he then was) awarded for pain and suffering and loss of amenities in 1992 - $48,000.00. That sum upgraded in December 2001 amounted to $222,249.00.

(2) **Earle v. Graham et al** (Suit No. C.L. 1990 E. 25). The plaintiff who was a passenger in a motor car which was hit from behind suffered a severe whiplash injury, resulting in neck pains and headaches, spasms and tenderness along the para-cervical and rhomboid muscles, restriction of motion in flexion and rotation of the cervical spine and episodes of fainting. She was placed in a cervical collar and treated by physical therapy and anti-inflammatory medications. Her condition was described as chronic and Dr. R.C. Rose, consultant

orthopaedic surgeon assessed her permanent disability at 10% of the cervical spine whish is equivalent to 6% of the whole person. Orr, J awarded for pain and suffering and loss of amenities in 1999, $800,000 valued in 2001 at $1,343,000.

(3) **Kean v. Officer et al** (Suit No. C.L. 1999 K 018). The plaintiff was injured in a motor vehicle accident having been hit from behind whilst stationary. He suffered cervical disc herniation. MRI showed cervical spine disc bulges at C4-5 & C 5-6. He suffered –

(a) Tenderness on the right side of the cervical spine and on the right side of the supra clavicular fossa – with pain on flexion and rotation.
(b) Pain extending down the right upper limb on rotation with reduced power to the right hand.
(c) Swelling of the chest and
(d) reduced wrist flexion and elbow extension.

He suffered continuing numbness and cramp to his upper limb, mid and lower back pains and was treated with anti-inflammatory medication. He was referred to Dr. Daniel Graham, consultant neurologist, who conducted studies and discovered the existence of carpal tunnel syndrome (the median nerve entrapped at the wrist). The plaintiff suffered muscular spasms of the trapezii muscles and was treated with anti-inflammatory medication. His condition worsened and he was admitted to the hospital. Dr. Ivan W. Crandon, consultant neurosurgeon examined the plaintiff and found him suffering from a diffuse sensory loss. He diagnosed flexion-extension injury of the cervical spine and treated him with bed rest. The plaintiff was treated further in the United States of America and gradually improved. His permanent partial disability was assessed at 5% of the whole person. Anderson, J in May 2001 awarded for pain and suffering the sum of $850,000 which was upgraded in December 2001 amounted to $898,953.00.

It seems to me that the award to the plaintiff in the ***Dixon v. Geddes*** case, not having been assessed as having a permanent disability, would be inevitably less than the award to the plaintiff in the instant case. The plaintiffs in ***Earle v. Graham & Kean v. Officer*** however, both suffered more serious injuries than the plaintiff in the instant case, although the permanent partial disability of the plaintiff in the instant case was 5% of the whole person as in ***Kean v. Officer*** (supra). I am of the view that an award of $650.000 for pain and suffering and loss of amenities to the plaintiff in the instant case is an adequate sum in the circumstances.

Ground 3

An award for handicap on the labour market may be made in circumstances where a plaintiff suffers injury and resumes his employment at the same wage or with an increased wage, but the injury is of such a nature that a risk exists that he may lose his job in the future. If the risk materializes and he is thrown out on the labour market because of his injury he would be at a disadvantage in competing for a job with other injury-free persons (***Monex Ltd et al v. Grimes*** (unreported) SCCA No. 83/96 delivered 15th December 1996 following ***Moeliker v. Reyrolle & Co Ltd*** [1977] 1 All E.R. 9). There must however be some medical evidence confirming the likelihood of such a risk. It was referred to in the latter case as "... a substantial or real ... risk."

In making an award under this head, the Court assesses the value of the risk by awarding a global sum as opposed to a conventional sum [***Monex Ltd***

(supra)] or employing the multiplier/multiplicand method, if the circumstances of the case demand it: (***Campbell et al vs. Whylie)*** SCCA No. 68/97 delivered 3rd November 1999 (unreported) following ***Kiskimo Ltd vs. Salmon*** SCCA No. 61/89 delivered 4th November 1991 (unreported).

In the instant case the learned trial judge made an award of a conventional sum of $100,000 for handicap on the labour market. Again, he gave no reasons for his choice in doing so.

Mr. Campbell for the appellant argued that there was a risk that the appellant could lose her employment as a police officer, that her prospects for promotion were affected, that the award of $100,000 was too low and that the Court should make an award based on a loss of two years as the multiplier.

Mr. Maragh argued that no award should have been made under this head because the appellant was at no risk of losing her job.

The medical report of Dr. Cheeks on 13th September 2001 stated inter alia, on page 14 of the record, that:

> "From the occupational standpoint this is expected to have a mild impact on her ability to function in her present occupation as a police officer."

This medical opinion placing the injuries as having merely a "mild impact" on her employment, is a contrary indication of any probability of a risk of loss of employment of the appellant. This by itself is sufficient to disqualify the appellant for any consideration of an award for handicap on the labour market.

Furthermore, although the appellant passed her qualifying examination in 1995 and was not promoted prior to the accident, the fact is that despite the existence of her injuries necessitating her absence from work from September 1998 and December 1999, she was promoted to the rank of corporal after the accident. In any event, she had been receiving the pay of a corporal from 1995, received the balance of her full standard five-year re-enlistment in March 2001 and was assigned, one month after resumption, to the Mediation Unit of the Jamaica Constabulary Force, a current expanding area of interest involved in the resolution of disputes. In apparent confirmation of no risk of tenure in her employment, the appellant at page 23 of the record said:

> "Any injury or pain I am feeling has not affected my employment to the extent that I am underpaid and to the extent that I feel I may lose my job or further upward mobility."

In the circumstances I agree with Mr. Maragh that no award should have been made under the head of handicap on the labour market. There is no evidence of a chance of a risk of the loss of her job arising in the case of the appellant.

For the above reasons the appeal is allowed in part. The award is varied to read:

Special damages	$277,600.00 plus interest @ 6% from 7th September 1998 to 7th December 2001.

General damages Pain and suffering and Loss of Amenities	$650,000.00 plus interest @ 6% from 29th August 2000 to 7th December 2001.

Costs of the appeal to the appellant to be agreed or taxed.

PANTON, J.A.

1. In this appeal, the appellant seeks an increase in the general damages awarded by Campbell, J. on December 7, 2001. The order made by the learned judge directed that the respondent should pay to the appellant the following sums:

> Special damages.....$277,600.00, with interest at 6% from September 7, 1998, to December 7, 2001
>
> General damages.....$220,000.00 with interest at 6% from August 29, 2000 to December 7, 2001
>
> (a) for pain and suffering and loss of amenities
>
> (b) for handicap on the labour market...$100,000.00

2. The appellant is challenging the amounts awarded for pain and suffering and loss of amenities as well as for handicap on the labour market. She is contending that the amounts are inordinately low, and is seeking a significant increase in the awards. Mr. Campbell, for the appellant, presented arguments in support of three grounds of appeal –

> 1. that the learned judge erred in law in finding that the appellant was not entitled to compensation for the inability to earn income being income not related to her employment as a police officer;
>
> 2. the award of damages for pain and suffering was unreasonable and inconsistent with

awards for similar types of injury and period of pain and suffering; and

3. the award of damages for handicap on the labour market was unreasonable and against the weight of the evidence.

3. We have not had the benefit of even a note of anything the learned judge may have said in arriving at his decision in this case. This Court has, on several occasions, indicated how useful it would be to us as an appellate body, if we were made aware of the thought processes of a first instance court in a matter such as this. It is not expected that there should be a full scale written judgment in every matter. Indeed, that would be unnecessary, undesirable and time consuming. However, in this matter, where we have the full notes of evidence, it would have been expected that there would have been a few lines from the judge indicating his reasoning at the end of the evidence and the submissions. This was not to be. It is reasonable to assume that the learned judge must have said something as he handed down his decision. If that assumption is correct, the attorneys ought to have made a note of what was said. That note would then have been referred to the judge, through the Registrar of the Supreme Court, for him or her to certify same, so that it would then have been made a part of the record of appeal.

4. The relevance of the foregoing comment became evident immediately Mr.Campbell started his submissions in respect of ground 1. That ground was based on a statement allegedly made by the judge in handing down his decision. Alas, the failure of the attorneys to follow the procedure referred to above

resulted in the absence of any material on which to ground the appellant's submissions. That ground of appeal was consequently abandoned.

5. **Ground 2** is in my view a ground with much merit. As indicated earlier, the appellant was awarded $220,000.00 for pain and suffering and loss of amenities. It seems, as suggested by Mr. Danesh Maragh for the respondent, that the learned judge made this award by using as his guide the unreported case **Anthony Dixon v. Geddes Refrigeration Ltd.** and **Ricardo Brown** (Suit No. CL 1991/D027). In that case, the plaintiff had suffered a whiplash as well as injury to the cervical spine with fracture of the 6th cervical vertebra. The sum awarded by Harrison, J. (as he then was) on January 22, 1992, was $48,000.00, which when converted at the time of the assessment came out at $222,249.00. In the instant case, the appellant not only suffered a class 2 cervical whiplash injury but was also permanently partially disabled in 5% of the whole person. That fact should have featured in the judge's assessment. Obviously, it did not. Had it been so, there would have been a significantly higher award to the appellant. In the circumstances, I should think that an award of triple that which was made by the learned judge would suit the justice of this case. That being so, I would allow the appeal on this point and award the appellant an amount that is about triple that which was made in the Court below for pain and suffering and loss of amenities.

Handicap on the labour market

6. The legal position in respect of an award of damages for handicap on the labour market is summarized in the case **Moeliker v. A.Reyrolle and Co. Ltd.** (1977) 1 All E.R. 9, a decision of the English Court of Appeal. At page 16 thereof, Browne, L.J. said:

> "But what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market...Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? I think the question is whether this is a 'substantial' risk or is it a 'speculative' or 'fanciful' risk. ...Scarman, L.J. in **Smith v. Manchester Corpn.** (1974) 17 KIR 1 referred to a 'real' risk, which I think is the same test. In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with the facts of particular cases."

And at page 17, he added:

> "I do not think one can say more by way of principle than this. The consideration of this head of damages should be made in two stages:
>
> 1. Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life?
>
> 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of

> the risk the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job."

This Court reviewed the relevant authorities in **George Edwards and Moses Morris v. Dovan Pommells and Fitzritson Gordon** (SCCA 38/90 delivered on March 22, 1991), **Monex Ltd. v. Derrick Mitchell and Camille Grimes** (SCCA 83/96 delivered on December 15, 1998) and **Godfrey McLean v. The Attorney General** (SCCA 43/98 delivered on June 3, 1999).

7. In the **Edwards and Moses** case, where an award for loss of earning capacity was set aside due to lack of evidence, Gordon, J.A.(Ag.) (as he then was) said at page 9:

> "The plaintiff has to show that as a result of the injury there is a substantial risk of loss of employment in the future. There is no evidence that he will have difficulty in finding alternative employment. There is no evidence that any subsequent employment would result in a diminution of earnings".

In **McLean**, the appellant a fireman suffered a permanent partial disability of 15 to 20% of the function of his right lower limb. He walked with a limp. Notwithstanding his disability, he had been promoted. He was however fearful that his physical handicap would result in his being retired prematurely. This Court, in denying the appellant's bid to receive an award for handicap on the labour market, said at pages 10 to 11:

"An award cannot be made in respect of a baseless fear".

8. Mr. Campbell submitted that the appellant has been handicapped on the labour market, and that a reasonable award in that respect would have been $1,080,800 using a multiplier of 3 and a multiplicand of $30,000.00 per month. In support of the appellant's claim, Mr. Campbell pointed to the re-enlisting of the appellant for one year instead of the usual five years, and her restricted ability to do dressmaking and drapery for reward on a part-time basis. In respect of the re-enlistment, it should be noted that the appellant, having had audience with the Commissioner of Police, was re-enlisted for five years. The appellant sustained her injuries on September 7, 1998. She was absent from work for sixteen months. That would have taken her to the end of the year 1999. Her period of enlistment ended in March 2000. It was at that time she was re-enlisted for one year. At the expiration of that one year period in March 2001, she was given what she described as "the additional years". It was quite reasonable that there should have been an investigation by doctors chosen by the Jamaica Constabulary Force as to the appellant's fitness to perform her public duties. That having been done, and the appellant having been subsequently re-enlisted for the five year period, it is reasonable to assume that there was no adverse report as to the appellant's ability to continue in the Jamaica Constabulary Force. That organization, it should be recognized, has various areas of operation which are equally important so far as effective policing is concerned. No good reason has been advanced for the holding of any view

that a transfer from one area to another is indicative of handicap on the labour market. The appellant was transferred from the unit investigating sexual offences and dealing with juveniles. At the time of the assessment she was at the mediation unit. That to my mind is not evidence of handicap on the labour market as the mediation unit has a very important role to play in a society as hostile and volatile as ours. In any event, the appellant's evidence under cross-examination put the matter to rest in this way:

> "Any injury or pain I am feeling has not affected my employment to the extent that I am underpaid and to the extent that I feel I may lose my job or further upward mobility. I may lose the Top Cop award – it is awarded for work in the field". (page 23 of the record).

9. In respect of the submission that the appellant's ability to earn an income from her sideline has been compromised, it should not be overlooked that the appellant in her evidence during examination-in-chief said at page 19 of the record:

> "I was still in pain when I took the vacation leave. I still continued dressmaking to supplement my salary, drapery making, machinery embroidery which I practiced prior to the accident".

It is true that she did go on to say that after the accident, she had pain in the neck and was unable to take care of normal household chores and so had to pay to get them done – chores such as washing, cleaning and ironing. This specific evidence did not indicate any handicap in respect of her dressmaking activities. The appellant's evidence did not support this aspect of her claim.

Neither did the medical evidence. Dr. Cheeks' opinion as expressed on August 13, 1999, was that it was anticipated that the appellant's "symptoms will eventually settle". "However from the prognostic standpoint she will be liable to experience bouts of neck and shoulder pains periodically since this is the usual natural history of mechanical invertebral disk derangement". This prognosis formed the basis of the view that there would be 5% permanent partial disability. And for this I would say that the appellant would be adequately compensated by the increase in general damages that I have suggested.

10. I would allow the appeal, and order costs to be paid by the respondent in terms of the order proposed by Harrison, P. (ag.)

COOKE, J.A. (Acting)

The plaintiff/appellant, a police officer, on the 7th September, 1998, sustained injuries consequent on a motor vehicle accident. The driver of the offending vehicle was the defendant/respondent. He did not contest the issue of liability and so the matter duly proceeded to an assessment of damages. This was done on the 7th of December, 2001. At the conclusion of that trial the court determined as follows:

> "1. That there be Judgment for the Plaintiff against the Defendant with costs pursuant to Schedule A.
>
> 2. That there be Judgment for the Plaintiff against the Defendant:

Special Damages	$277,600.00
Interest @ 6% p.a. from 7/9/98-7/12/01	54,120.59
General Damages	
Pain & Suffering & loss of Amenities	220,000.00
Interest @ 6% p.a. from 29/8/00 – 7/12/01	3,254.79
Handicap on the Labour Market	100,000.00
	$654,975.38"

The appellant is dissatisfied with the quantum of the award and now moves this court to increase it. The grounds of appeal were stated thus:

> "1. That the Learned Judge erred in law in finding that the Plaintiff was not entitled

to compensation for the inability to earn income being income not income related to her employment as a Police Officer.

2. The award of damages for pain and suffering was unreasonable and inconsistent with awards for similar types of injury and period of pain and suffering.

3. That the award of damages for handicap on the Labour Market was unreasonable and against the weight of the evidence."

In respect of Ground 1 the record reveals that in examination by her counsel the substance of the plaintiff/appellant's evidence was:

> " I was still in pain when I took the vacation leave. I still continued dressmaking to supplement my salary, Drapery making, machine embroidery, which I practised prior to the accident.
>
> I earned from doing the dressmaking – I was engaged in sheets, drapes, etc. A set of drapes and sheets could carry me to $30,000. I could earn up to $30,000 for the month."

In cross-examination this was her evidence:

> "Been a dressmaker from a teenager, got trained from 19 years old at School of Fashion at 1 Retirement Road for nine (9) months. Started the training in dressmaking in 1984, there about, at Cassava Piece Road in Constant Spring.
>
> I had done further training in embroidery and dressmaking.
>
> 1988 – embroidery course. Did two (2) dressmaking course at Kingston, Parkington Plaza. I started early May at Cassava Piece.

> That was about 1984 started dressmaking. I did not have a registered establishment. It was home run business. Had no book and did not make tax returns."

Besides the bald assertion that "I could earn up to $30,000 for the month," there was no other evidentiary material to substantiate this claim. It has long been settled that mere assertions are without value. In **Bonham-Carter v. Hyde Park Hotel Limited** [1948] 64 T.L.R. 177 at page 178, Lord Goddard C.J. stated in a trenchant manner:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I had lost; I ask you to give me these damages.' They have to prove it."

This court has repeatedly embraced this approach in a number of its judgments. See for example, **Lawford Murphy v. Luther Mills** [1976] 14JLR 119.

It is clear, therefore that there was no basis upon which the learned trial judge could make any award for loss of income. Accordingly, the claim for $486,172.64 was misconceived. Now this ground as framed, complained that the appellant was denied compensation for loss of income being income not related to her

employment as a police officer. This drafting presupposes that the stated income would be accepted. Well, it was not. Consequently, the question of whether a police officer is entitled to compensation for income derived from activities outside the ambit of established policing duties does not now fall for consideration. This ground fails.

As regards ground 2 the appellant contends that the award of $220,000.00 is inadequate. It is submitted that a proper award would be one of $1,200,000.00. Unhappily, the record does not indicate the reasoning process of the learned trial judge which led him to arrive at his assessment for pain and suffering and loss of amenities.

There are two medical reports, both by Randolph E. Cheeks, F.R.C.S., a consultant neurosurgeon. The first is dated the 13th August, 1999 and I reproduce hereunder the relevant portion:

> "The onset of neck and shoulder pain within 20 minutes of the accident strongly suggests that this lady sustained a soft tissue injury to the cervical spine, a not uncommon sequel to motor vehicle accidents of this type. Her MRI scan gives good corroborative evidence of injury to one of her cervical intervertebral disks, [C3-4] which is herniating posteriorly and impinging on the thecal sac, changes which are not normally seen at this age in healthy uninjured individuals. This injury is classified as a Class 2 cervical whiplash injury and she is currently still under treatment but it is anticipated that her symptoms will eventually settle. However from prognostic standpoint she will be liable to experience bouts of neck and shoulder pains periodically since this is the usual natural history of

mechanical intervertebral disk derangement. Should further deterioration of the disk occur it is possible that the herniation may progress leading to nerve entrapment and necessitating spinal surgery.

Taking the above into consideration, this single level non-operated cervical disk derangement carries a PPD of five percent of the whole person according to the AMA guidelines."

The second, dated the 13th September, 2001 stated:

"This report reads in continuity with my previous medical report dated 13 August 1999 regarding this individual.

Since that time Miss Walker has attended in follow up neurological consultations on nine occasions, the last being on 21 May 2001. Four years have now elapsed since the accident and it can be safely assumed that she has reached M.M.I., i.e. she has reached the point of maximum medical improvement. Her permanent partial disability remains at five percent of the whole person.

From the occupational standpoint this is expected to have a mild impact on her ability to function in her present occupation as a police officer.

Prognostically this condition will undergo intermittent episodes of neck and shoulder pain particularly at times of heavy exertions. Should this individual in the future sustain a further neck injury (particularly one of the whiplash type) then she would be more vulnerable than a normal healthy person to suffer severe protracted pains. These factors are taken into account in her P.P.D. assessment as five percent of the whole person."

It would seem that at the trial the plaintiff/ appellant relied on **Kathleen Earle v George Graham** (Defendant) Elvin Nash (snr.) Elvin Nash (jnr.) (Third Parties) Suit CL 1990 E 025 reported in Volume 4 of the Khan compilation of Personal Injury awards at page 173. In this case the plaintiff was diagnosed as having a severe whiplash sustained in a motor vehicle accident on the 22nd of September, 1989. In February 1995 Dr. R. C. Rose, F.R.C.S. a consultant orthopaedic surgeon measured the range of motion in the cervical spine. There was as reported at page 174 (c) "Extension 5 degree, Flexion 10 degrees, lateral rotation 30 degrees – 85 degrees and attributed the restriction of motion to pain". He thought that her condition was chronic and that she would be left with permanent sequelae. He assessed her permanent disability at 10% of the cervical spine which is equivalent to 6% whole person disability. On the 11th December 1996, Courtney Orr J made an award of $800,000 for pain and suffering and loss of amenities.

In this court in addition to **Kathleen Earle** (supra) three other cases were cited. They were:

(a) **Olive Henry v Robert Evans and Greg Evans** C.L. 1998 H019 Volume 5 of the Khan compilation page 756.

(b) **Ellie Kean v Bridgette Offiicer & Leroy Stewart** C.L. 1999 K 018 Volume 4 of the Khan Compilation page 172 and

(c) **Wesley Glanville v Delroy Campbell and Gwendolyn Brown** C.L. 2000 G 012 volume 5 of the Khan Compilation at page 174.

In **Olive Henry** Dr. G.G. Dundas, an orthopaedic consultant diagnosed whiplash injury with sequelae. X-rays indicated a serpentine configuration of the cervical spine in the flexion view. There was cervical spondylosis between C5/6. This he opined was not unusual for someone at this age (65 years old). A programme of physiotherapy was recommended. This was on the 11th January, 1996. In March 1996 Dr. Dundas was hopeful that ongoing therapy would result in the absence of permanent disability "but the nagging ongoing symptoms could be troublesome."

In November 1997 Dr. Dundas was of the view that therapeutic intervention had not produced the desired beneficial results. Based on the restriction in range of motion he assessed her permanent partial disability as 10% of the whole person. The plaintiff was also seen by Dr. Randolph Cheeks for neurological evaluation. He first, had similar optimism as Dr. Dundas for the recovery of the plaintiff. He assessed her disability resulting from the injury as 10% whole person for 10 months plus 5% whole person for a further 3 months and then had the opinion that there was no permanent partial disability resulting from the injury. This view was changed as a result of a further assessment

by Dr. Cheeks in December 1998. His settled conclusion was that there was permanent partial disability of 11% of the whole person but in view of the fact that spondylosis was present albeit in an asymptomatic way the accident was responsible for 50% of the permanent partial disability i.e. 5.5 of her total whole person disability.

On the 23rd of February 1999 damages for pain and suffering and loss of amenities was assessed by Wesley James, J. at $750,000.00.

Ellie Kean is not helpful in that the injuries sustained and consequential disabilities are not comparable to the instant case. In **Wesley Glanville** the initial x-ray examination showed subluxation of the C7 vertebra. On the 10th May, 1999, Dr. Mena conducted an examination which revealed:

(i) Pain on touch over right side of neck

(ii) Range of movement slightly restricted

(iii) Pain whenever he attempted to turn his face to the right side

(iv) That muscle power and sensation were slightly reduced in her right hand.

A further X-ray showed moderate degenerative changes present in lower cervical region, subluxation of C6 or C7 with loss of disc space and that the associated joints appeared narrowed and somewhat distorted making appearances suspicious for a fracture. There was

also narrowing of the C5/C6 disc space. Permanent functional impairment was assessed by Dr. Mena at 10% of the whole person. On the 14th June, 2001, Anderson J assessed the damages for pain and suffering and loss of amenities at $975,000.00. Apparently, the learned trial judge regarded **Kathleen Earle** (supra) as offering guidance.

At the trial the record shows that cases were cited on behalf of the defendant but these were not identified. In this court counsel for the defendant/respondent has stated which were those cases. They were all taken from the casenotes of the Harrison's compilation and are to be found between pages 84 to 87. Most of these are reports of consent judgments and are thus of quite limited value. There were two cases **Pamela Francis v Karel Nicholson** C.L. 1985/F128 and **Francine Frances v Karel Nicholson** C.L. 1985/7126A in which there was judicial assessment. However in these two cases there is silence in the note as to any permanent partial disability. Finally, there is **Joy Mae Hall v Gordon Morgan and Alston Bright** CL 1988/H 125. Here the note on page 84 reads:

> " Injuries – severe whiplash injury; pain in neck and right shoulder; tenderness along the paracervical muscle especially on the right side with marked restriction of neck movement due to pain. Disability – permanent partial disability assessed at 18% of the whole person."

On the 7th of November, 1990 Patterson J (as he then was) awarded $65,000.00 for pain and suffering and loss of amenities. At the time of the trial of this case $65,000.00 in the money of the day would have been in the vicinity of $586,000.00.

Manley Nicholson v Ena Thomas and Glenmore Thomas

CL 1999 N 202 came before this court. There is a report in volume 5 of the Khan compilation at page 165. Here the plaintiff suffered:

- unconsciousness
- whiplash to neck with soft tissue injuries
- cerebral concussion
- tenderness and functions of thoracic and lumber spine
- mild limitation of movement of cervical spine
- abrasion of the scalp on left poriento-temporal region, chest and back pain.

The X-ray of the cervical spine was normal in appearance. However, the thoracic spine showed mild scoliosis with concavity to the left. There was mild limitation of movement of the cervical spine due to pain and muscle spasm. It is to be noted that there was no permanent partial disability. In January 2000 the court below made an award of $450,000 for pain and suffering and loss of amenities. This court considered this amount to be "inordinately high" and in a terse oral judgment (SCCA No. 20/2000) reduced the amount to $250,000. This was on the 22nd November 2001.

In **Godfrey McLean v The Attorney General** (SCCA No. 43/98 delivered June 3, 1999, Panton J.A. (acting), as he then was, comprehensively discussed the approach of the appellate court when awards are challenged. As he did, I also will repeat the sage words of Green L.J. at page 359 in the judgment of the English Court of Appeal in **Flint v Howell** (1935) 1 KB 354. They are:

> "I should like to add a few words about the jurisdiction of this Court in appeals where the only contention, or one of the contentions, is that the damages awarded by a judge hearing a case without a jury are excessive ... I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

This approach has been sanctioned and faithfully applied by this court. Further I will heed the caution given by **Lord Morris of Borth-y-Gest** when in delivering the advice of the Board in **Singh v Toong Fong Omnibus Co. Ltd.** (1964) 3 All E.R. 925 at page 927 he said:

> "It need hardly be emphasised that caution has to be exercised when paying heed to the

> figures of awards in other cases. ... It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made. If, however, it is shown that cases bear reasonable measure of similarity, then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardised, or that there should be an attempt at rigid classification. It is but to recognize that, since in a court of law compensation for physical injury can be assessed and fixed in monetary terms, the best that courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion."

In applying the principles just referred to I am of the view that when the learned trial judge accepted the submission of counsel for the defendant that an award in the vicinity of $200,000 was adequate, he was in error. This was so very small as to make it an entirely erroneous estimate of the damage to which the plaintiff is entitled. Just approximately one month before the date of assessment by the learned trial judge this court had awarded $250,000 in a "whiplash" case - **Manley Nicholson** (supra) where not only was there no permanent partial disability but the injuries were not as serious as in the instant case. Using the appellate award in **Manley Nicholson** as pointing the way it would seem that the award in **Joy Mae Hall** (supra) may well have been somewhat on the low side – there being an 18% permanent partial disability of the whole person. However

that was more than a decade ago. In **Kathleen Earle** (supra) the injuries were more substantial than in the instant case as also was the situation in **Wesley Glanville** (supra). These awards ought to be regarded as being on the high end of awards in this area. I would say that a proper award would be $650,000.

The final ground of appeal concerns the award for handicap on the labour market. The appellant has submitted that the award of $100,000.00 should be increased to $1,080,000.00. The evidence is that following her accident the plaintiff was absent from work for sometime – sixteen months. She was sent to a medical board. Before her accident she was assigned to an investigating unit, investigating sexual offences and also the unit for juveniles. She is now in the mediation unit. When she applied for re-enlistment she was at first granted one year but was subsequently given an additional four years – five years being the maximum time period re-enlistment at any one time. She has since her accident been promoted.

The criteria to be utilized in considering the issue of handicap on the labour market were enunciated by Browne L.J. in his judgment **in Moeliker v A Reyrolle and Company Limited** [1977] 1 All ER 9 at page 17 letter b. He said:

> "I do not think one can say more by way of principle than this. The consideration of this head of damages should be made in two stages. 1. Is there a 'substantial' or 'real' risk

> that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materializes, having regard to the degree of the risk, the time when it may materialize, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job."

In my view the plaintiff has not satisfied the first stage. There is no evidence that she is at any risk at all that she will lose her job before the end of her estimated working life. There is no necessity therefore to proceed to the second stage. There should not have been any award for handicap on the labour market. This, counsel for the defendant had submitted in the court below. However the defendant/respondent has not challenged this award in this court specifically by way of a cross-appeal. Does that mean that the award should stand? I think not. In the Court of Appeal Rules 2002, Rule 1.16. is in these terms as far as is applicable:

> "1.16 (1) An appeal shall be by way of re-hearing.
>
> (2) At the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless –
>
> (a) it was relied on by the court below; or

(b) the court gives permission.

(3) However –

(a) the court is not confined to the grounds set out in the notice of appeal or counter-notice, but

(b) may not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground. (emphasis mine)

(4) ..." (not applicable)

So did the appellant have sufficient opportunity to contest the issue of whether there should have been this award? [See 1.16(3)(a) and (b)]. The answer is yes. There were exchanges between the bench and counsel for the appellant as to the correctness of this award. I would say that this award should not be allowed to stand. The virtue of the Rule 1.16(3) is obvious. Our appellate court is the highest court in the land. It would certainly be incumbent on this court to correct errors in law or mixed law and fact made in lower courts in matters that come within its purview - even if such error has not been an issue on appeal. This, of course, is subject to the opportunity requirement in 1.16(3)(b).

In conclusion ground 1 fails. I would increase the award for pain and suffering and loss of amenities to $650,000. I would disallow the

award of $100,000.00 for handicap on the labour market. The plaintiff/appellant shall have her costs to be agreed or taxed.

ORDER

HARRISON, P. (Acting)

Appeal allowed in part. Award varied to read:

Special damages	$277,600.00 plus interest @ 6% from 7th September 1998 to 7th December 2001.
General damages Pain and suffering and Loss of Amenities	650,000.00 plus interest @ 6% from 29th August 2000 to 7th December 2001.

Costs of the appeal to the appellant to be taxed if not agreed.