

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No 2297 of 2001

WENDY NEWTON

PLAINTIFF

AND

THE TRANSPORT BOARD

DEFENDANT

**Before the Honourable Madam Justice Jacqueline Cornelius, Judge of the
High Court**

2010: November 3; 23-26;

2011: March 17;

June 10;

August 9-10

2013: June 24

Sir Richard Cheltenham QC. with Alrick Scott for the plaintiff

Leslie Haynes QC. with Leslie Roberts for the defendant

DECISION

[1] On 14th May 1997, Wendy Newton, the plaintiff was 3 months pregnant. She was employed as a customs and purchasing clerk at the defendant's offices. On that day she sat in a chair which broke and collapsed under her. She fell and was seriously injured. She claims that her injuries loss and damage were caused by negligence on the part of the defendant, its

servants and or agents. Judgment was given on 6 December 2002 on the issue of liability in favour of the plaintiff. This matter therefore is an assessment of damages.

The Parties

- [2] At the time of trial, the plaintiff deposed that she was 53 years old having been born on 8 June 1957. She is the mother of three children; Sharon, born 28 January 1975; Kyle born 25 August 1984; and Hasani born 21 November 1997. She is legally married but separated from her husband.
- [3] The defendant, a body corporate, was established under the provisions of the *Transport Board Act Cap 297*. It provides, maintains and operates a passenger road transportation service in this Island.

THE PLAINTIFF'S CASE

Evidence of Wendy Newton

- [4] The plaintiff deposed that prior to the accident she led an active life and was in good health. She was pregnant, excited about the pregnancy, enjoying life and optimistic about the future. She regarded herself as having promotional prospects given that she had been interviewed and shortlisted for the post of Public Relations Officer. She had done a number of courses including customs management, radio broadcasting and small business management. The plaintiff also deposed that she attended classes in labour management and labour etiquette and she sold food on Thursdays to Saturdays but the accident has reduced her life to one of pain, sleeplessness and disability.
- [5] Whilst 12 weeks pregnant and at work, she sat on a typist's chair, stretched back to relax and the back of the chair fell off. She fell out of the chair striking her back against the wall and then fell to the ground afterwards. She stated that she sustained injuries to her back, neck and, to a lesser extent, her right wrist. She went to the bathroom and there was a lot of internal bleeding and discharge afterwards.
- [6] The plaintiff was seen by a number of medical practitioners the first of which were Dr. B.B. Simon, whom she saw the day after the accident, and

Dr. Bennett, her gynaecologist. At that point she was experiencing severe pain and stiffness in the lower spine but X-rays were not done since she was pregnant and radiological examination was contraindicated during pregnancy. Dr. Simon prescribed anti-inflammatory analgesics and recommended a period of six weeks sick leave. She consulted Dr. Simon for nine months after the accident whilst experiencing considerable pain and discomfort in her back during the pregnancy, delivery and post-natal period. She required assistance when rising from a sitting position and was troubled by insomnia, recurrent backaches and morning stiffness. At the time of her last visit to him, she experienced minimal improvement in symptoms.

- [7] On 24 April 1998 she consulted Dr. Cyril Nelson, a surgeon and practitioner in pain management, since her symptoms were showing minimal improvement. Her back pain was continuing and was intensified when she bent over or was in the same position for an extended period. Her symptoms included stiffness in the back, intermittent pain in the nape of her neck with occasional swelling on the right side and depression. After examination Dr. Nelson prescribed Maxifen, Parafon and hot packs for her back. He also recommended physiotherapy but she was unable to afford the sessions at that time.
- [8] She consulted Dr. Nelson again on 23 May 1998. Her symptoms had worsened in the intervening period with her neck, shoulder, right arm and back being very painful and weak. She had swelling on the right side of her neck and diarrhoea for 2 days. Her right wrist was swollen and shoulder movement restricted; pain and tenderness in the back and her back muscles were in spasm. She was treated, on occasion, with injections and advised to continue the hot packs and Algypam liniment.
- [9] Dr. Nelson submitted three reports on Mrs. Newton, the last report being dated 28 June 2000. Up until the time of the last report, she was still experiencing multiple symptoms including severe low back pain, dragging her legs, numbness in the fingers and a reduction in straight leg raising.

The injury was impacting on her employment and this was the conclusion of Dr. Nelson in his reports for April and June 2000. He stated that the 'chronicity of (her) symptoms would be responsible for (her) low productivity and absenteeism'.

[10] The plaintiff consulted Dr. Jerome Jones on 27 October 1998. She was then experiencing pain in the lower back, shoulders and right wrist. The doctor diagnosed a strain and sprain to her right shoulder and lower back with residual chronic low back pain. She was advised that she had reached the maximum medical improvement and to limit activities requiring repetitive bending, squatting or lifting of over 20 pounds.

[11] Mrs. Newton visited Dr. Gill after being referred by Mr. Winston Seale. Dr. Gill referred her to physiotherapy from September 2004 and reviewed her during March, April and June 2005 whilst her physiotherapy was ongoing. Physiotherapy was not producing long lasting relief and Dr. Gill advised her to consider invasive pain management. She considered this option but later decided to postpone it. She continued her visits to Dr. Gill's office between 2006 and 2008 whilst her pain was marked by period of acute exacerbations.

[12] Her primary care physicians have all advised her of a decrease in her functional capacity. Dr. Nelson assessed her disability at between 55 and 60%. Dr. Gill stated that the injury to her back would reduce her productive capacity and that she would find it difficult to cope with her present work. Dr. Jones also pointed to numerous restrictions all of which were self-evident.

Effect on work

[13] At the time of the accident, Mrs. Newton worked as a customs/purchasing clerk. Following the accident, she was placed on six weeks sick leave and thereafter made redundant. She experienced considerable difficulty finding employment and for about nine months worked as a security guard deployed at the Queen Elizabeth Hospital by the Ministry of Defence and Security. Most of the time she was deployed with another person but she

had to be regularly relieved as the pain became too much. She had to go back out to work to support herself.

[14] In February 2002, she gained employment with the Barbados Port Inc as a security officer and has continued in that work to date. Her current work involved long periods of sitting and standing and sometimes her co-workers 'covered' for her as she was in pain daily.

[15] She stated that her functional capacity was now diminished and she found it difficult to cope with her present job. The protracted walking and standing have led to severe exacerbation of her lower back pain and this in turn resulted in absences from work. It was her view that with her history of lower back pain, she would be unlikely to find new employment if that need arose. She stated it to be her belief that she was now at a disadvantage in the labour market. Her record of absenteeism made her an almost certain candidate for redundancy if her employer ever had to downsize. She maintained a fairly good attendance record due mainly to the assistance of her co-workers who would often exchange duties with her to allow her to sit when she was in pain.

Effect on Social Life

[16] Prior to the accident, Mrs. Newton led an active life and vigorously pursued various activities. She played netball and was a member of the Texaco netball team. She was also the captain of Raider's softball cricket team. She played both sports until she became pregnant but was unable to resume sports after the birth of her child because of the degree of pain in her lower back. Her sleep, to date, was regularly disturbed and some nights she could not sleep at all because of the severe pain in her lower back.

Effect on marriage

[17] Mrs. Newton stated that her sex life was ruined. The vigour of sexual intercourse produced pain in her lower back and made the act less enjoyable. Her constant complaints of sex during sexual intercourse frustrated her husband and eventually she gave up on sex around 2002.

Her husband moved into a separate bedroom and later left the marital home.

- [18] She was happily married for two years at the time of the accident and had been with her husband for three years prior. She stated that her injuries had placed restrictions on her and caused her husband to desert her. She lost the joy, comfort and companionship of marriage and had been placed in a position of loneliness and pain to raise her son on her own.
- [19] She was unable to lift her son in his tender years in the way that mothers normally would and she could not hold him for long periods. She could not play ball games with her son, help him with his riding or play as she had done with her other children. She missed the joy of lifting and playing with her son when he was a baby and her mother and sister would take turns caring for and holding him to enable her to rest her back.
- [20] In relation to her household duties, she could not 'hang out clothes' and would leave them for someone else to take them out of the machine and hang them out. She stated further that she could do no scrubbing or mopping and relied on her family to assist with household activities.

Medical Evidence

- [21] The plaintiff gave evidence that she went through a bad period after the accident. She suffered from depression after the accident and recently she experienced more pain and was moving slower and dragging.
- [22] The plaintiff submitted her medical reports. Reference was made to the findings of all of the doctors who examined her and the court refers to this evidence for the purposes of its determination.
- [23] Dr. Simon's report is dated 6 January 1998. He was the doctor that the plaintiff saw immediately after the accident. The plaintiff could not have an X-Ray because she was pregnant at the time of the accident. Examination revealed tenderness to palpitation and percussion in the lower spine and the straight leg-raising test revealed reduced results in both legs. Dr. Simon prescribed anti-inflammatory analgesics and recommended a period of six weeks sick leave. In summarizing the

plaintiff's condition over the first nine months, the doctor wrote that the injury caused considerable discomfort to her during the pregnancy, delivery and post-natal period. She needed assistance when raising from a seated position, was troubled with insomnia, recurrent backache and morning stiffness. He observed that minimal improvement in her symptoms was shown due to the severe damage to the ligaments and joints and assessed her prognosis for recovery as fair.

- [24] Dr. Nelson's first report was dated 24 July 1998. This report was based on six prior visits. On the first visit he noted that the plaintiff's back pain intensified on bending and being in one position for an extended period of time. Her symptoms also included stiffness in the back, neck pain, depression and a tendency to lean to the right when sitting and walking. His examination of her neck revealed good movement in all directions with minimal tenderness. She was able to move her shoulders well and the straight leg raising test was normal. Dr. Nelson prescribed Maxifen, Parafon, hot packs and Physiotherapy but the plaintiff could not afford the cost of the sessions.
- [25] On Mrs. Newton's second visit, her symptoms had worsened. Her neck, shoulder, right arm and back had become very painful and weak. She complained of swelling on the right side of her neck and diarrhea for two days. Swelling in the right supra-clavicular bone was found along with swelling in the right wrist and restricted shoulder movements. She experienced pain and swelling in her back and the para-spinalis muscles were in spasm. The straight-leg raising test showed a reduction of approximately 30 - 40%. She was prescribed Voltaren injections, Norflex, hot packs and Algybam liniment.
- [26] On her third visit she noted the success of the injections but this proved to be short lived and over the next three visits on 5, 12 and 19 June 1998, the pain in her neck had increased in severity and activities such as lifting her baby were exacerbating her neck and lower back pain.

- [27] Dr. Nelson diagnosed the plaintiff as having a combination of blunt and extension injuries of the back. He classified the injuries as moderate to severe and stated that all her symptoms were indicative of the chronic nature of the injury and were characterised by periods of remission and exacerbation. Dr. Nelson's other reports featured more of the same diagnoses. In the final report he stated that "there is a strong probability that Mrs. Newton's pain and suffering would have led to giving up her job". He stated further that the 'chronicity of her symptoms would be responsible for her low productivity and abstention'.
- [28] Dr. Gill in his report dated 22 January 2009 found that the accident had an adverse impact on the plaintiff's work, her hobbies, her marriage and her social lifestyle. He advised the plaintiff that given the failure of conservative treatment to ameliorate her symptoms, she should consider invasive pain management.

Cross Examination

- [29] The plaintiff stated that prior to the accident she had a history of pelvic pains and not back pains. She was sitting in the chair for about three hours before she stretched back and denied that the distance between the wall and the chair was very small. When shown a photograph of the area she stated that it was not the area where she was sitting and that they could 'touch each other's desks'. She stated further that the office had been restructured.
- [30] The plaintiff admitted that in her injury report, she did not say that she fell out of a chair. She stated that she told Dr. Gill that the chair back collapsed and that she fell off the chair and struck her back. She stated further that she did not hit her head on the wall, she hit her back and when it was suggested that this was not so, she remained unshaken.
- [31] After the accident, the plaintiff stated that during any day her daily activities included taking breakfast and medication and reading because there was not a lot that she could do. The pain in her back was severe and she was restless during her pregnancy. She needed help with her personal

hygiene and her mother would help her to bathe sometimes. When asked about a prior injury to her right knee she stated that the injury gave her no problem.

[32] The plaintiff gave a clear account of her running of the food stall. She said that she bought the goods during the week and prepared the items for cooking on the weekend. She had some help from friends who would deliver the goods to her house and from her sister who also helped prepare some of the food. The stall earned \$480 net per week for the three days. She said that her sister was not in it for any money, but she would help her financially if asked, but this was not consistent. After the accident she was unable to continue the business but thereafter she made an effort to run a small shop with a friend of hers. This venture was short lived as she stopped running the shop with her friend after she obtained the job at the Bridgetown Port.

[33] The plaintiff deposed that her symptoms now were just as bad as after the accident. She gave a graphic description of her symptoms and said that she felt that 'her back (was) tearing apart.' If she sat for a long period and then got up, her back felt as if it 'did not want to come up'. She stated further that her right foot went numb and she would stumble, she had pain in her shoulders and neck, muscle spasms would immobilize her for up to an hour and in the morning her fingers would be swollen and stiff. The dragging in her feet started in or about 1998 and she had to pay someone on occasion to come and assist her with household duties.

EVIDENCE OF JEROME JONES

[34] Dr. Jones is a registered medical practitioner and a Board certified orthopedic surgeon. He deposed that he saw the plaintiff for the first time in 1998, and that she stated that she had fallen from a chair injuring her back and that lower back pain persisted for the 4 ½ years after that. He diagnosed "a strain and a sprain"; a strain referring to injury to her muscles and a sprain refers to an injury to her ligaments.

[35] Dr. Jones described the plaintiff's condition as chronic, that is, that her condition would not resolve itself in any specific time. He expected the injury to persist into the indefinite future and stated that she would have difficulty with movements such as repetitive lifting and bending. He did not expect the strain to have progressed to its exacerbated state but stated that if the plaintiff had arthritis in her lower back, she would experience severe pain. He agreed that back injuries could resolve themselves within a three month period but stated that if they went on for a longer period of time, they became more difficult to resolve. Upwards of the age of 40, most people had degenerative changes in the spine but were asymptomatic unless some trauma was experienced.

Cross-examination

[36] Dr. Jones stated that he saw the plaintiff twice; in 1998 and in 2006. His notes did not reveal the plaintiff telling him that she had hit her back against the wall. His notes showed that she said that she was sitting on a chair and the back of the chair fell off and she fell. His report reflected that plaintiff complained that her back pain with radiation down the right leg had increased. In his opinion, this indicated a neurological problem, but his examination found that she was normal neurologically. Neurological examinations test motor strength and sensation, but not pain; a person could have a normal neurological examination but still suffer pain. He said it would be difficult to explain the pain in the shoulder almost a year after the injury.

[37] Dr. Jones stated further that if a patient had pain, a subjective symptom, one needed to do further examination to determine whether there was something pressing, for example, on the nerve. If the patient had a neurological deficit the examination needed to be more intense, but if there was a normal neurological examination, that would make it less urgent to examine the patient to find the site of injury or pathology. It would be less likely that a patient would have nerve compression or any abnormality that would need surgery.

- [38] Dr. Nelson's report (14 April 2000) was put to the witness. He (Dr Jones) agreed that the flare ups were normal, and that the severe pain radiating down her legs was not consistent with a sprain and a strain, nor was the dragging leg or numbness of the fingers. He said that he could not interpret the symptom "inability to maintain one position for too long" and therefore could not comment on it.
- [39] Dr. Jones explained the factors to be taken into account at this stage given the acceleration. One had to consider the degree of the trauma, the mechanism of the injury, the degree of force, the degree of the degenerative arthritis at the time of the trauma and the specific location of the arthritis within the spine, as well as the nature of the patient's general activities.
- [40] In re-examination, Dr. Jones stated that it would be unusual for an accident to occur in May 1997 and for the patient to have no symptoms for a year. He agreed that in the plaintiff's condition, her obesity could be as a result of not being able to do the exercise because of injury. He did not rule out radicular pain shooting down the leg as being part of the said injury. He re-stated further that the 'dragging' of her leg was not consistent with strain and sprain. When he examined her he said that she did not have the 'dragging', and if she had it now it may be due to some abnormality of the nerve of her lower back. This would not be a result of the sprain and strain, but could be the result of a neurological abnormality which developed since 1998-2000.

Evidence of Dr. Gill

- [41] Dr. Gill is a neurosurgeon and he testified that he saw the plaintiff initially in September 2004 and on 5 subsequent occasions. He stated that the plaintiff complained of lower back pain and pain radiating down her limbs. The plaintiff told him that she had back pain, that the pain changed her life, made her unable to engage in work and leisure or sex with any ease. The plaintiff told him that she sustained injury to her lower back; while attempting to sit on a chair, she fell back, hitting her back against

the wall. At the time, she was in the second trimester of pregnancy. In his opinion, the effects on the pregnancy would be that she might experience long term pain because of joints which had been altered by the hormone relaxin; these joints being altered by the gravid state, being more mobile and loose during pregnancy, she may be more susceptible to injury.

[42] He gave evidence that the hormonal effects of pregnancy died away about 6 weeks after birth, however, (in the plaintiff's case) the loose and relaxed capsules of the joints may have caused a greater vulnerability of injury. The effect of the injury during pregnancy could be one of the factors in the pain she was suffering now. He performed a neurological examination and found no abnormalities, but the fact that she had pain was not inconsistent with that.

[43] Dr. Gill gave evidence of his findings from the examination. He stated that he saw images which showed three things. The first image showed an annular tear anterior of L3/4 disc with a diffuse bridge (this is a gap in the disc itself just above the pelvis just below the mid-back). This was a signature of degenerative disease of the spine. It was difficult to suggest that this might have been due to the injury but it pointed to the fact that there probably co-existed a degenerative disease of the lumbar spine. Such a disease took some time to develop. Degenerative changes became evident after 30 years of age but there was no uniformity as to how they would present given that it depended on genetics and environmental factors. The majority of persons after 30 years of age would have this degenerative disease. Trauma could induce symptoms, converting an asymptomatic person into a symptomatic one; or it could worsen the symptoms.

[44] The second image showed a left foraminal disc protrusion associated with left L4/5 foraminal stenosis. This meant that the disc was bulging or protruding into an area that was usually occupied by the spinal nerve. This could be made symptomatic by trauma.

[45] The third image showed a central posterior L5/S1 disc protrusion; facet hypertrophy (enlargement of the latter joint of the spine) and bilateral foraminal stenosis. The plaintiff presented with lumbar radiculopathy (shooting pain in the legs), this pain went down the legs and into the soles of the feet. It was within the area of 5th lumbar and sacral nerve roots. One would have to infer that these nerve roots were responsible for the pain. There was, possibly, a very likely connection between what she suffered and her symptoms; in fact, it was probable. He reported that the plaintiff found it difficult to conduct her daily activities and suffered excruciating debilitating pain. He prescribed analgesics and therapy and further advised the patient to consider invasive pain management. As he indicated in his report, '(her) injury has proven to be the fulcrum upon which her quality of life has turned in an unfavourable fashion.'

Cross-examination

[46] Dr. Gill agreed that the plaintiff's pain had three elements to it; the trauma, hormonal changes during pregnancy and the degenerative changes in her spine. The degenerative injuries in the spine made the spine more susceptible to injury and the lasting effect of the injury was caused by the vulnerability of the spine at the time of pregnancy. A person with degenerative disc disease had a chance of remaining pain free until death or of developing pain without injury but once that person was injured it was impossible to determine which category the person would have been in.

[47] In order to give an acceleration opinion, a number of factors had to be taken into account including family history, genetic influence, weight, environmental factors, the history of the trauma and whether or not the person had a narrow spinal canal. The extent of the degenerative disease was seen in half of the plaintiff's lumbar spine and in order to give an acceleration opinion, he would have to balance the degree of degenerative change with the degree of force.

- [48] When asked if the injury as described by Dr. Jones (strain and sprain) was wholly to blame for the plaintiff's present situation he said that the injury description was understated given that there was no qualification by way of radiological examination. Dr. Gill agreed that Dr. Simon found no altered sensation in 1998 but disagreed with the proposition that if the plaintiff's accident had caused the symptoms complained of, they would have been seen by Dr. Simon. In his view the emergence of pain was accelerated by 10 or 15 years. The pain which she felt now could in all probability be as severe but it would have taken about 20 years to manifest at her current level.
- [49] In re-examination, Dr. Gill stated that there were two critical factors to consider; the degree of degeneration and the degree of force. The trauma did no cause the disc problems but could have accelerated them.

EVIDENCE FOR THE DEFENCE

- [50] The defence referred to the medical report of Dr. Gill in which he stated that results of the MRI revealed that the plaintiff had a pre-existing degenerative condition of the spine prior to the accident. The defence submitted that the condition manifested itself as a 'slight backward angulation of the lumbar vertebrae' and was described by Dr. Gill as extensive and affecting almost half of the lumbar spine. It was stated that this kind of degenerative disease generally occurred over a period of 10 – 20 years in a patient.
- [51] The defence submitted therefore that the mechanics of the injury was important in determining how much of plaintiff's condition was attributable to the actual injury and how much was attributable to her pre-existing degenerative condition. Dr. Gill's evidence suggested that the plaintiff's condition had been accelerated by as much as 10 -15 years.
- [52] The defence took the view that the plaintiff's condition was not entirely asymptomatic and had begun to deteriorate prior to the accident thereby rendering her more vulnerable to debilitating injury. It was suggested that given the plaintiff's distance away from the wall in her office, she should

have struck her head in the fall but did not do so. They submitted further that she would therefore have to be closer to the wall than she stated and that the distance from her desk to the wall was really 1 foot $\frac{3}{4}$ inches and not 3 - 4 feet as stated.

- [53] In light of the evidential discrepancy here, the defendant submitted that the plaintiff could not reasonably be believed with respect to the distance at which she fell from the chair; and further if one considered the plaintiff's condition prior to the accident and the likely distance that she fell, it was reasonable to conclude that her injury was accelerated in the range of 5 - 10 years as opposed to 10-15 years.

Evidence of Michael Lascelles

- [54] Mr. Lascelles was the defendant's Parts and Purchasing Supervisor from 1998 and was a purchasing clerk prior to that. He knew the plaintiff and related an incident which happened on 14th May 1997. Mr. Lascelles gave evidence as to the make up of the room where the plaintiff was injured based on pictures of the same. He could not remember if the pictures of the office represented what he saw on that day but stated that what he saw was usually how the room was configured.

Cross-examination

- [55] Mr. Lascelles stated that he did not know when pictures of the office were taken, he did not take them and he was not in the room when they were taken. He agreed that the plaintiff's chair was mobile and he did not know the exact location of the chair to the wall when the plaintiff fell.

Evidence of Winston Seale

- [56] Dr. Seale testified that he was a consultant orthopaedic surgeon and had been practicing as such for 26 years. He saw the plaintiff in 2003 when she complained of back pain. She had been to a number of doctors but on examination he diagnosed back pain with some nerve root involvement in the right leg. He reviewed X-Rays and noted degenerative changes at L4-L5 disc, requested a CAT scan of her disc and started her on painkillers.

The plaintiff reported some relief from the medication and when the CAT scan was finished she was referred to Dr. Gill.

Evidence of Lyle Padmore

- [57] Mr. Padmore is the defendant's Accidents and Complaints officer. He worked in that position from 1998 but had been an employee for about 40 years. He recalled the incident with the plaintiff but stated that it happened so long ago and he could not recall when he made the notes of the accident. He did state that he did not make notes on the same day of the accident and the plaintiff's statement was not recorded at the time she gave it.

PLAINTIFF SUBMISSION-DAMAGES

- [58] The plaintiff submitted that whatever quantum was rewarded had to reflect the already lengthy period of pain and suffering (some thirteen years) and the multiple restrictions the injury had imposed on her. It was submitted further that the plaintiff's lower back injury fell near lower end of the Judicial Studies Board Guidelines which meant that her award would more likely fall in the range of \$93,625.00 to \$105,000.00. The plaintiff indicated however that account had to be taken of the injuries to her neck and shoulders and the breakdown of her marriage and in so doing a reasonable figure for her pain, suffering and loss of amenities (PSLA) would be **\$110,000.00**.
- [59] Turning to the plaintiff's claim for disadvantage on the labour market, a multiplier of 4 was submitted based on the cases of *Foster v Tyne & Wear CC* [1986] 1 All ER 567 at 570 and *Gunter v John Nicholas & Sons (Port Talbot) Ltd Kemp & Kemp Vol. 1, 6-617*. The plaintiff's current earnings was \$693.00 net weekly or \$36,036.00 annually. Applying the multiplier, the claim under this head would be **\$144,144.00**.
- [60] Under the head of future domestic services, based on Dr. Nelson's assessment of the plaintiff's disability at 55-60%, it was submitted that the plaintiff had extreme difficulty performing household chores. She could not scrub her bath, sweeping was difficult, she needed assistance putting

on shoes and could not carry heavy shopping. In the circumstances, the plaintiff would need assistance 2 ½ days a week. This produced a multiplicand of \$5,200.00 (\$40.00 x 2.5 days x 52 weeks). A reasonable multiplier would be in the region of 12 years and the claim therefore was for **\$62,400.00**.

[61] Under future medical care, it was submitted that the plaintiff would need monthly visits to a specialist at \$200.00 per visit over a period of five years. This equated to \$12,000.00 (\$200 x 12 x 5). She required three epidural injections at a cost of \$ 2,000.00 each and it was possible that she required a spinal stimulator at a cost of \$55,000.00. The claim under this head was therefore **\$73,000.00**.

[62] Turning to the award of special damages, past medical care was set at **\$5,181.99** accordingly to the receipts submitted. Under domestic services, the plaintiff submitted that she was entitled to recover the value of gratuitous services rendered to her and submitted the cases of *Hunt v Severs* [1994] 2 All ER 385 and the local case of *Barker v Boyce* decided **6 January 2006 per Blackman J.**

[63] Prior to the accident the plaintiff performed a full range of domestic services but a range of family members including her mother and sister helped her after the accident. **Blackman J.** accepted a rate of \$40.00 per day as a reasonable figure and the plaintiff submitted that the value of the assistance rendered was in the region of \$200.00 per week during the acute phase of the injury (first three years) and thereafter 2 ½ days per week valued at \$100.00. It was conventional to discount that rate by 20-25 % and therefore the claim for domestic assistance was for **\$86,600.00** (1. [15 May 1997- 15 May 22] 152 weeks x \$200.00 = \$31,200.00; and 2. [16 May 2000 – 16 May 2009] 544 weeks x \$100.00 = \$54,400.00)

[64] The next head under special damages was Past Loss of Earnings. The plaintiff submitted that she was entitled to loss of earnings from the date she was likely to gain employment had she been fit given that she her post was made redundant. If credit was given for the nine months of

employment at the Ministry of Defence & Security, the claim would be for **\$36,000.00** (\$1,500.00 x 24 months).

[65] Additionally, the plaintiff sold food on weekends but had no records to verify her earnings. She estimated that she earned approximately \$480.00 per week after deducting the cost of inputs. She paid no statutory contributions on this income and it was proposed to deduct 50% of her income to account for this fact. This would give a net figure of \$240.00 net per week. After the accident she was forced to employ workers and that continued for about six months before it became unprofitable to do so. In the circumstances the claim for the loss of earnings for her part-time work was for **\$141,120.00** (\$280.00 x 588 weeks) from November 1997 to present, 11 years and 4 months.

[66] In summary therefore the full claim for damages was for **\$646,153.03**.

DEFENDANT'S SUBMISSION- DAMAGES

[67] Under the head of PSLA, the defendant submitted that the starting point should be \$76,112.95 reflective of a figure which straddled the lower severe and upper moderate categories according to the JSB guidelines.

[68] The defendant submitted the case of *Wale v Underground Kemp & Kemp Vol. 3 F7-004* ([2000] C.L.Y. 1598) where the plaintiff was a 41 year old female who suffered a lower back injury. The court awarded £15,500.00 for her PSLA damages. Taking inflation into account, that award would be worth £22,320.00 up to 2011 and the defendant suggested that based on the similarities, *Wale* was highly persuasive in this matter. The defendant also submitted the cases of *McHugh v Carlisle City Council Kemp & Kemp Vol. 3 F 7-005* ([2000] 3 Q.R. 6) and *re Orford Kemp and Kemp Vol. 3 F11-002* in which the plaintiffs were awarded £14,500.00 (updated to £20,300.00) and £15,000.00 (updated to £19,200.00) respectively. The defendant also referred the court to the recent local decision of *Alleyve v the Attorney General decided 28 March 2008 per Crane-Scott J.* in which the court awarded a similarly

injured plaintiff with no pre-existing degenerative condition, the sum of \$85,000.00.

[69] Turning to the head of disadvantage on the labour market, the defendant submitted that the considerations laid down in the case of *Smith v Manchester* [1974] 17 KIR 1 had to be considered. The plaintiff's evidence showed that her attendance at work was fairly regular and that there were minimal medical certificates for her over the years. Her description of her work at the Port Authority did not suggest that she was physically or otherwise unable to carry out the demands of her job. There was no evidence to suggest that the plaintiff's employment was in danger and further the plaintiff obtained her job some five years after the injury which clearly indicated that her injury in no way prevented her from obtaining employment in the first place. The defendant submitted therefore that there was no basis for a *Smith v Manchester* award and accordingly, there should be no award under this head.

[70] Turning to Future Domestic Services, the defendant agreed with the multiplicand of \$5,200.00. Dr. Gill suggested that the plaintiff's degenerative condition would have become symptomatic at age 55; she was 40 at the time of then accident. If the court accepts that her condition was indeed accelerated by 10 years then it is likely that she would have started experiencing pain at age 50. She would therefore become handicap at age 55, assuming that her pains would become a handicap after five years, at which point she would then require domestic services. The period of loss numbered in years (the multiplier) would then be limited to the period from this date at age 53 to when she would have eventually required domestic services in the absence of her injury at age 55. The multiplier to be applied would therefore be 2 and damages under this head would be **\$10,400.00**.

[71] Turning to future medical care, the defendants have suggested awards under Physiotherapy, Pharmacological Care and Invasive Pain Management.

Physiotherapy

[72] Dr. Gill testified that the plaintiff would require 6 to 12 weeks per year; two sessions per week for 6 weeks and depending on how the plaintiff responded to the session. Each session cost \$100.00 and he indicated that the session would continue for at least 5 years but more likely a decade. Assuming the plaintiff required the maximum of 12 weeks a year, this would amount to \$2,400.00 yearly. Again, assuming the court accepted the submission with respect to when the plaintiff should have become symptomatic, and would require physiotherapy, then an adequate figure would be **\$4,800.00** reflecting a multiplier of two years.

Pharmacological Care

[73] Dr. Gill testified that the various medications taken by the plaintiff would cost between \$2,500.00 and \$3,500.00 annually. The defendants have taken the higher figure and making the same assumptions, a multiplier of two would be applicable. The suggested award under this sub-head is **\$7,000.00**

Invasive Pain Management

[74] Dr. Gill opined that treatment would be in the form of epidural injections to the spinal area at a cost of about \$6,000.00 per year. Applying a multiplier of 2, the award under this head would be **\$12,000.00**. The defendant submitted that the plaintiff might need a stimulator in the event that invasive pain management was not successful. The evidence however, in their view, was not sufficient to establish that such intervention would be required and as such the defendant have not accounted for it. Overall, the appropriate award for future medical care in their view should be **\$23,800.00**.

Special Damages

[75] Past medical damages are agreed at **\$5,181.99**. The defendant's arguments therefore focused in on awards for past domestic services and past loss of earnings.

- [76] Under the head of past domestic services, the defendant accepted the rate of \$40.00 per day as set out in *Barker v Boyce* (*Op cit*). The defendant suggested that the vast majority of domestic work to be performed based on the evidence related to cleaning. They suggested further that in a small household, these were not daily tasks and it was more likely that they would be performed on average, every other day. Some task like laundry and cleaning of bathrooms could be performed weekly and the defendant submitted that it was unlikely that the plaintiff would have had the burden of performing these tasks on her own. The defendant therefore submitted that the plaintiff should be entitled, for the initial 3 years, to an average of 3 days domestic service amounting to \$120.00 per week. Over the 3 years or 156 weeks this would amount to **\$18,720.00**.
- [77] During the pregnancy, for the second and third trimesters the plaintiff would have required domestic services in any event and the value of it should be deducted from the total sum. That would mean a reduction of some 26 weeks amounting to \$3,120.00 thereby reducing the sum to \$15,600.00. Dr. Gill's evidence was that the plaintiff required 2 ½ days assistance in domestic services weekly. At a rate of \$100.00 over the 11 years, damages would be **\$57,200**.
- [78] Altogether the cumulative award suggested is **\$72,800.00**.
- [79] Under the head of past loss of earnings, the defendant submitted that a claim under this head would be for the period of time for which the plaintiff was out of employment, that is, from 1 August 1997 up to 2001, which is when she started looking for work and found employment as a security officer with the Ministry of Defence and Security for 9 months. The plaintiff was pregnant at the time of the injury and would have to take some time to take care of the baby. The parties agree that she would not have taken more than a year to find employment and therefore the claim should be assessed on the basis of 24 months.
- [80] The defendant's further submission was the plaintiff was not entitled, as of right, to an award in damages unless she could show that her injury

prevented her from gaining or seeking employment. Her evidence, when asked about seeking employment, was that she was not in any condition to so do; but the doctor at no point indicates that she not capable of undertaking gainful employment during that period.

[81] Given that the plaintiff had found work during the years 1999 and 2000 when she indicated that her condition was deteriorating and she was not in any condition to work, the defendant submitted that she failed in her duty to mitigate the period during which she was out of employment by failing to seek employment no later than the beginning of 2000. Clearly she was able, is presently employed and has so been for 9 years with the Barbados Port Authority.

[82] The defendant submitted that she sought out new employment at the beginning of 2000 and would more than likely have found employment within 6 months. The period for the plaintiff's claim should therefore be reduced to 12 months.

[83] Accordingly, the claim under this head would be equal to 12 months x \$1,500.00 net salary which equated to **\$18,000.00**.

[84] Turning to the claim for past loss of earnings in respect of her part-time business, the sole evidence in that respect was that of the plaintiff. The court was being asked to award a substantial sum in respect of special damages which had to be strictly proved and for which there was no substantiating evidence. Given the lack of particularity, the plaintiff had not achieved the requisite level of proof and was therefore not entitled to any award.

[85] The overall total suggested for damages therefore was **\$187,181.99**.

DISCUSSION

Legal Principles

[86] A court in assessing damages for non-pecuniary loss and pecuniary loss must consider an appropriate award for an injured party that would essentially put said party in a similar position to that which he would be in had it not been for the injury. (*Livingston v Rawyards Coal Co. (1880)* 5

App Cas. 25). In many instances the best a court can do is to put a monetary value upon any deprivation that the injured party suffers and arrive at a fair estimate taking into account all relevant considerations. (refer *British Transport Commission v Gourley* [1956] AC 185).

Damages- PSLA

- [87] There has been some discussion in this matter as to the mechanics of the plaintiff's fall and what was the true distance that she fell from. Having regard to the medical findings of the doctors in their reports, it does not appear that much turns on this submission. Whether the plaintiff fell from 3-4 feet or 1 foot from the wall does not assist the court in its determination given the evidence as a whole.
- [88] The court accepts that the plaintiff's injury was caused when the chair back fell off the chair, she fell and hit her back on the wall, which is plaintiff's version of how the accident occurred. The defendant's submissions with regard to the degree of force, determining the severity of the injury are, in the court's view, unhelpful. The defendant's argument that she would have hit her head in no way negates the injury that plaintiff sustained and no evidence has been presented to the court indicating that the plaintiff should really have a neck injury instead of a back injury. Indeed the defendant has already accepted liability for the fall and the injury to the plaintiff's back.
- [89] I consider that the real issue, therefore, as counsel for the plaintiff urges, is whether the plaintiff had a pre-existing degenerative complaint and what would be the nature of any acceleration to a symptomatic point.
- [90] Dr Gill's evidence was that the plaintiff did have a pre-existing degenerative condition which the fall accelerated by some 10-15 years. He stated that the plaintiff had hitherto not been afflicted by any chronic painful condition. The defendant suggested that such acceleration was really in the region 10 years given that the plaintiff was not entirely asymptomatic based on a letter to the plaintiff's employers which indicated that she had a history of back pains.

- [91] There is, however, no evidence to show that the plaintiff's history of lower back pain was anything other than acute and the court accepts as fact the finding of the doctor that her condition was not of a chronic nature before the injury. Impliedly then, the court must also accept the doctors testimony with respect to acceleration of the degeneration. It follows that the court must hold that degeneration did indeed accelerate by some 10-15 years.
- [92] Notwithstanding the existence of a degenerative condition, the court is satisfied that the chronic back pain which the plaintiff now suffers from is directly attributable to the fall which she sustained during the course of her employment. In the absence of any evidence to the contrary, the court accepts the evidence of the plaintiff supported by the medical reports.
- [93] The court is satisfied that the plaintiff has seen a number of medical practitioners over the years and her painful symptoms have not been resolved and continue to date. The plaintiff said in her evidence that she will have to live with it. Although she has been treated with anti-inflammatory analgesics, hot packs, algytam, injections and physiotherapy, her symptoms have only ever partially subsided. Dr. Gill in his report advised that her symptoms would continue to worry her in the long term. He advised further that they would worsen or manifest themselves in a remitting and relapsing pattern but were unlikely to disappear.
- [94] Sometime after the accident, in 2002, the plaintiff gained worked at the Barbados Port as a security officer. Her evidence was that her work required lengthy periods of sitting and standing which she tried to avoid. The court has no difficulty in accepting that the plaintiff's diminished abilities have indeed caused her great difficulty and are of concern to her capacity for continued employment.
- [95] The plaintiff is now the sole breadwinner for her family and indicated in her evidence that she had no choice but to continue working given that she had a son who was 11 years old. Some weight has also been given to the fact that her marriage broke down under the strain of the injury and

disability. A number of cases are particularly instructive in this matter, particularly those submitted by the defendant. It is helpful to look at a few of the cases presented to the court.

[96] In *Wale* the circumstances are rather similar;

“W, a female, aged 41 at the date of the accident and 46 at trial, sustained a low back injury and consequent low back pain following a fall down the stairs at work. Prior to the accident, W had suffered from pre-existing degenerative disc disease in the lower lumbar spine which would have progressed naturally. However, the agreed medical evidence was that the fall had accelerated by approximately 10 years the symptoms suffered since the accident. Those symptoms comprised mild but constant pain, which restricted W's employment to either a sedentary occupation or an occupation involving light duties. The back injury also caused an abnormality of her detrusor (ie. bladder) muscle which resulted in W having to empty her bladder hourly by day and getting up two to four times at night with incontinence on occasions. The prognosis was that W would never have normal bladder function again. Although her voiding pattern might be controlled with drugs, it was not suggested that the bladder problems would have occurred had it not been for the accident. Damages were assessed, as W did not succeed on liability. General Damages: GBP 15,500”.

Taking inflation into account, that award to Wale would be equivalent to GBP 22,320.00 at today's rates.

[97] The court has also considered the case of *McHugh v Carlisle City Council*. The facts are as follows:

M, male, aged 29 at the date of the first incident, 32 at the date of the second incident and 34 at trial, sustained injuries to his back. The first injury occurred when M lifted a heavy kerbstone and the second when he slipped whilst dismounting from a flat bed wagon. In respect of both injuries, liability was established against CCC. Both medical experts agreed that M had sustained a permanent back disability and was permanently unfit for heavy labouring. The medical picture was clouded by the fact that M's back had already been degenerating before the first accident and that there was specific reference within his GP and medical records to a back injury which had occurred whilst M had been helping to push start a car in February 1995. However, the judge was satisfied that, cumulatively, the two accidents constituted the major significant causes of M's back condition and that but for the happening of those accidents, he would not be in the condition that he was in and would remain in for the foreseeable future. The first accident, which occurred in June 1995, caused low back pain and sciatica. M was able to return to work after three weeks to light duties at first and then to normal heavy labouring, but was left with a vulnerable back. The second accident, which occurred in May 1997, caused further trauma to the lower back, resulting in low back pain and sciatica. M's condition then became irreversible and he was

permanently unfit for heavy work. There was some evidence that M might need an operation on the degenerative disc in the future. During the course of the hearing, CCC sought an adjournment in order to interview M for alternative employment as a car park warden. M indicated that he would accept such employment. The judge considered that the claim fell within the category of a back injury of moderate severity with substantial acceleration of back degeneration for the purposes of the Judicial Studies Board Guidelines and the appropriate bracket was GBP13,250 to GBP18,500. General Damages: GBP 14,500. Past loss of earnings (including interest): GBP11,362. Future loss of earnings: GBP 56,597. Smith v Manchester award: GBP7,793. Past care: GBP500. Loss of pension: GBP14,481. Total award: GBP 109,405.

The updated award for general damages at today's rate is GBP 20,300.00.

[98] The local decision of *Alleyne* is also instructive despite the plaintiff in that matter having no pre-existing degenerative condition. The plaintiff was 37 years old at the time of her injury. She fell during the course of her employment as a department aid at the Sir Winston Scott Polytechnic. She was married and the mother of four children; two of whom were still minors. When she fell, she hurt her and buttocks and when she tried to get up she fell again on her wrist.

[99] The pain from which she suffered affected her back, neck and both of her arms. She suffered from hot flashes in her feet, pain in her hips, needed help to bathe and could not sit or stand for a very long time. Her domestic activities and going to church were curtailed, her sex life was affected and

her marriage was placed under stress. She was awarded damages in the sum of \$85,000.00 for PSLA.

- [100] Having regard to the totality of the evidence, the medical findings, the legal submissions and the findings of fact, the court is of the view that an award of **\$90,000.00** is reasonable in the circumstances for the Pain, Suffering and Loss of Amenity suffered by the plaintiff.

Disadvantage on the Labour Market

- [101] The plaintiff was initially employed as a Customs/Purchasing Clerk with the defendant. After an initial six week sick leave period, the plaintiff lost her job. She had difficulty in finding work between 1997 and 2002 when she gained employment at the Port apart from a period of 9 months when she worked as a security guard with the Ministry of Defence & Security.
- [102] The plaintiff has to establish two things under this head (as set out in *Smith v Manchester (Op cit)*). First, is there a real or substantial risk of the plaintiff losing her employment during her working life? The considerations here are whether, on a balance of probabilities and given the plaintiff's age and qualifications, the length of service, nature of her disability and the employer's prospects, there was a real and substantial risk of her losing her job (refer *Moeliker v Reyrolle & Co. Ltd [1977] 1 WLR 132; Davies v Taylor [1974] AC 207*).
- [103] If the court accepts that there is a real and substantial risk of the plaintiff losing her job, then it must also accept based on the evidence that the plaintiff's employer is likely to terminate her employment at some point in the future. This is speculative at the best. The plaintiff is employed by the Port, a state agency, and no evidence has been led to indicate that the plaintiff is any more susceptible to termination than any other employee. It is not that simple however.
- [104] The role of the court in assessing damages under this head has to be an examination of the plaintiff's loss of earning capacity given her handicap and then what is likely to happen in the future. Dr. Nelson in his report dated 24 July 1998 stated that the plaintiff's injury was moderate to

severe. Her disability was diagnosed at 55-60% and in his report of 14 April 2000, he stated that ‘her age and the constant absenteeism and low productivity resulting from the chronic pain and other symptoms have reduced her re-employment prospects. She was made redundant in her last job’. He stated further in his report of 28 June 2000, that “it (was) not difficult to understand that in restructuring the company she would have been one of the first to be made redundant. In summary, the chronic post-traumatic symptoms of her injury would be responsible for her low productivity and abstention- consequently she would experience difficulty in finding and keeping a job”. This evidence has to be balanced against the report from Mr. Peter Carrington, Human Resources Manager at the Barbados Port Authority. He stated that over the nine years the plaintiff had been employed as a security officer, her attendance in comparison to other officers was average and there were minimal medical certificates on her file.

[105] The considerations for *Smith v Manchester* awards have changed over time. The case of *Foster v Tyne and Wear CC* [1986] 1 All ER 567 at 570 seems to have softened the harshness of the considerations to include a more global approach. Considering the evidence before the court therefore, inclusive of the plaintiff’s level of disability, her age, the difficulties in the exercise of her present duties at work and the very real prospect that she may more than likely have to stop working early as she ages, this court holds that the plaintiff does suffer some disadvantage in the workforce.

[106] It is the court’s considered view however, on the evidence that this disadvantage is not major given that the plaintiff is indeed employed and has so been for a while. Taking into account the time that the plaintiff took to find a job after the injury, her present annual income of \$36,036.00 (\$693.00 per week), her age and the prognosis, an award of \$ **\$36,036.00** is reasonable in the circumstances.

Future Domestic Care

[107] Under this head the plaintiff seeks the sum of \$62,400.00 derived from a rate of \$40.00 per day for 2 ½ days a week over a 52 week period (\$5,200.00) and using a multiplier of 12. The defendants whilst agreeing with the daily rate of \$40.00 and a multiplicand of \$5,200.00 submitted that the multiplier should be the period of loss numbered in years (which they state should be 2).

[108] Having considered the totality of the matter and giving due consideration to the plaintiff's level of disability and the level of acceleration of her condition, the court is of the view that a multiplier of 10 is reasonable in this matter. Applying this multiplier to the multiplicand of \$5,200.00, the award for future domestic assistance is **\$52,200.00**.

Future Medical Care

[109] The medical evidence from both Doctors Nelson and Gill suggests that the plaintiff will need physiotherapy, pain management using medication and epidural injections in the spinal area. The court has already accepted the medical evidence suggesting that the plaintiff's condition has accelerated by some 10-15 years. Dr. Gill indicates that the plaintiff will need monthly visits for at least five years. In the circumstances, taking into account the medical evidence and the earlier holding on the acceleration on the plaintiff's condition, a multiplier of 10 is appropriate. Given that the court has held that acceleration could reasonably be 10-15 years, it means that the assumption that the plaintiff would only become symptomatic long before she reaches 55.

[110] Under the sub-head of physiotherapy, the evidence suggested that the plaintiff would require 6 - 12 weeks per year at a cost of \$100.00 per session. The defendant suggested and the court accepts that the costs per year would be \$2,400.00. Applying the multiplier of 10, the figure for physiotherapy is **\$24,000.00**.

[111] Under the sub-head of pain management, the medical evidence suggested that the various medications will cost the plaintiff around \$2,500.00 to

\$3,500.00. Taking a figure of \$3,000.00 per year as reasonable in the circumstances, and applying a multiplier of 10, the award for pain management is **\$30,000.00**. The medical evidence suggested further that the plaintiff will need 3 sets of epidural injections or pain block procedures and the plaintiff has included the sum of \$6,000.00 representing a cost of \$2,000.00 per procedure. The court awards the sum of **\$6,000.00** under this sub-head.

[112] Dr. Gill has suggested that the plaintiff may need a spinal stimulator at a cost of \$55,000.00 if all measures failed. The defendant suggested that the evidence was not sufficient to establish that the plaintiff would require such intervention. Indeed Dr. Gill's evidence is quite speculative. The court has no definitive evidence upon which to make an award for this procedure and as such, the court declines to do so.

[113] Accordingly, the total award under the head of future medical care is **\$60,000.00**.

SPECIAL DAMAGES

[114] The parties agreed Past Medical Expenses in the amount of **\$5,181.99**.

Past Domestic Expenses

[115] The authority for an award under this head has its most recent origins in the case of *Hunt v Severs* [1994] 2 All ER 385. In recent years, local courts, especially after *Clover v Barker* (*op cit*) per **Blackman J.**, have accepted the rate of \$40.00 per day as reasonable.

[116] Prior to the injury, the evidence suggested that the plaintiff performed a full range of domestic services for herself. After the injury, her ability to tend to her own needs fluctuated and on some days she needed more help than on others. The defendant suggested that the plaintiff would presumably have been aided by her children and husband and suggested the plaintiff would have been entitled for a period of 3 years after the accident to an average of 3 days domestic services per week at a total of \$120.00 weekly. This would amount to \$18,720.00. They suggested further that during the 2nd and 3rd trimesters of her pregnancy she would

have required domestic services anyhow and therefore that period (of 6 months or 26 weeks) should therefore be subtracted from the total.

[117] Dr. Gill suggested that the plaintiff would require 2 ½ days assistance at a cost of \$100.00 weekly. This would amount to \$57,200.00 over the intervening 11 years. The total suggested therefore was \$72,800.00.

[118] The plaintiff on the other hand suggested a figure of \$200.00 per week for the acute phase (first three years) amounting to \$31,200.00 (156 weeks x \$200.00) and \$100.00 per week for the intervening period amounting to \$54,400.00. The total being claimed is for \$86,600.00.

[119] Having considered the circumstances, the court accepts the amount quoted for the intervening years quoted by the plaintiff as \$54,400.00 as being reasonable. The only issue which remains to be determined is the correct figure for the first three years (the acute phase).

[120] The defendant's submissions were that the plaintiff would have required help during her pregnancy in any event. The court rejects this assertion completely. The evidence is that the plaintiff's pregnancy was unremarkable; she was an experienced mother having given birth on two previous occasions; relatively youthful and married. The evidence indicated, further, that she only needed help because of her injury. In the circumstances therefore, the court finds no reason to reduce the award under this head on the basis that she would have needed help anyhow because she was pregnant. Applying a rate, therefore, of \$140.00 per week representing 3½ days per week as reasonable in the circumstances, the award for the first three years (156 weeks) is **\$21,840.00**

[121] The total award under this head therefore is **\$76,240.00**.

Past Loss of Earnings

[122] Under this head, there are a number of pertinent considerations that the court must take into account. First, whether the plaintiff was physically capable of undertaking any gainful employment during the period; and/or second, whether the injury prevented the plaintiff from seeking other employment.

- [123] The plaintiff suggested that had she been fit, it would not have taken 2 years post redundancy to have gained employment. This assumption took into account that the plaintiff would have gone through her pregnancy (six months) and taken a further three months to be with her new born baby. It also assumes that it would not have taken the plaintiff more than a year afterwards to find a job.
- [124] The plaintiff suggested further that she would have found a job paying a comparable salary (around \$1,500.00 net monthly) and she therefore claimed for 33 months of unemployment. This figure was discounted by 9 months representing the period of employment with the Ministry of Defence & Security. The award claimed therefore was \$36,000.00.
- [125] The plaintiff also sought an award for her part time work. She sold food and bread on weekends but had no record of her earnings. She estimated that her earnings were approximately \$480.00 weekly but they proposed a 50% deduction as the basis of their claim. She had to give up the business about six months after the injury given that it became unprofitable after she had to hire persons to carry on the business. In the circumstances, the claim was for \$141,120.00 (\$280.00 x 588 weeks).
- [126] The defendant suggested that a figure of \$18,000.00 should be the award. They have suggested that the plaintiff's acute pain would not have persisted for more than a year and that she failed in her duty to mitigate the period during which she lost her employment. They stated further that if, as the plaintiff suggested, her acute pain continued for this period, it would have been difficult to imagine that it would have resolved itself to a point where she could resume gainful employment. They suggest that had she sought work at the beginning of the year 2000, she would more than likely have found employment in six months. In the circumstances they suggested a figure of \$18,000.00 equivalent to 12 months salary.
- [127] With respect to the part time work, they submitted that the sole evidence of this work was the plaintiff's testimony and no witnesses were called to

verify the testimony. The court was being asked to grant an award where no proof was provided.

[128] The medical evidence before the court from Dr. Simon and Dr. Nelson in 1998 suggested that at best the plaintiff's prognosis was fair. In his report of 14 April 2000, Dr. Nelson described her symptoms as chronic for the preceding 2 ½ years. He indicated that her re-employment prospects were reduced as a result of the chronic pain and symptoms. It follows therefore that the defendant's assertion that the plaintiff's acute pain had persisted has merit but must be balanced against the evidence which suggested that the pain moved from an acute stage to a chronic stage.

[129] In the circumstances, the court holds that a period of 22 months representing the net period of unemployment is justifiably the period for which a claim should be met. Accordingly, the award for past loss of earning with regard to full time employment is **\$33,000.00**

[130] Having considered the submissions with regard to part time work, the court finds that the plaintiff has not discharged the burden of proof sufficient if at all to justify any award under this head. Whilst the court does not disbelieve the plaintiff, the dicta of **Lord Dunedin** in *The Susquehanna* [1926] AC 655 at 661 is instructive. His Lordship stated thus:

“If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved, and, if proved will be awarded.”

[131] Such damage must be specially pleaded and proved and in a case of this nature “capable of substantially exact calculation”. (**Per Lord Goddard** in *British Transport Commission v Gourley* [1925] AC 185 at 206.

[132] Accordingly, the total award under this head is **\$33,000.00**.

CONCLUSION

[133] In summary, the awards which the defendant shall pay to the plaintiff are as follows:

General Damages

a) Pain, Suffering and Loss of Amenities	\$ 90,000.00
b) Disadvantage in labour market	\$ 36,036.00
c) Future domestic services	\$ 52,200.00
d) Future medical care	\$ 60,000.00

Special Damages

a) Past medical expenses	\$ 5,189.99
b) Past Domestic Services	\$ 76,240.00
c) Past loss of earnings	\$ 33,000.00

TOTAL **\$352,665.99**

[134] Special damages shall bear interest at a rate of 4% per annum from the date of the issue of the writ until today and 8% per annum thereafter until payment. General damages shall bear interest at a rate of 6% from today until payment.

[135] The plaintiff shall have her costs certified fit for two Attorneys-at-law to be taxed if not agreed.

Jacqueline Cornelius
Judge of the High Court