

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Civil Suit No: 0247 of 2009**

**BETWEEN**

**LOLETA HUSBANDS**

**CLAIMANT**

**AND**

**MINISTRY OF PUBLIC WORKS  
AND TRANSPORT**

**DEFENDANT**

*Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court*

**Date of Decision: 2020: March 18**

**Appearances:**

**Ms. Veronica McFarlane, Attorney-at-Law for the Claimant**

**Mr. Roger Barker in association with Mrs. Carolyn Ward-Sargeant,  
Attorneys-at-Law for the Defendant**

**DECISION**

**INTRODUCTION**

[1] In this case liability is not in dispute. This case therefore concerns the assessment of the Claimant's damages for personal injuries sustained as a result of a fall which occurred on the 17<sup>th</sup> February, 2006. What

is in issue is the medical condition of the Claimant prior to the fall and whether or not that condition has a causal connection with the injuries she sustained in the fall.

- [2] The Claimant's claim is that the injury she suffered as a result of her falling on the 17<sup>th</sup> February, 2006 is the sole cause of the disability that she suffers. The Defendant on the other hand contends that there is not sufficient medical evidence to establish such a causal relationship and it is their position that the Claimant's disability is from a pre-existing condition.

### **BACKGROUND**

- [3] The Claimant who was sixty (60) years old at the time of her injury was walking in the city when she fell into a hole dug by the servants and/or agents of the Defendant and suffered injury, loss and damages. She therefore claims damages for pain, suffering and loss of amenities, past and future medical expenses, past and future transportation cost, past and future domestic assistance, handicap on the labour market, interest, costs and such further or other relief as the court deems fit.

### **THE CLAIMANT'S CASE / THE EVIDENCE**

- [4] In her witness statement which was accepted as her evidence-in-chief, the Claimant deposed that she was about 60 years old at the time of her injury, having been born on the 23<sup>rd</sup> July, 1945. She was employed as a departmental aide at the Queen Elizabeth Hospital (hereinafter referred to as the QEH). On the 17<sup>th</sup> February, 2006 she sustained injury to her right leg when she fell into a hole in the road at the

- corner of High Street and Victoria Street. She experienced excruciating pain and was taken to the Accident and Emergency Department of the QEH. X-rays were carried out on her foot which revealed that her right foot was fractured. The foot was placed in a cast, she was given pain killers, discharged and referred to the Orthopedic Outpatients Department of the QEH for follow-up care.
- [5] According to the Claimant apart from attending the outpatients' clinic, she also received private medical treatment from Dr. Ishmail Makda. Her cast was removed after seven weeks and she was discharged from the orthopedic clinic on the 16<sup>th</sup> August, 2006.
- [6] The Claimant further deposed that even though she was still experiencing pain in the foot, she went back to work in August, 2006. Her job however entailed a lot of moving and standing and she began having back pain and her foot would hurt, this resulted in her being out on sick leave often.
- [7] During this period of time, the Claimant stated that she attended staff clinic at the Hospital or she would go to the Accident and Emergency Department between her shifts. This she said, continued from 2006 through 2008, then in 2008 she was seen by Dr. Harley Moseley at the Rehabilitation Outpatients' Clinic and was referred for physiotherapy at the said clinic in November of 2008. According to the Claimant she was told that she had myofascial pain syndrome. She was eventually sent home medically unfit in July, 2009. Since retirement she was still being seen at the QEH and being treated by Dr. Harley Moseley at the Rehabilitation Outpatient's Clinic and in 2007 she was

again under the care of Dr. Makda. She was also attending the Warrens Polyclinic for medication for pain.

- [8] The Claimant deposed that following the injury and due to her lack of mobility she has had to use the living room as her bedroom as she is in too much pain to navigate the stairs which lead to the bedroom upstairs the National Housing Unit where she resides. She has had to rely on the assistance of her husband and a friend by the name of Harriette to assist with her personal hygiene. This continued for about three months after the accident where Harriette would assist and a further two months where her husband continued until she was able to comfortably go to the bathroom herself and deal with her personal hygiene.
- [9] The Claimant further desposes that she is very dependent on her husband who does everything to assist her from preparing her meals, washing her clothes, cleaning the house and even bathing her when she is unable to bathe herself. He also provides transportation for her most of the time as she is unable to get around with public transportation and that when he is unable to transport her, she takes a taxi.
- [10] With respect to her loss of earnings, the Claimant stated that while she was on sick leave the Hospital paid her full pay, that is, her gross salary was \$2,516.01 and her net salary was \$2,348.17. When she came off medically unfit she was receiving half pay for about 7 months from the Hospital and that she is presently getting disability benefit from the National Housing Department in the sum of \$511.22

bi-monthly from the NIS, thereby contending that she is now receiving \$1,325.75 less than she would have received from her net salary.

[11] At trial on cross-examination the Claimant stated that prior to this injury she was never granted any sick leave or time off and that she had never had any problems associated with her weight. It was her evidence that it was about three to four (3-4) years after this injury that she was diagnosed with arthritis. She stated that she could not remember being told by the doctors at the QEH that she was obese and needed to work on her weight, nor that her obesity was linked to the arthritis, nor that if she decreased her weight that this would help with the arthritis.

[12] The Claimant was then shown a medical report dated 20<sup>th</sup> March, 2007 from the QEH which stated at paragraph 6 that “she was advised weight loss” and a patient discharge note from the QEH dated 12<sup>th</sup> April, 2008 which stated “Diagnose – flare of osteoarthritis” and under further recommendation “patient advise and counsel re lifestyle changes – to reduce weight which would aid in decreasing severity of osteoarthritis pain”. Dr. Makda in his report dated 7<sup>th</sup> July, 2007 also referred to “her heavy weight”.

[13] The Claimant also testified that at the date of the injury she weighed about 240 lbs. She maintained that she never suffered any injury to her back and that even though the claim for invalidity benefit form states “chronic repetitive injuries to the lower back”, that she only started getting such pains after the fall in 2006.

- [14] The Claimant's husband Mr. Selvin Husbands, a taxi driver was the next witness to give evidence. As deposed in his witness statement he stated that since his wife's injury he was responsible for the cooking and cleaning of the house as she was unable to do same. He was also responsible for transporting her to all of her appointment and when he could not do it because of work commitments that she had to take a taxi as public transportation is too problematic for her. He stated that in the initial stages his wife did have a friend who would assist her but that her care mostly fell on him and that she is now in a position where she can assist herself. He indicated that there was a cost associated with providing transportation services for his wife.
- [15] On being questioned in cross-examination, Mr. Husbands indicated that he was not aware that his wife's doctors had advised her that obesity was contributing to her problem. He did admit that since he and his wife have the same doctor that the doctor would speak to him about her weight and as a result of this he would cook accordingly.
- [16] Dr. Kevin Weekes, a registered physiotherapist at the QEH was called as a witness for the Claimant. He was accepted as an expert witness based on his qualifications and expertise in the field of psychical therapy.
- [17] In relying on his witness statement as his evidence-in-chief in this matter, he deposed that the Claimant was referred by Dr. Harley Moseley on the 25<sup>th</sup> November, 2008 with a diagnosis of cervical spine spondylosis and myofascial pain syndrome and further on the 21<sup>st</sup> April, 2009 with lumbar stenosis. She was assessed by

Mr. Wayne Harris on the 5<sup>th</sup> January, 2009 and he took over treatment from the 9<sup>th</sup> May, 2009. She complained of hand, neck and lower back pain which increased from 2008 and it was noted that even though she was followed up by the staff clinic doctor that her pain persisted. Under patient's medical history it referred to the right ankle fracture in 2006 but stated that no chronic illness was noted at this time. She was assessed as having a soft tissue injury to her right trapezius muscle and when she was seen on the 15<sup>th</sup> September, 2009 by physical therapist Mrs. Stacey Boyce she reported that she was feeling a bit better but that she still gets severe lower back pain intermittently. She was discharged as functional with mild to moderate disability and given a home program of walking and pain management. It was his opinion that given her discharge status, it was expected that her problems could recur or occasional exacerbations could result.

- [18] On cross-examination the witness testified that arthritis could develop in the absence of trauma. He noted that in any fall there is a level of trauma to the body whether minor or major and that even though a bigger person may experience greater trauma, he opined that the Claimant's condition was more in keeping with the injuries from the fall. He further opined that they could be two explanations for the Claimant's back pain, namely, she may have hit her back on impact and the process started there or the fractured ankle could have caused the back pain.

- [19] The next witness called on behalf of the Claimant was Dr. Harley Moseley, a physical rehabilitation specialist who indicated that he has been practicing rehabilitative medicine since 2006. His witness statement was entered into evidence as his evidence-in-chief and it stated that he first saw the Claimant on the 25<sup>th</sup> November, 2008 after she was referred by a general practitioner – the Claimant’s complaint at that time was back and neck pain. After performing a thorough clinical evaluation, he diagnosed the Claimant as suffering from myofascial pain syndrome which was secondary from trauma as well as cervical spondylosis with foraminal stenosis. She was prescribed a muscle relaxant in conjunction with physiotherapy. According to his witness statement the Claimant had successful results on this treatment and the back pain even though not fully resolved had become tolerable.
- [20] The Claimant had an x-ray study performed upon her cervical and lumbosacral spine where evidence of spondylosis with osteopathic changes were detected.
- [21] It is his professional opinion that among other things the Claimant’s disability is due to her chronic pain symptoms which includes an inability to maintain prolonged positions such as sitting and standing and that the patient should respond well to a multidisciplinary approach and her function should gradually improve as long as she is compliant to the program outlined with the goal being to alleviate the symptoms of her chronic back pain.

- [22] He opined that the Claimant's trauma originated with her stepping into the hole in the road. He noted that her body mass index as well as her age were factors to be considered in the healing process.
- [23] On cross-examination and in response to the question whether the Claimant had osteoarthritis prior to the incident, the witness opined that osteoarthritis was systemic occurring in all persons from as early as age twenty-three (23) years. With regards to her being deemed incapable for work due to his diagnosis of chronic repetitive injuries to the back, he explained that "chronic" was a term used to refer to an injury lasting longer than three (3) months and "repetitive" referred to her previous painful condition from the fall.
- [24] On re-examination the witness stated that in his opinion they were no other contributing factors to the Claimant's condition except the trauma experienced from the fall.
- [25] Dr. Ishmael Makda in his evidence noted that he saw the Claimant on the 26<sup>th</sup> February, 2006 for an injury which she suffered on the 17<sup>th</sup> February, 2006. He stated that she was sixty-one (61) years old at the time and that she was seen at her home with a fracture of her right foot, pain in the chest and pain in both upper limbs. She was approximately two hundred and forty (240 lbs) pounds and reported her inability to climb the stairs due to pain and having the cast on her right foot.
- [26] The Claimant was assessed as having soft tissue injury to her chest, shoulders and wrists as well as having a fractured right foot. She was also assessed as being moderately incapacitated as a result of the pain

she was experiencing and also due to her fractured foot and her heavy weight. It was expected that her condition would resolve gradually and completely with possible osteoarthritis developing later in the fractured foot.

[27] It was his evidence that after the visit in 2006, the next time he saw the Claimant was on the 15<sup>th</sup> April, 2010.

[28] On cross-examination this witness stated that he has treated the Claimant for a number of ailments including chest pains, heart failure, high blood pressure, suspected stroke, as well as he treated her in 2002, some four years prior to the fall for osteoarthritis in her back. It was his evidence that he had seen the Claimant twice before the incident of the fall and both complaints were related to her back where she was experiencing moderate to severe pain which were dealt with by anti-inflammatory medication and injections. He further stated that the Claimant had an x-ray done in 2002 which showed mild degenerative disease in the lower back. He also stated that when he dealt with the Claimant in 2006 there was no mention of any back complaint.

[29] Dr. Jerome Jones, Consultant Orthopedic Surgeon was not called as a witness at the trial but his witness statement was admitted into evidence with no objections by the Defendant. In that statement he deposed that he saw the Claimant in the Orthopedic Outpatient's Department on 22<sup>nd</sup> February, 2006 with a history of twisting her right foot in a pothole five days prior. X-rays showed a fracture of the base of the fifth metatarsal bone. According to his statement she was

immobilized in a short leg cast for a period of five weeks (she maintains that it was eight weeks), following which she was mobilized full weight bearing.

[30] He saw the Claimant again in May, 2006 where she was still complaining of pain in her right foot but was also complaining of pain to her right hip radiating to her right knee for a period of one month. On examination she was noted to have tenderness over the base of all metatarsal bones of her right foot but there was no swelling. She also had severe tenderness over her right greater trochanter but had full range of motion to her right hip. A diagnosis of right trochanteric bursitis of the right hip was made and the Claimant was treated for both symptoms with analgesia as necessary, ice to her right greater trochanter and advised weight loss.

[31] On her follow up visit the Claimant continued to complain of pain to her foot despite treatment, however she no longer complained of right hip pain at subsequent visits. On examination, she was noted to have mild tenderness to her ankle and foot but continued to have normal range of motion and was mobilizing fully without difficulties. She was discharged from the Orthopedic Outpatients Department on the 16<sup>th</sup> December, 2006.

### **THE COURT'S FINDINGS OF FACT**

[32] In determining whether or not the injury which the Claimant suffered as a result of falling into the hole in the road was the sole cause of the disability which she suffers or whether or not she suffered from a pre-

existing condition, will depend largely on the evidence of the expert witnesses in this matter.

- [33] In the case *of Loveday v. Renton and Wellcome Foundation Ltd.* [1990] 1 Med LR, **Justice Stuart Smith** addressed the proper approach to be taken by the court in determining the evidence of expert witnesses as follows:

“...The court has to evaluate the witness and the soundness of his opinion. Most importantly, this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witness’ opinion by examining the internal consistency and logic of his evidence; the care with which he has considered the subject and presented the evidence; his precision and accuracy as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic of a proposition put in cross-examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether it is biased or lacks independence.”

- [34] In evaluating the experts’ testimony the court have found all of them to be credible but was particularly impressed with the evidence of Dr. Makda, who was the only doctor who saw and examined the Claimant prior to her fall in 2006 and therefore greater weight will be given to the findings of this doctor. What was particularly noteworthy in his evidence was the fact that the Claimant was treated by him in 2002, some four years before the fall, for moderate to severe back pain which was dealt with by anti-inflammatory medication and

- injections. An x-ray done in 2002 revealed mild degenerative disease in the lower back. He also treated her for a number of other ailments previously outlined in his evidence.
- [35] In reviewing all of the evidence, in particular that of Dr. Makda, I am satisfied on the balance of probabilities that the Claimant suffered from a pre-existing back condition from as far back as 2002.
- [36] It is not disputed and in fact liability has been accepted, that the Claimant sustained a fractured right foot and soft tissue injuries to her chest, shoulders and wrist as a result of falling into a hole in the road for which the Defendant is responsible.
- [37] Even though she returned to work in August of 2006 she experienced so much pain that she was constantly on sick leave, until eventually she was retired from work at the age of sixty-two (62) years on the grounds of medial incapacity.
- [38] The Claimant has been diagnosed by Dr. Moseley as having myofascial pain syndrome.
- [39] According to Dr. Moseley myofascial syndrome is a condition in which there is generalized pain and hypersensitivity essentially throughout the entire body and it is almost always associated with some type of traumatic event. It is an inflammatory condition involving muscle and fascia, that is, ligaments in the back, the inflammation may become chronic and may cause prolonged pain in muscles anywhere in the body.
- [40] I accept the evidence of the Claimant which is supported by Dr. Jones and Dr. Makda that the immediate effect of the fall in the hole was a

fractured right foot with soft tissue injuries to other parts of her body as stated before.

[41] I accept the evidence of Dr. Makda that the Claimant from 2002 had a history of back pain which when x-rayed showed degenerative changes of the sacroiliac joints (osteoarthritis).

[42] I accept the evidence of Dr. Moseley that the trauma suffered as a result of the fall could be attributable to the Claimant's chronic back pain and therefore his diagnosis of myofascial pain syndrome is also accepted.

[43] The fact that the Claimant has not recovered from what can be described as a moderate injury could also be due to her age (she was sixty (60) years old at the time of the incident) and her weight 240 lbs at the time of the fall.

[44] Having reviewed the evidence, the court finds and accepts the following facts:

1. Prior to the incident on the 17<sup>th</sup> February, 2006, the Claimant was a sixty years old female who worked as a departmental aide at the QEH.
2. As a result of a fall into a hole in the road, the Claimant suffered a fracture to her right foot with soft tissue injuries to her chest, shoulders and wrist.
3. The Claimant was seen by a number of doctors namely Dr. Jerome Jones, Dr. Ishmail Makda, Dr. Kevin Weekes and Dr. Harley Moseley.
4. The court accepts the evidence of these medical practitioners and is satisfied that the opinions of these doctors establish that the Claimant has suffered from the incident.

5. The court further accepts that prior to the fall, the Claimant complained and was treated for back pain on at least two occasions in 2002 and was diagnosed with osteoarthritis of the lower back.
6. The court finds that before the incident, the Claimant was self-reliant and independent however after the fall she has lost some of that independence and for some time was dependent on her husband and a friend.

## **ASSESSMENT OF DAMAGES**

### **Pain and Suffering and Loss of Amenities (PSLA)**

[45] Under this head the Claimant is seeking \$55,500.00. In support of this, her Counsel has indicated that the Claimant's major injury was to her foot which was placed in a cast for some eight weeks as oppose to five weeks which was stated in one for the medical reports. She maintains that after the cast was removed, the Claimant continued to experience pain and that this was the major factor behind her being retired due to incapacity. This however was not the Claimant's only complaint in that she also suffered from neck pain and pain to the upper extremities for which she received treatment. Further it was only in 2010, she contends, that the Claimant discovered that she had a fracture to the wrist of the hand that she had used to break her fall in 2006.

[46] Under the head future pain and suffering and loss of amenities, the Claimant is seeking \$37,750.00.

[47] In support of these amounts, Counsel has submitted the following authorities taken from Volume 3 of *Kemp and Kemp, Mitchell v. Centrica PLC* (2004 – £3,000.00 uplifted in 2014 to £4,060.00);

*Snowden v. Cassidy* (2002 – £6,500.00 uplifted in 2014 to £9,110.00); *Hill v. Apoca Parking Ltd.* (2002 – £5,000.00 uplifted in 2014 to £7,450.00) and *Newcombe v. Liverpool* (2004 – £3,000.00 uplifted in 2014 to £4,060.00). It is her position however that none of these cases are on par with the Claimant's case, in that the level of disability suffered by the Claimant far exceeds the Claimants' in those cases.

[48] It is Counsel for the Defendant's position that an award of £4,550.00 or \$15,925.00 would be an appropriate one to compensate the Claimant for pain and suffering. It is their position that the claim of \$37,750.00 for further pain and suffering and loss of amenities is unreasonable, excessive and has not been supported by the medical evidence relied upon by the Claimant. They contend that there is no causal link between the injuries sustained in the fall on 17<sup>th</sup> February, 2006 and the diagnosis of myofascial pain syndrome which the Claimant currently suffers from and they further contend that the source of the trauma leading to this diagnosis has not been identified. They maintain that the Claimant was deemed to be permanently incapable of work as a result of "chronic repetitive injuries to the lower back" and that the source of these injuries have not been identified.

[49] The Defendant accepts that the Claimant suffered a fractured right foot and soft tissue injury to her chest, shoulders and wrist, for which the treatment included a short leg cast with oral analgesics and rest. A further diagnosis was made by Dr. Jones of the QEH of "trochanteric bursitis of the right hip" which was treated with oral analgesics and

- into the right greater trochanter, after which no further treatment was prescribed and neither was any surgical intervention prescribed.
- [50] It is the Defendant's position that the most serious injury was the fracture of the right foot, in which they contend that the deviation of the acute pain and suffering spanned a seemingly brief period in relation to the injury. They noted that on discharge of the Claimant from the QEH on 16<sup>th</sup> August, 2006, Dr. Jones noted that there was "mild tenderness to her ankle and foot but (the Claimant) continued to have normal range of motion and was mobilizing fully without difficulty".
- [51] Further Dr. Makda in his medical report dated 7<sup>th</sup> July, 2007 noted that the Claimant was "moderately incapacitated" in respect of her injuries and that she was not seen after 26<sup>th</sup> April, 2006 "for these ailment". He however "expected that Mrs. Husbands' condition would resolve gradually and completely, with possible osteoarthritis developing later in the fractured foot."
- [52] What Counsel for the Defendant thought was noteworthy was that Dr. Gill, Dr. Jones and Dr. Makda felt that the Claimant had an issue with weight which impacted on her pain and mobility.
- [53] It is the Defendant's position that based on the medical evidence the Claimant had by August 2006 made a full recovery from the injuries sustained on 17<sup>th</sup> February, 2006. They further contend that the osteoarthritis seemingly never materialized and that the Claimant went on to be treated by Dr. H. Moseley for chronic back pain sometime in 2008.

- [54] Counsel for the Defendant referred to the Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury cases at page 54 para (P) (g) Foot Injuries – Modest, which recommends that “straight forward foot injuries such as fractures, lacerations, consensus etc. from which a complete or near complete recovery is made would justify awards of £4,350.00 or less”. They believe that the medical evidence produced and relied on by the Claimant supports the categorization of the injuries sustained as minor injuries and furthermore that none of the medical specialists have recommended surgical intervention. To support their quantum they relied on *Morrissey v. Bondorndown Communication, Kemp & Kemp* para 18-020; *Douglas v. Fensome, Kemp & Kemp* E 2-067/1 and the Judicial Studies Board Guidelines for the Assessment of General Damages.
- [55] In arriving at the global figure for the Claimant’s pain and suffering and loss of amenities, the court is satisfied that the Claimant’s injury can be considered as follows: (i) the fracture right foot and (ii) the soft tissue injuries to her chest, shoulders and wrist.
- [56] The medical evidence suggests that the Claimant suffered injuries as a result of her fall into a hole in the road as a result of the Defendant’s negligence. From the medical evidence the Claimant suffered and received treatment for back pain from 2002, some four years prior to the fall and degenerative changes were also noted.
- [57] The Claimant’s age at the time of the fall as well as her weight cannot be excluded as contributory factors when it comes to determining the

cause for the Claimant's current diagnosis. In spite of these other complaints, and bearing in mind the evidence of Dr. Moseley, the court cannot say that the trauma associated from the fall in 2006 is solely responsible for her current diagnosis of myofascial pain syndrome. However even though the court cannot and does not hold that it is the sole cause for the Claimant's current condition, according to the medical evidence, the fall does play a role in the Claimant's current medical condition.

[58] In light of the evidence in this matter, inclusive of the submissions of both Counsel and the authorities cited, the court is of the view that

- (i) an award of \$25,000.00 is an appropriate award for the PSLA as it relates to the fracture of the right foot. I do not accept that this was a minor injury but was more in line as being a modest injury using the above-mentioned JBS guidelines. A modest orthopedic injury is considered as a simple metatarsal fracture resulting in no permanent deformity with an award of up to £9,000.00.
- (ii) an award of \$7,500.00 is an appropriate award for the PSLA as it relates to the soft tissue injuries to the chest, shoulders and wrist – see *Lamb v. East Yorkshire NHS Trust (2001)* reported at 16-063 *Kemp & Kemp* and *Layland v. Creative Print and Design Ltd. (2005)* reported at 17-051.

[59] The total award under this head is therefore \$32,500.00.

#### **Past Domestic Assistance**

[60] The amount claimed by the Claimant for past domestic assistance is \$68,160.00 which has been calculated from the date of the injury until present and the sum for future domestic assistance as \$46,176.00. Counsel has relied on the cases of *Daly v. General Steam Navigation*

*Co. Ltd. [1981] 1 W.L.R. 120* and *Hunt v. Severs [1994] 2 All E.R. 385* as authorities for recognizing lost ability to carry out household services.

[61] Counsel for the Defendant on the other hand consider these figures as unreasonable and excessive and it is their position that the Claimant had recovered from her injuries by August, 2006. They propose the rate of \$35.00 per day as oppose to the Claimant's \$40.00 per day and states that this rate was employed in *Layne v. The Attorney General BB2010*. They accept that the Claimant was incapacitated to the extent that she was unable to perform certain duties for a period of five weeks (the length of time her foot was in a cast). Accordingly for past domestic assistance, the Defendant proposed the sum of \$525.00 calculated at three (3) days per week at \$35.00 per day for five (5) days.

[62] In light of the testimony of the Claimant and her husband, together with the medical evidence presented, the court is satisfied that for a period of at least three months the Claimant would have been unable to perform her household chores and take care of herself adequately without the assistance of domestic help. The court is therefore satisfied that a sufficient legal basis has been established for an award under this head.

[63] The court accepts the commercial rate of \$40.00 per day at three (3) times per week for a period of twelve (12) weeks, that is \$40.00 x 3 days per week x 12 weeks which totals \$1,440.00.

- [64] With respect to future domestic assistance it is the Defendant's position that there is no documentary evidence showing that after August 2006 and up until November 2008, that the Claimant attended any doctor in relation to the injuries sustained on 17<sup>th</sup> February, 2006. They noted that the medical certificate of permanent incapacity for work listed the reason for the claim for invalidity benefit from the National Insurance Department as "chronic repetitive injuries to the lower back" and what they thought was significant was that no back injuries were revealed in either of the earlier medical reports by Dr. Jones or Dr. Makda, nor was there a record in either of the said reports of the Claimant complaining in the six month period of any back pain.
- [65] It is their opinion that by August of 2006 the Claimant had recovered from her injuries and that no causal link has been established between the fall on 17<sup>th</sup> February, 2006 and the injuries for which the Claimant saw Dr. Moseley on 25<sup>th</sup> November, 2008. They should therefore be no award for future domestic assistance.
- [66] The evidence shows that the Claimant was assisted by her husband and a friend for a period of time after the fall. I will accept the Claimant's evidence that she was in the cast for eight weeks instead of the five weeks stated in the report and that for this period she was immobilized and needed assistance. Once the cast was removed the Claimant was able to assist herself more and would have needed less domestic assistance but would have still needed assistance for an additional month. As stated earlier, after twelve weeks the Claimant

would have been in a position to take care of herself and to perform household chores and therefore I can find no basis to support future domestic care.

**Loss of Earnings (Past and Future)**

- [67] Prior to her disability, the Claimant was employed as a departmental aide at the QEH. The Claimant now claims the sum of \$59,658.75 for past loss of earnings from April 2010 to December 2013 together with loss of earnings of \$9,005.71 for the period August 2009 to March 2010 for a total of \$68,664.46.
- [68] The Defendant however contends that the Claimant was incapacitated and off work for a period of five weeks and that at the time she was an appointed public officer and as such would not have sustained any losses under this head of damage. It is their submission that the claim for loss of earnings identified in the Submissions on Damages is for the period of August 2009 to March 2010. According to the Defendant this is a period well after the injuries sustained in the fall were resolved. Again they reiterate that there is no causal link between the injuries sustained in the fall on 17<sup>th</sup> February 2006 and furthermore the Claimant was deemed to be permanently incapable of work as a result of “chronic repetitive injuries to the lower back.” It is their position that no award should be made by the court under this head.
- [69] As stated by the court earlier even though the Claimant was treated for pain to her back in 2002, the court cannot dismiss the credible evidence of Dr. Moseley that the trauma caused as a result of the fall

could have contributed to her back problems and therefore the pain associated with the same is responsible for the Claimant's current diagnosis of myofascial pain syndrome.

[70] As a public officer the Claimant continued to receive her full salary right up until 2009 when she was deemed medically unfit for work, that is, for some three years after the fall in which all of the doctors had expected should have been resolved fully.

[71] After giving the matter due consideration and bearing in mind the Claimant's age, the nature of her injuries, her pre-existing back problems and the fact that she continued to receive a salary for some three (3) years after the fall, the fact that she would have been eligible to retire at age 67 years, I would consider an award of \$25,000.00 as appropriate under this head.

#### **Future Medical Costs**

[72] The Claimant is seeking the sum of \$10,747.40 for future medical cost on the ground that the Claimant's pain seems to be increasingly debilitating and requiring attention. She believes that as she ages, her condition will worsen requiring her to attend more doctor visits, injections and x-rays if needed and treatment in general.

[73] The Defendant's position is that the medical evidence does not support this contention and that the basis of the calculation is unclear. It is therefore their position that no award should be made under this head. It is the court's position that given the facts previously stated in respect of the cause of the Claimant's injuries, the claim for future medical care is not supported in the circumstances.

**Past Transportation (Past and Future)**

- [74] The court accepts that for some time the Claimant continued to experience pains and problems which caused her to expend money on transportation. The Claimant is seeking the sum of \$14,817.00 for past transportation cost and \$9,000.00 for future transportation costs. She contends that due to her injury she is unable to take public transportation and that she depends on her husband who is a taxi driver to provide her with transportation and when he is unable to do so, she uses other taxi service to transport her. It is her position that between 2006 through 2011 she required transportation for her doctors and physiotherapy appointments and that she still enquires transportation today as she is unable to sit or stand for extended periods of time and entering and exiting public transportation is difficult for her.
- [75] The Defendant contends that these figures are unreasonable and unsupported by documentary evidence and have no basis on the evidence provided. They further contend that on the basis of the medical evidence provided between the period February 2006 and August 2006, the Claimant saw the doctors at the QEH and at the clinic of Dr. Makda on four occasions and therefore an award of \$320.00 made up as \$40.00 per trip for eight (8) trips.
- [76] This court accepts that at least for a period of three (3) months and maybe longer the Claimant would have required transportation assistance, not only for visits to the doctors but for her general needs

as well. An award of \$5,000.00 is appropriate for past transportation costs. There will be no award for future transportation costs.

**Special Damages**

[77] The Claimant claims special damages in the sum of \$4,511.15 and of that sum the Claimant claims on the sum of \$3,996.15 interest at the rate of 4% from the date of filing until the date of judgment and 8% from the date of judgment until payment.

[78] The Defendant states that having reviewed the receipts and invoices supplied by the Claimant, only the sum of \$1,288.57 has been proven.

[79] The Defendant is therefore prepared to reimburse the following:

Visits to Dr. Makda	\$ 190.00
Medical Report – Dr. Makda	\$ 695.00
Medical Report – QEH	\$ 50.00
Ace Pharmacy	\$ 241.62
Knights Pharmacy	<u>\$ 111.95</u>
<b>Total</b>	<b><u>\$1,288.57</u></b>

[80] It is the Defendant's position that the sum of \$2,707.58 has not been proven and therefore should not be reimbursed for lack of proof. The Defendant further contends that the claim for the sum of \$900.00 paid to Teleradiology Inc. is not supported by any evidence even though the Claimant indicates that she was referred for these tests. According to the Defendant there is no evidence of this referral and furthermore it has not been proven that there is a causal link between the injury and the CAT scans that were done.

[81] The evidence show that for some time after the fall in 2006 continuing right up until the present that the Claimant continues to suffer pain

resulting in a diagnosis of myofascial pain syndrome by Dr. Moseley. The Defendant's position is that there is no causal link between this diagnosis and the trauma suffered as a result of the fall, in addition to which the Claimant was already labouring under a per-existing condition to her back.

[82] The Claimant's position is that prior to the fall she was asymptomatic of any pain and was self-sufficient, however since the incident she is in constant pain and requires assistance with her domestic chores. She contends that no evidence was led to show that the Claimant's condition was not a result of the trauma which she suffered in 2006. The court finds however that evidence was led which satisfies it, that the fall was not solely responsible for the Claimant's current position and that the Claimant had a pre-existing condition which cannot be ruled out as contributing to her present condition.

[83] The court is satisfied that since her fall in 2006, the Claimant has seen a number of medical doctors for her painful symptoms and she has also undergone various tests and scans for which she should be compensated. The amount requested is not excessive and the Claimant has justified the amount sought under this head, namely the sum of \$4,511.15.

[84] The court accepts that even though liability has been accepted by the Defendant, there is evidence of the patient's age, the fact that she was overweight and the fact that she suffered from a pre-existing condition which may have been exacerbated by the fall, which would have contributed to her present condition. So that while it is true that the

Claimant has to be compensated for whatever loss and damage she has suffered as a result of the fall, that is what she must be compensated for, nothing more, nothing less.

**Summary of the Awards**

[85] In summary the awards which the Defendant shall pay to the Claimant are as follows:

**GENERAL DAMAGES**

(i)	Pain Suffering and Loss of Amenities (PSLA)	\$32,500.00
(ii)	Past Domestic Assistance	\$ 1,440.00
(iii)	Loss of Earnings	\$25,000.00
(iv)	Transportation	<u>\$ 5,000.00</u>
	<b>Total General Damages</b>	<b><u>\$63,940.00</u></b>

**SPECIAL DAMAGES**

	Medical Expenses	<b><u>\$ 4,511.15</u></b>
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**Interest**

[86] The above awards will bear interest on the Special Damages at the rate of 4% per annum from the date of the issue of the Writ until today's date and thereafter at the rate of 6% per annum until payment and on General Damages at the rate of 6% per annum from today's date until payment.

**Costs**

[87] The Claimant shall have her costs certified fit for one Counsel to be assessed if not agreed.

**PAMELA A. BECKLES**  
Judge of the High Court