EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE

(CIVIL)

Claim Number: ANUHCV 2013/0231

BETWEEN:

MIRIAM MYERS

Claimant

AND

DICKENSON BAY HOTEL MANAGEMENT LTD

DBA SANDALS ANTIGUA

Defendant

Appearances:

Gina Dyer Munro and Cherissa Roberts Thomas for the Claimant
E. Ann Henry Q.C for the Defendant

2015: November 30

2016: March 8, July 11

August 18, October 6

ASSESSMENT OF DAMAGES

[1] GLASGOW, M: The Claimant (hereinafter Ms. Myers) filed the claim herein against her former employers, the Defendant (hereinafter Sandals) seeking compensation for personal injuries suffered further to a fall whilst she was at work on 14th April 2010. At the time of her fall Ms. Myers, who was employed with Sandals as a waitress, went to a refrigerator to retrieve some dessert to serve the guests of Sandals. It is her case that she slipped and fell on the wet floor of the refrigerator. The issue of the Sandal's liability for the incident leading to the injuries was resolved by way of consent order dated May 14, 2015. The parties thereby agreed that Sandals would pay

Ms. Meyers the sum of $17,700.00 as compensation for special damages. There was no agreement on the quantum to be paid to Ms. Myers as general damages and as such this ruling relates to that issue.

Relevant background

[2] After Ms. Myers' fall she was taken to the Mount St. John's Medical Centre where she was treated for soft tissue injury and backache. She was placed on medical leave for about 2 weeks. After 2 weeks, Ms. Myers complained of continued pain and went to see a private physician, Dr. K.K Singh who placed her on further medical leave. Several visits to Dr. Singh were followed with a number of medical reports being sent to Sandals by the doctor regarding Ms. Myers' continued pain and disabilities. After consultations with Dr. Singh and overseas medical experts, Ms. Myers was diagnosed with '*L4/5 broad disc herniation with severe and degeneration of the L4/L5 disc*.' In June 2011, Dr. Singh recommended her retirement on medical grounds. This view was seconded by Dr. Ramcharan, the consultant physician in Trinidad, and on 27th July 2011 Ms. Myers was released from her employment with Sandals due to continued pain and suffering from her injuries which rendered incapable of performing her job. Dr. Ramcharan, in his medical report dated July 27, 2011 observed that Ms. Meyers' continued exposure to physiotherapy and pain medication had not serve to alleviate the pain and suffering she endured since her fall. She was diagnosed with a '*permanent partial disability of seven percent (7%) for her degenerate L4-L5 disc*.' Dr. Ramcharran recommended that '*her only option for management at this point would be an L4-L5 discetomy and fusion.*' The doctor however recorded the fact that Ms. Myers was not at '*eager to have this procedur*e.' In May 2014, Dr. Ramcharan estimated the cost of the surgery to be $108,000.00 (Trinidad and Tobago currency). The surgery has not been conducted to date. On 12th November 2015, Dr. Singh provided a further medical report in which he reiterated the permanent nature of Ms. Meyers' injuries and forecasted that her disabilities would increase as she grows older. The doctor commented that after 5 years Ms. Meyers ailed from the '*same pain and suffering and deterioration of overall general health*…'

Ms. **Meyer's** evidence and submissions on damages

[3] In her submissions Ms. Meyers asks the court to award her general damages under 3 heads of losses –

(1) Pain and suffering and loss of amenities

Under this head of loss, the court is asked to consider that Ms. Myers, who was 41 years old at time of the accident, continues to suffer with pain which has led to limitation in her daily activities. Repeated exposure to physiotherapy has not assisted. She has not worked since the time of her fall and she has difficulty obtaining further employment due to the state of her health. In her affidavit evidence filed November 18, 2015, Ms. Myers complains that her life has been so affected that she now depends on her sons to help her with laundry, take baths, use the toilet and to perform household chores. She cannot take the bus to travel to buy her groceries or to pay her bills. Her injuries have prohibited her from going to the beach, exercising, playing softball cricket and rounders. In fact she claims that her lifestyle is now sedentary since she cannot walk as she did before due to the pain. Her financial circumstances have been so diminished that she now relies on her son Michael Charles for financial aid. Michael Charles gave evidence by affidavit detailing these matters.

(2) Ms. Myers seeks damages under this head of loss in the sum of $150,000.00. The case of Aubrey Smith v Clavert Fleming[1] is submitted as authority for this proposal. The Dominican case of Bellot v Raffoul[2] where the claimant, Lisa Bellot suffered a whiplash injury and was awarded $40,000.00 as general damages for pain and suffering and loss of amenities is also submitted. Ms. Myers asks the court to award a greater sum than was granted in Bellot since that claimant did not suffer permanent injuries as those endured by her.

[1] Claim No AXAHCV2008/0050
[2] DOMHCV 2012/0360

Future loss of earnings

(3) The claim under this head of loss flows from Ms. Myers' inability to work from the time she was retired on medical grounds on 27th July 2011. At the time she was released from her employment her monthly income was $1364.26, amounting to a yearly income of $16,371.12. Had she retained her job, she would have retired at the age of 62 if all factors remained constant. She therefore seeks the income lost had it not been for her injuries. Again relying on the Aubrey Smith decision, Ms. Myers asks the court to apply a multiplier of 14 to her yearly income of $1364. 26 to make an award of $229,195.68.

Future medical expenses

(4) The estimated costs of the surgery as stated by Dr. Ramcharan are claimed under this head of loss. Ms. Myers further seeks a sum of $50,000.00 for follow up treatment, cost of a care taker, travel expenses for the surgery and attendant expenses. The case of Clarke v Nicholas et al[3] is provided as authority for the grant sought.

Sandals' response

[4] In its initial submissions filed before the hearing of the assessment, Sandals stated that it intended to take issue with the fact that Ms. Myers failed to heed the recommendation for surgery to repair the injuries she suffered[4]. In addition, Sandals, through its witness Veronica Charles, challenged the assertion that Ms. Myers would work until the age of 62 years. [5] Ms. Charles' evidence was that due to the nature of the tasks undertaken by waitresses, few worked beyond the age of 50 years (mid to late 40's opines Ms. Charles). The initial submissions acknowledge that, liability having been accepted, Ms. Myers is entitled to some damages but Sandals suggests that the award for pain and suffering and loss of amenities should be no more than $50,000.00. Sandals relies on the cases of Aubrey Smith, Celia Hatchett v FirstCaribbean International Bank et al[6] and Tobitt v

[3] DOMHCV 2004/0268
[4] Submissions for the defendant filed on April 5, 2016
[5] Affidavit of Veronica Charles filed on April 5, 2016
[6] BVIHCV 2006/0277

Grand Royal Antigua Beach Resort Ltd et al[7] as authorities for this view. Sandals proffers a multiplier of 5 to be applied when the court assesses the loss of future earnings.

[5] In its closing submissions filed on July 25, 2016, Sandals again made much of the fact that Ms. Myers has not undertaken Dr. Ramcharran's July 2011 recommendation that she undergoes surgery to repair her injuries. The argument is that Ms. Myers has not taken the requisite action to mitigate her losses. Under cross examination, Dr. Ramcharran did assert that while full recovery could not be guaranteed, the surgery would give relief as opposed to physiotherapy which had only a slim chance of yielding positive results at this time. Sandals says that[8]

> *having decided not to pursue the recommended course of treatment made by Dr. Ramcarran for no apparent reason… the Claimant's conduct in refusing to undertake the surgery was unreasonable and… the Defendant should only be required to bear that portion of loss as was caused by its breach of duty. It is submitted that the Claimant should be treated as bearing one-half of her loss based on the evidence of Dr. Ramcharran that the operation would have provided at least partial relief, if not full relief. This is most favorable to the Claimant as the surgery may well have resulted in full relief for the Claimant*.

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[6] Sandals also relies on the case of Aubrey Smith for the view that no award should be made for the future medical losses as there was no evidence that Ms. Myers would benefit from the surgery or that she intended to undergo the same

[7] Regarding pain and suffering and loss of amenities, the further submissions propose the approach taken by the court in Tobitt as the claimant in that case is said to have been afflicted with injuries similar to those suffered by Ms. Myers. Ms. Tobitt was 35 years old at the time of her injuries. She was awarded the sum of $50,000.00 for pain and suffering and loss of amenities. Sandals similarly argued that, Ms. Hatchett in the Hatchett case suffered injuries closely resembling those of Ms. Meyers. Ms. Hatchett was awarded the sum of $20,000. 00 for her pain and suffering and loss of amenities.

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[7] ANUHCV 2006/0026

[8] Submissions filed by Sandals on July 25, 2016 at paragraph 19 and 20

[8] In respect of the loss of earning capacity, Sandals posits that it is significant that there is no evidence before the court that Ms. Myers was previously employed and in what capacity. Such material, it is asserted, would assist the court to '*gauge' Ms. Myers' 'predisposition to being in employment*.'[9] Sandals submits further that the evidence that waitresses do not typically work beyond their 40s was not seriously challenged or contradicted. The court was therefore urged to find that Ms. Myers would not work beyond the age of 50. The court is to be guided in this exercise by the learning in the case of Alphonso and others v Ramnauth[10] where Singh JA stated the following

> *In determining the multiplier a court should be mindful that it is assessing general and not special damages. That it is evaluating prospects and that it is a once-for-all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident*

[9] If the foregoing submissions are accepted, Sandals calculates Ms. Myers' remaining years of employment as 9 years after her injuries sustained at the age of 41 years. A multiplier of 5 is suggested to be applied to the agreed multiplicand of $1364.26 to produce future loss of earning in the sum of $81,855.60. Having regard to Sandals' previously recited reasoning about Ms. Myers' failure to mitigate her losses, Sandals suggests that she is granted half of the sum proposed for pain and suffering, loss of amenities and loss of earning capacity.

Ms. Myers closing response

[10] Ms. Myers wholly disagreed with all of Sandals' contentions. In respect of the argument that she did not mitigate her losses due to her failure and/or refusal to undergo the recommended surgery, Ms. Myers says that no such finding can be made on the facts. Indeed she claims that she could not undergo the surgery due to her financial circumstances as the evidence shows that she has

[9] Supra, note 6 at paragraph 33
[10] (1997) 56 WIR 183 at 193

stopped receiving a salary, she is unable to work and that she does not receive any assistance by way of social security benefits. The facts are that her circumstances have not changed. Physiotherapy has not alleviated her plight and she is in need of the surgery. Sandals is said to have produced no evidence that Ms. Myers has refused to have the surgery. The Tobitt authority is distinguished from her case on the grounds that there was no finding in those proceedings that surgery was necessary.

[11] In respect of Sandals' position on her claim for future loss of income, Ms. Myers rejoined that the suggestion that a multiplier of 5 should be applied to her case went against both the evidence and the law as set out in the case of Alphonso v Ramnauth[11]. Ms. Myers provided the court with the case of Christopher v Samuels dba Samuels Richardson & Co[12] in which a multiplier of 12 was applied for a 44 year old claimant. When determining the multiplier, Ms. Myers response to Sandals' posture is that the court ought to reject Ms. Veronica Carlos's testimony that waitresses do not work beyond the age of 50 years. Ms. Carlos conceded that the early retirement of a waitress was usually a voluntary act. It is said that Ms. Carlos' evidence was diminished by Ms. Myers' assertion that she intended to work until retirement. Ms. Myers further claims that Ms. Carlos did not seriously challenge her assertion that there were other waitresses working at Sandals who were beyond the age of 50 years.

[12] Regarding pain and suffering and loss of amenities, Ms. Myers' response is that her pain and suffering have increased due to her inability to have the surgery performed. As such her circumstances are further distinguished from the Tobitt case and thus it is said that the case for a higher award than that made in Tobitt is further made out.

FINDINGS AND AWARD

[13] It is accepted by both sides that the object of an assessment of damages in cases of this sort is to arrive as[13]

[11] (1997) 56 WIR 183
[12] BVIHCV 2008/0183
[13] Lord Blackburn in Livingstone v Rawyards Coal Co (1880) 5 App. Cas. 25 at 39

nearly as possible … to that sum of money that will put the party who has been injured, who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[14] In respect of general damages, it is equally now commonly accepted that the court will consider the quantification of such damages along the five guidelines outlined in Cornelliac v St. Louis[14] namely (a) the nature and extent of the injuries sustained; (b) the nature and gravity of the resulting physical disability; (c) the pain and suffering endured; (d) the loss of amenities and (e) the impact on the claimant's pecuniary prospects.

[15] In terms of the nature and extent of the injuries suffered and the resulting physical disability, the consensus of the various medical reports is that Ms. Myers suffered serious spinal injury in the area of the lower back. As early as July 2010, a few months after her fall, Dr. Singh observed in his medical report that she suffered from multiple levels of disc herniation at L3/L4 and L5/S1 and recommended that she visit a neurosurgeon overseas to verify if surgery was necessary. The consultant physician advised quite early in November 2010 that she ailed from ' *L4-L5 broad disc herniation with severe and (sic) degeneration of the L4-L5 disc'*.[15] He recommended a strict course of physiotherapy and weight loss. Ms. Myers was to avoid lifting heavy objects, sitting for long periods and falls or accidents. There is evidence that at the time of this latter report, Ms. Myers was already undertaking some physiotherapy which, evidently, had not served to significantly improve her health[16] A follow up visit to the consultant physician in July 2011 did not reveal any improvements in her state. Rather the doctor recited the lack of improvement of her condition through physiotherapy and he declared her unfit to work. The doctor recommended that surgery would be the only option for 'management' and declared Ms. Myers 7 percent permanently disabled. As recent as November 2015, a further review of Ms. Myers by Dr. Singh paints a picture of lack of progress and reiterates her permanent disabilities. The need for the recommended surgery was repeated in that report. Ms. Myers testified also testified of the resulting physical limitations and the impact on her lifestyle.

Pain and suffering and loss of amenities

[14] (1964) 7 WIR 491

[15] Medical report of Dr. Ramcharran dated 1 November 2010

[16] See paragraph 27 of Ms. Myers' affidavit filed on November 18,2015 and receipts for visits to Dr. Allred, chiropractor

[16] Regarding pain and suffering and loss of amenities, the details of these items have been extensively set out above. While no serious challenge has been made to the evidence of the extent of the pain and suffering endured by Ms. Myers and which she continues to endure, the parties are worlds apart on the sums to be awarded for this head of loss. It is often repeated that[17]

> *The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases, as represents the court's best estimate of the plaintiff's general damages*

Harriprashad J put it this way in Darrel Christopher v Benedicta Samuels dba Samuels Richardson & Co.[18]

> *It is obvious that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff's necessary medical care, operations and treatment.*

[17] The parties have supplied the court with a number of authorities which I have considered.

(1) In the Aubrey Smith case, the sum of USD 45,000.00 or ECD 122,260.50 was awarded for pain and suffering and loss of amenities. The claimant in that case who was 57 years old at the time of the accident suffered serious injury to the neck and spine. His injuries significantly affected his quality of life as he suffered from persistent debilitating pain. He could not stand, sit or sleep at nights. His conjugal relations with his wife were hampered as well. The chronic pain and limited mobility with concomitant severe restrictions on his lifestyle worsened after some surgical intervention;

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[17] Wells v Wells [1998] 3 All E R 481 at 507
[18] BVIHCV2008/0183 at paragraph 61

(2) In Bellot v Raffoul, the claimant suffered soft tissue injuries to the neck, back and left shoulder. The claimant's condition affected her sleeping, driving, exercise and posture at work. After examining all the facts, the court found that the claimant's injuries were not very severe. An award of $45,000.00 was given for pain and suffering and loss of amenities;

(3) The two abovementioned authorities are provided by Ms. Myers to buttress her request for an award of $150,000.00 under these heads of losses. Sandals relies on the reasoning in the Aubrey Smith case set out above, Hatchett v FirstCaribbean et al and Tobitt v Grand Royal Antiguan Resort Ltd et al to propose the sum of $50,000.00.

(4) In Hatchett, a 46 year old claimant was diagnosed with fractured C3 vertebrae without displacement of her cervical spine and central disc herniation of her lumbar L5/S1 vertebrae with degenerative disc disease at L4/L5 disc level. There was evidence of continued severe pain and restrictions in normal activities like bending. No evidence was led as to loss of amenities but the court found that in all the circumstances Ms. Hatchett would be affected in the usual physical activities performed by a person of her age. Surgery was considered as a possibility. The court awarded the sum of USD 20,000.00 or ECD 54,338.00 for pain and suffering and loss of amenities;

(5) In Tobitt, a 35 year old claimant was diagnosed with prolapse of lumbar inter-vertebral disc/lumbo-sacral disc with diminished sensation in the dermatone distribution of L5-S1. Ms. Tobitt was found to be 8% permanently disabled with a recommendation that future surgery may be required as her condition deteriorates in the future. There was evidence of continuing pain, discomfort and the negative impact on the claimant's lifestyle and future prospects. No evidence was led of a recommendation for surgery at the time of the assessment. An award of $50,000.00 was granted for pain and suffering and loss of amenities.

[18] The assessment conducted in Christopher v Samuels dba Samuels Richardson & Co on the amount to be awarded for pain and suffering and loss of amenities has lent further assistance to this exercise. Mr. Christopher who was 44 years old at the time of the accident suffered serious

spinal injury and a fracture to the tibia. His injuries left him with significant permanent disability and chronic pain which together greatly altered his ability to live a functional life. I observe that the medical professional in Mr. Christopher's case found that, like Ms. Myers' case, the limiting effects of his injuries could not be remedied without some surgical intervention. In making the award of USD 60,000.00 or ECD 163, 014.00 for pain and suffering and loss of amenities, the learned judge considered a number of authorities with similar facts. I extract a few of those cases which I find to be of some assistance to the present assessment.

(1) Cedric Dawson v Cyrus Claxton[19], the award for pain and suffering and loss of amenities was USD 36,000.00 or ECD 97,808.40. The claimant was 38 years old claimant and suffered C3 – C4, C4- C5 disc herniation resulting in severe back pain which hampered his ability to work as a mechanic;

(2) Daphne Alves v the Attorney General[20], where an award of USD 35,000.00 or ECD 95,091.50 was made to a 35 year old for pain and suffering and loss of amenities. The claimant's injuries were L4-L5 annular dics tear, S1 joint arthropathy – discogenic disease of the lumbar spine and lumbar facet joint syndrome. The claimant was in constant pain, could not sit or lie on her back for long periods, walk for long distances or carry heavy weights.

[19] I would agree with Ms. Myers that the Hatchett and Tobitt cases are not particularly helpful as guides to making an award under this head of loss. In particular, the injuries in both cases, while serious, were not as severe to produce a firm recommendation for surgery to remedy or alleviate the prevailing state of health of the claimants in those cases. Further, in Hatchett, no evidence was led of loss of amenities as opposed to this case where there is cogent and uncontroverted evidence of Ms. Myers' unalleviated pain and limitations. In all the circumstances, I find that the facts and assessment in the Aubrey Smith and Darel Christopher authorities bear a closer resemblance to the circumstances of the present ruling. Ms. Myers is now 46 which age is closer to the age of the claimant in the Christopher case. Having weighed all the circumstances of her

[19] BVICAP 2004/0023
[20] BVIHCV2006/0306

present condition as highlighted above in this ruling, I am of the view that a fair award of $95,000.00 should suffice as compensation for her pain and suffering and loss of amenities.

Future loss of earnings

[20] Ms. Myers is to be compensated for the loss of income she will suffer in the future as a consequence of her injuries. As with most assessment of general damages, this quantification is conducive to imprecision. Ms. Myers' future prognosis for recovery and all the probabilities of her finding employment must be some of the matters thrown into the mix. The usual method of assessment of this loss is to find the net loss of income which is used as a multiplicand. The multiplier will be the assessed number of years the loss is expected to subsist. If the injury is to affect the claimant for the rest of his life, the multiplier will be deduced by assessing the number of years he is expected to have worked if he had not been injured.

[21] Haynes J put it this way in Heeralall v Hack Bros Constructing Co Ltd and another[21]

> *Based on these assumptions the method of assessment evolved under this head is described in MAYNE AND MCGREGOR ON DAMAGES (12th edn), p 767, thus:*
> *The basis is the amount that the plaintiff would have earned in the future and has been prevented from earning by the injury. This amount is calculated by taking the figure of the plaintiff's annual earnings at the time of the injury less the amount, if any, which he can now earn annually, and multiplying this by the number of years during which the loss of earning power will last, which, if the injury is for the plaintiff's life, will re-quire a calculation of the period of his expectation of working life. The resulting amount must then be scaled down by reason of two considerations, first that a lump sum is being given instead of the various sums over the years, and sec-ond that contingencies might have arisen to cut off the earnings before the period of disability would otherwise come to its end. The method adopted by the courts to scale down the basic figure is to take the figure intact of present annual earnings and reduce only the multiplier. And if the present annual earnings are liable to increase or decrease in the future, then the practice of the courts is still to allow for*

[21] (1977) 25 WIR117 at pages 132 - 133

this not by changing the figure of present annual earnings but by altering up or down, the multiplier.'

In practice this method has been applied in one or the other of two ways. In Jamaica Omnibus Services, Ltd v Caldarola ((1966), 10 WIR 117) (supra) and Khan v Bhairoo ((1970), 17 WIR 192) (supra) in each case the trial judge used the full estimated remaining working life as multiplier, then "scaled down" by reducing the resulting sum by one-third and awarded the remaining two-thirds as compensation under this head-this is one way. The other approach was used by GEORGE J (as he then was) in the local case of Sarju v Walker ((1973), 21 WIR 86). His Honour there "scaled down" for "imponderables" by taking a reduced multiplier of 15 instead of the full estimated working life of the plaintiff of 23 plus; and in Burrowes v Chandler ((1974), 151/72-18 July 1974) MITCHELL J, "scaled down" similarly, using a reduced multiplier of 14 for a plaintiff of 36, whose remaining working life he fixed at 60.

[22] The parties do not dispute the evidence that Ms. Myers has been put out of employment by her present state. There has been no issue taken with the medical opinion that she will be disabled for some time and that this will impact her ability to gain future employment. The parties have likewise achieved consensus on the applicable multiplicand which is the monthly sum of $1364.26 paid by Sandals to Ms. Myers at July 2011. Sandals' position on mitigation will be addressed below

[23] There is great variance on the appropriate multiplier. In choosing a multiplier, the court is reminded that[22]

> *it is assessing general and not special damages. That it is evaluating prospects and that it is a once-for-all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident*

[24] The various arguments and cases presented by the parties on the multiplier have been set out above. Sandals says a multiplier of 5 is adequate in all the circumstances. Ms. Myers suggests a

[22] Alphonso v Deodat Ramnauth (1997) 56 WIR 183 at 193

multiplier of 14. I note that Sandals' contention on the applicable multiplier makes much of the fact that, as claimed by Ms. Carlos in her evidence, many waitresses do not work beyond the age of 50. I must reject this evidence as it is a bland assertion without any factual underpinning by statistics or records of the company which could have been easily placed before the court. Further, there was not much by way of contradiction by Ms. Carlos of the equally unsubstantiated claim by Ms. Myers that there were other waitresses presently working at the company who were older than 50 years. I do not attach much weight to this latter testimony by Ms. Myers but I find it somewhat telling that Ms. Carlos' cross examination conceded that she could not say definitively if there were other waitresses employed beyond the age of 50 years. In fact, in reply to the question that a waitress by the name of Joyce was working beyond the age of 50, Ms. Carlos's response was that she was not aware of her exact age but she agreed that she was probably about 55 years old.

[25] It was equally telling Ms. Carlos conceded that a waitress' retirement before the age of 50 or thereat would be a voluntary act due to the nature of the job which required standing for long hours. Ms. Myers put this issue to rest by her testimony that she intended to work until the age of 62 had it not been for her injuries. I therefore find that, Ms. Myers who was 41 years old at the time of her fall, would have worked until the age of 62 years had it not been for the accident which placed her in her present difficulties. Further, I find that the medical evidence confirms that the extent of her injuries would negatively hamper her ability to find the same or other employment in the future. Taking all these circumstances into account and having regard to the contingencies and imponderables of life and adjusting the multiplier for the fact that Ms. Myers will be receiving a present lump sum, I will apply the multiplier of 12 to Ms. Myers' case. The award for future loss of income is therefore $196,453.44

Sandals' views on mitigation

[26] In its closing written submissions, Sandals relied on the case of Geest Plc v Lansiquot[23] to argue that Ms. Myers should only be awarded half of her claim to the sums granted for pain and suffering and loss of amenities and loss of future income. It is said that Ms. Myers's failure to have the recommended surgery for '*no apparent reason'* must be taken to mean that she has refused to do

[23] [2002] UKPC 48

so the same and she has therefore failed to mitigate her losses. Accordingly, she must therefore bear the damages for some of her loses.

[27] In Geest, the Privy Council restated a defendant's obligation to show not only that the claimant failed or as is said in this case, refused to mitigate the losses incurred but that this conduct was unreasonable. For my part, I agree that Ms. Myers has failed to have the surgery that all the doctors recommend as her only viable option for the 'management' of her ailments. I would however disagree that she has refused to do the surgery. On the totality of the evidence presented, it is clear to me that Ms. Myers has not undergone the surgery owing to impecuniosity. Dr. Ramcharran did note in his July 2011 medical report that she was not eager to have the surgery at that time. No reasons were stated in the report for the lack of eagerness but Sandals did not actively pursue the reasons for this in their cross examination of Ms. Myers or the doctor. Rather, it remains that Ms. Myers that she is very distressed about her present state and that she has not taken the recommended surgery because of her present financial limitations. Sandals has failed to demonstrate that Ms. Myers did not act to mitigate her losses.

[28] Before departing from the discourse on mitigation, I observe a salutary statement on pleadings reiterated by the Privy Council in Geest which I recite in full

> *This assessment proceeded without any pleading and without any evidence beyond the plaintiff's affidavit and oral evidence. This is not unusual. Many such assessments proceed in a relatively informal manner. The object is to ascertain the plaintiff's medical history since the accident and to assess the plaintiff's continuing symptoms and long-term prospects, with a view to putting a money value on the plaintiff's pain and suffering, loss of amenity and financial loss. Had there been pleadings, however, it would have been the clear duty of the company to plead in its defence that the plaintiff had failed to mitigate her damage and to give appropriate particulars sufficient to alert the plaintiff to the nature of the company's case, enable the plaintiff to direct her evidence to the real areas of dispute and avoid surprise (see Bullen & Leake & Jacob's Precedents of Pleadings, 14th ed (2001), vol 2, page 1103, paragraph 71-13; Rules of the Supreme Court, Order 18 rule 12(1)(c), Order 18 rule 8(1)(b); The Supreme Court Practice 1999 (published September 1998), vol 1, paragraphs 18/7/4, 18/7/11, 18/8/2, 18/12/2, 18/12/13). In this instance, no*

complaint was made by the plaintiff's leading counsel when counsel for the company advanced this argument, perhaps because he had been warned in advance, and no point was taken in the Court of Appeal or before the Board on the procedure adopted. It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter.

[29] On this view of the procedure, I think it would suffice to say that in this case Sandals did not indicate its stance on mitigation either by way of pleadings or by notice by way of letter.

Future Medical expenses

[30] Sandals opposes any award under this head of loss on the grounds that Ms. Myers has failed to show that '*she might have the surgery'.* Sandals similarly ask the court to find that the surgery will not have any useful benefit due to Ms. Myers' delay in undergoing the same. Sandals argue that the doctors have not advocated the need for surgery at this time. I have already found that there is no evidence to support Sandals' position on Ms. Myers's disposition to having the surgery. My view of the evidence is that she is inclined to undergo the same but she is hampered in her efforts by her lack of financial resources. With respect to the efficacy of surgery at the present time, Dr. Singh stated under cross examination that he examined Ms. Myers before writing his report of 12 November 2015 in which he reiterated that Ms. Myers' health has not improved and lamented the fact that the recommendation for surgery to address the injuries has not been performed to date. There was no retreat from the doctor under cross examination. Dr. Ramcharran did make the point that it would be difficult to say if the surgery would have any present impact as he had not seen or examined Ms. Myers since July 2011. Sandals asks the court to follow the reasoning in the Aubrey Smith case to find that Ms. Myers should not be awarded any future medical expenses as she has not proved that the surgery was necessary and that she would undergo the same. Based on what I have said before about Ms. Myers' disposition to having the surgery I find that this contention has not been made. It is this court's view that Ms. Myers has demonstrated on her case

that the surgery is necessary and that she intends to undergo the same if placed in a sufficient financial position to do so. My view on this aspect of the assessment is fortified by the Privy Council's approach to the issue in Seepersad v Persaud[24]

> *The evidence about the possibility of the appellant's requiring surgery in the future was equivocal. Mr Ramroop said that disc herniation could be treated surgically and that it was possible that the appellant might need spinal fusion surgery if instability were found. The latter was major surgery, and he mentioned costs ranging between $25,000 and $65,000.*
>
> *It is not possible to form an accurate and verifiable estimate of the future cost of medical treatment and medication, because so much depends on how the appellant progresses in the future. It was not challenged that he had incurred such expense in the past, as is shown by the inclusion in the agreed special damage of a significant sum for medical treatment and medication. It appears that there is likely to be some continuing expense, even if he improves significantly as time goes on. In the Board's opinion the most appropriate way to deal with this item is to allow a figure which will reflect the possibility of his incurring future expense of this type, on similar lines to the well-established approach to valuing loss of employment capacity*

[31] In Seepersad, the Privy Council therefore awarded the sum for future medical expenses on the evidence that it was possible that the claimant would incur such expenses in the future. In Ms. Myers' instance, surgery was firmly recommended at the time of assessment. I would also make the award based on the totality of the evidence which suggests a strong possibility that Ms. Myers would require surgery in the future to address her present injuries. The sum of $45,740.29 (TT$108,000.00) is awarded for future medical expenses.

[32] Ms. Myers asks me to award the sum of $50,000.00 for travel for the surgery, follow up treatments, a care taker after surgery and attendant expenses. There is no medical evidence presented as to whether follow up medical visits or palliative care for pain would be necessary after surgery. But I am satisfied that Ms. Myers would incur some expense to travel for the surgery as there is no contradiction of the medical evidence that she must travel to Trinidad and Tobago to perform the

[24] (2004) 64 WIR 378 at page 388

same. I will add to this sum, an award for home care as she would require some domestic assistance with ambulation and other daily activities for some time while she convalesces post-surgery. This award includes a sum for miscellaneous medical expenses. In the Christopher case, in the absence of evidence on such costs, the court made a nominal award for future miscellaneous medical expenses plus a nominal sum for housekeeping services where it was apparent on the facts that the claimant would incur such expenses[25]. A nominal award of $30,000.00 is granted under this head of the claim.

Total award

[33] It is hereby ordered that Ms. Myers is granted the following as general damages –

(1) Pain and suffering and loss of amenities	$95,000.00
(2) Future loss of income	$193,454.65
(3) Future medical expenses	$45,740.29
(4) Future travel expenses and home care	$30,000.00
(5) Interest on pain and suffering and loss of amenities from the date of service of the writ (October 2, 2013) to today's date at 5% per annum	$9525.52
(6) Prescribed costs on award	$52,308.69
(7) Total award (interest is to be applied to the Total award from todays' date at the rate of 5% per annum)	$426,029.15

.....

RAULSTON GLASGOW

MASTER

[25] See Grant v Motilall Moonan Ltd. (1998) 43 WIR 372