[2025] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00026

BETWEEN	**JAY-ANN O'CONNOR**	**APPELLANT**
AND	**DELSHA HYMAN**	**RESPONDENT**

David Johnson instructed by Samuda & Johnson for the appellant

Joseph Jarrett instructed by Joseph Jarrett and Co for the respondent

19 February, 8 April 2024 and 30 May 2025

Civil procedure – Assessment of damages – Personal injury – Damages for future medical care and loss of earning capacity – Claim for future medical care not pleaded – Whether failure to plead damages for future medical care fatal to award of damages – adequacy of evidential basis for awards of damages for future medical care and loss of earning capacity – Whether award of damages for loss of earning capacity inordinately high – Civil Procedure Rules, 2002, rr. 8.9 and 8.9A

Costs – costs for expert witnesses' attendance at court – Whether judge erred in ordering the losing party to pay the costs of the attendance of experts commissioned by the successful party – Civil Procedure Rules, 2002, rr. 32.10 and 64.6(1), 64.6(3), 64.6(4)(b)

Interest on award of damages – Discrepancy between formal order granting interest on general and special damages and the order made in the judge's reasons for judgment – Error in formal order – Power of the Court of Appeal to correct the error – Civil Procedure Rules, 2002, r 42.10(1) – Court of Appeal Rules 2002, r 2.14

MCDONALD-BISHOP JA

[1] This is an appeal from the decision of Thomas J ('the learned judge') delivered on 19 February 2019, following an assessment of damages consequent upon the entry of judgment on admission. The learned judge awarded Delsha Hyman ('the respondent'), among other reliefs, damages in the sum of $2,000,000.00 for future medical care and $2,500,000.00 for loss of earning capacity. She also awarded costs to the respondent, which included costs for the attendance of two doctors called by the respondent at the trial. It is these specific awards that form the subject matter of the appeal.

The background

[2] The proceeding in the Supreme Court from which the appeal emanates has its genesis in a motor vehicle collision that occurred on 5 August 2014 in the parish of Saint Andrew. The accident involved two motor vehicles, one driven by the respondent and the other by Jay-Ann O'Connor ('the appellant'). On 8 October 2014, the respondent filed a claim form with particulars of claim in the Supreme Court against the appellant. In the claim form, the respondent alleged that the appellant negligently drove her vehicle, causing it to collide with the rear of the respondent's vehicle, thereby injuring both the respondent and her minor child. The respondent also initiated proceedings against the appellant as the mother and next friend of her child. The respondent particularised her injuries resulting from the collision as follows:

(a) pain and shock;

(b) head injuries;

(c) dizziness;

(d) tenderness in the right side and back of her head and neck;

(e) tenderness over the upper chest vertebral spines with pain radiating down to the spines and lower back; and

(f) whiplash injury to the neck and spine, especially of the upper thoracic spine with scalp contusion and brain concussion.

[3] She tabulated her claim in these terms:

General Damages to be assessed	$
Amount of Claim/Special Damages (accruing)	$65,760.00
Together with interest at 6% per annum to the date of judgment	
Court fees	$2,000.00
Attorney's Fixed Costs on issue	$12,000.00
Total amount	$**79,760.00**

[4] The appellant did not contest liability for the collision. However, on 13 November 2014, she filed a defence limited to quantum in which she disputed that the collision had caused the respondent's injury, loss, and damage. The appellant also asserted in her defence that the respondent was required to mitigate the alleged injury, loss and damage. She also contended that the respondent did not receive medical treatment between 12 August 2014 and the filing of the claim.

[5] Judgment was entered on admission on 8 April 2015, with damages to be assessed.

[6] After receiving evidence from the respondent and four medical doctors (two called by each party), the learned judge considered that there were two issues that she needed to resolve, which were:

> "(a) Whether the medical evidence can be reconciled in relation to the claimant's claim for pain and suffering, loss of amenities, future care and loss of earning capacity; and
>
> (b) Where there is conflict in the evidence of the medical doctors which evidence should I accept."

[7] Following the hearing of the matter, the learned judge awarded judgment in favour of the respondent in the following terms contained in the formal order:

> "1. General Damages of $1,600,000.00 less interim payment of $850,000.00 plus interest at the rate of 3% per annum from the 5th August 2014 to the date of Judgment.
>
> 2. Cost of Future Care lump sum of $2,000,000.00
>
> 3. Loss of Earning Capacity lump sum of $2,500,000
>
> 4. Special Damages of $234,600.00, plus interest at the rate of 3% per annum from date of service of 18th October 2014 to date of Judgment.
>
> 5. Costs to [the respondent] to be agreed or taxed and to include Dr. Phillip Waite and Dr. Jerome Stern."

The appeal

[8] Aggrieved by most aspects of the order, the appellant filed notice and grounds of appeal on 26 March 2019, challenging the decision. There were nine grounds filed. For clarity and convenience, I have distilled five issues from the grounds as filed and will treat with them accordingly. Therefore, the issues for this court's consideration are:

(1) Whether the learned judge erred in awarding the sum of $2,000,000.00 for future medical care in circumstances where it had not been expressly pleaded in the particulars of claim (ground 1).

(2) Whether the learned judge erred in awarding damages in the sum of $2,000,000.00 for future medical care on the evidence adduced and in the sum awarded (grounds 1, 2, 3 and 9).

(3) Whether there was sufficient evidence before the learned judge to justify the award of $2,500,000.00 for loss of earning capacity and, if so, whether the award is inordinately high (grounds 4, 7 and 9).

(4) Whether the learned judge erred in ordering that the costs associated with the attendance of the medical experts commissioned by the respondent were to be borne by the appellant (grounds 5 and 6).

(5) Whether the learned judge erred in awarding interest on general damages to be from the date of the accident and on special damages to be calculated from the date of service of the claim (ground 8).

Standards of review

[9] The issues which are the crux of this appeal (issues (1) – (4)) concern the learned judge's award of damages and costs following an assessment of damages.

[10] Regarding the award of damages, the recommended standard of review established by Greer LJ in **Flint v Lovell** [1934] All ER Rep 200, at pages 202 – 203, and accepted by his court for decades, remains applicable; that is to say:

> "... this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum.
>
> **To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled**." (Emphasis supplied)

[11] More recently in this court, Panton JA (as he then was) in **The Attorney General v Derrick Pinnock** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 93/2004, judgment delivered 10 November 2006, at para. 6 opined as follows:

> "6. ...Furthermore, it goes without saying that the Court of Appeal, while giving due regard and respect to awards made by the judges of the Supreme Court, is not bound by such awards or their perceived pattern. **The important point to be noted is that an award will not be disturbed by this Court unless it is either**

> **inordinately high or inordinately low, or there is a breach of some other principle of law**." (Emphasis supplied)

[12] The awards of damages under the different heads were also informed by the learned judge's findings of fact and inferences drawn from facts she found proved. In this regard, the duty of this court is not to disturb the learned judge's decision because it would have arrived at a different decision. It can only justifiably interfere with the learned judge's findings of fact where she is found to have been plainly wrong (see **Watt or Thomas v Thomas** [1947] AC 484).

[13] With regards to the exercise of the learned judge's discretion in the award of costs, which is now being challenged, the court is guided by the pronouncements of Morrison JA, as he then was, in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 at para. 20, where he adopted Lord Diplock's well-known caution in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046 ('**Hadmor**'). According to Morrison JA, this court will only set aside the exercise of discretion by a judge of first instance where it,

> "…was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

Issue (1) – whether the learned judge erred in awarding the sum of $2,000,000.00 for future medical care in circumstances where it had not been expressly pleaded (ground 1).

[14] The respondent sought damages for future medical care on the basis that she will require painkillers in the form of injections every month at a cost of $45,000.00. However, counsel for the appellant, Mr David Johnson, correctly highlighted that the respondent's particulars of claim made no mention of the need for and the costs of injections or that she was claiming damages for future medical care. This was the case, although she alleged in her witness statement that the injections were required to treat the discomfort she experienced as a result of her injuries.

[15] In line with Mr Johnson's crucial observation, the particulars of claim specified the special damages; however, there was no indication of any head of losses constituting a claim for general damages. Regarding general damages, the particulars of claim only bore this notation as part of the prayers "WHEREOF THE CLAIMANT CLAIMS: (i) General damages against the Defendant…".

[16] It was in the respondent's witness statement (that stood as her evidence-in-chief) that the claim for damages for future care in the form of the cost of injections first arose. These were her averments in the witness statement:

> "1.10 There are times when I have difficulty getting up from lying down and difficulty walking. On one occasion I have been away from work resting my back for two weeks. I cannot properly position myself to bathe and care for Tristan who is now seven years old without discomfort.
>
> 1.11 **I cannot afford the injections I need to treat the condition as it costs $45,000 per month**. **An interim payment will assist with this...**". (Emphasis supplied)

The question, therefore, arises regarding the legal ramifications of the claim for damages for future care, which was confined to the witness statement (the evidence) and not pleaded in the statement of case.

[17] The law governing pleadings in personal injury cases is well established. In the celebrated case of British Transport Commission v Gourley [1956] AC 185 at 206, Lord Goddard set out the distinction between general and special damages concerning pleadings in personal injury cases. He stated that:

> "In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. **Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation**

> **for loss of earning power in the future**." (Emphasis supplied)

[18] In McGregor on Damages (seventeenth edition) at paras. 1-033 and 1-035, the learned author, whilst recognising that there is "so much ambiguity in the use of the terms special and general damages", nevertheless explained that while special damages ought to be averred and proved, damages of a general nature ought to be averred and their quantification left to the jury. He stated that:

> "The third meaning of general and special damage concerns pleading. The distinction here is put thus by Dunedin in *The Susquehanna [1926 AC 655 at 661]* :
>
> > '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. **If the damage be general, then it must be averred that such damage has been suffered, but the quantification is a jury question**.'
>
> ...
>
> Here, in pleading, general damage is wider than its second meaning, for it includes losses the amount of which the law will not presume since this is capable of calculation, and **therefore evidence to assist the court in doing the calculation must be given if the plaintiff wishes to obtain substantial damages on the general head. Thus, in a personal injury case, loss of future earning capacity and future expenses are general damages in pleading, but the plaintiff must clearly give evidence of the amount**...". (Emphasis supplied)

[19] Within the framework of the procedural regime of the Civil Procedure Rules 2002 (the 'CPR'), one of the most authoritative pronouncements on the subject of pleadings for general damages comes from the Judicial Committee of the Privy Council in **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15 (**'Charmaine Bernard'**), a case on appeal from Trinidad and Tobago. The guidance from that case was subsequently followed by this court in **Alcoa Minerals of Jamaica Incorporated v Marjorie Yvonne Patterson (Court-appointed personal representative of the**

Claimant, the late ORITHIA HANSON deceased) [2019] JMCA Civ 49 (**'Alcoa Minerals'**).

[20] In **Charmaine Bernard**, the appellant, Ms Bernard (the claimant in the lower court proceedings) claimed damages in a fatal accident claim as the legal representative of the deceased, who she alleged was killed as a result of the respondent's negligence. She also sued the respondent's insurers. The Privy Council noted that "neither the claim form nor the statement of case gave any details of the claim for damages" (para. 2 of the judgment). Ms Bernard subsequently filed a list of documents that included receipts for funeral expenses, pay sheets relating to the deceased's wages and a witness statement. This was done after three case management conferences.

[21] In her witness statement, Ms Bernard named the undertakers who conducted the funeral arrangements and the associated costs. She attached a copy of the receipt for that item. She also gave details of the deceased's employment and his monthly income for a period and provided pay sheets for that period. She later filed a bundle of documents, which included the receipt for the funeral expenses and the pay sheets evidencing the deceased's income for the relevant period. In light of these inclusions in her witness statement, she applied for permission to re-amend her statement of case to include particulars of special and general damages relating to the new matters that were never pleaded. The application was opposed by the respondent.

[22] Permission was granted by the application judge for the further amendment of the statement of case. The Court of Appeal of Trinidad and Tobago overturned the application judge's decision, primarily based on a difference in the interpretation of rule 20.1(3) of the Civil Procedure Rules of Trinidad and Tobago (the 'TT CPR'). There is no equivalent to rule 20.13 in our rules. Nevertheless, the reasoning of the Privy Council dismissing Ms Bernard's appeal, and agreeing with the Court of Appeal of Trinidad and Tobago, remains relevant to our consideration of the pleading point raised in the instant case.

[23] Insofar as is relevant to the issue for resolution in this case, the Privy Council noted that an amendment of Ms Bernard's statement of case was required for the

general and special damages to be claimed. The Privy Council referenced rule 8.6 of the TT CPR, which is headed "Claimant's duty to set out his case", and which provides that the claimant must include in the claim form or in his statement of case a short statement of all the facts on which he relies. This rule is equivalent to rule 8.9 of the CPR and rule 16.4(1) of the England and Wales Civil Procedure Rules (the 'UK CPR'), as the Privy Council noted.

[24] Sir John Dyson SCJ, who delivered the judgment on behalf of the Board, cited the well-known pronouncements of Lord Woolf MR in **McPhilemy v Times Newspapers Ltd** [1999] 3 All ER 775 ('**McPhilemy**') at page 792J that:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to r 16, para 9.3 (Practice Direction – Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a *concise* statement of those facts is required."

[25] Dyson SCJ also referenced the case of **Perestrello v United Paint Co Ltd** [1969] 3 All ER 479, where Lord Donovan, in giving the judgment of the UK Court of Appeal, stated in part, at page 485I (para. 16 of the Privy Council's judgment):

> "**Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet…**

> The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses or loss of earnings, incurred prior to trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires it to be pleaded.
>
> **The claim which the present plaintiffs now seek to prove is one for unliquidated damages, and no question of special damage in the sense of a calculated loss prior to trial arises. However, if the claim is one which cannot with justice be sprung on the defendants at trial it requires to be pleaded so that the nature of the claim is disclosed**…
>
> … **a mere statement that the plaintiffs claim 'damages' is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendants are entitled to fair warning**." (Emphasis supplied)

[26] His Lordship directed that these observations by Lord Donovan "are applicable to Part 8.6 of the CPR as well as to Part 16.4(1) of the England and Wales CPR" (para 17 of the judgment). He then concluded:

> "17. …In the present case, there was nothing in the original statement of case to indicate the heads of general damages that were being claimed. In order to satisfy Part 8.6, it was necessary to amend the statement of case to make good that omission."

[27] Following a review of **McPhilemy** and other relevant authorities, including **Charmaine Bernard**, this court noted in **Alcoa Minerals** at para. [79]:

> "Having reviewed the authorities, it can be concluded that the application of the principle of **McPhilemy** does not obviate the requirement that the respondent's pleaded case should plead the full substance for which she seeks redress. Alternatively, it could be stated that the statement of case should include all the material facts necessary to prevent surprise and set out the extent of the dispute between the parties."

[28] Based on these authorities, it is safe to conclude that the claim for future medical care in the form of the costs of injections represents a specific type of loss, which is not a necessary and immediate consequence of the wrongful act of the appellant, and therefore cannot be presumed to naturally arise as damage. Accordingly, this item of prospective loss was such that the appellant would have been "entitled to a fair warning," and thus the appellant should not have been taken by surprise by the inclusion of the claim for such damages only in the witness statement.

[29] In considering this issue within the context of rule 8.9, I have noted that rule 8.9A of the CPR itself sets out the consequences of not setting out a case. It reads:

> "The claimant may not rely on an allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."

[30] It is noted that the learned judge did not purport to exercise her discretion under rule 8.9A of the CPR by granting permission to the respondent to rely on what was averred in her witness statement regarding future medical care. Evidently, the learned judge believed that the claim for future medical care and the amount being claimed did not need to be pleaded as a matter of law. However, I would hold that given (a) the nature of the claim, which concerns the future costs of injections that the appellant would not have known about prior to its emergence in the witness statement; (b) the appellant's objection to the claim being unpleaded; (c) the amount being sought; and, ultimately; (d) the weak evidential base underlying such a claim (an issue examined in detail below), the learned judge would have failed to properly exercise her discretion in permitting the respondent to advance the unpleaded claim for damages for future medical care.

[31] It is the fundamental requirement of fairness that has led the authorities to hold that if a claimant intends to claim under certain heads of damages, then a defendant ought to be given prior notice of such an intention in the claimant's pleadings, so that he can properly put himself in a position to meet the case against him. This, as case law has established, pertains to a claim involving a particular kind of loss that is not an immediate or necessary consequence of the wrongful act and for

which a defendant is entitled to a fair warning, even if that loss falls to be classified as part of general damages. In other words, pleading of the loss or damage is required where the claim is one "which cannot with justice be sprung on the [defendant] at trial".

[32] It then follows that, in the context of this case, where monthly treatments involving injections costing $45,000.00 did not arise as a necessary or immediate consequence of the appellant's negligence, prior notice of the existence of such future costs was required in the respondent's statement of case. Therefore, while the cost of future medical care is regarded as general damages, this designation does not mean that there is no requirement for it to be expressly set out in a claimant's statement of case as a pleaded item of damages.

[33] In the premises, since the claim for future medical care was not pleaded in the instant case, an amendment would have been required to rectify the defect in the statement of case. Consequently, the respondent could have sought to amend the pleadings to align them with the evidence. This was not done. Ultimately, the respondent sought to prove what she had not pleaded. This contravenes the long-settled common law principle in civil proceedings that a party is bound by its pleadings.

[34] In the text, "Harrisons' Assessment of Damages" [Cases on Personal Injury and Fatal Accidents Claims] (2nd edition), the learned authors cautioned legal practitioners about the extreme care that must be taken when drafting pleadings for future medical care. They warned that (page 46):

> "Extreme care should be exercised in the drafting of pleadings under this head. Once damages are assessed, the case cannot be reopened and the claimant will have to bear these future costs if they were not pleaded. One such instance arose in the case of **Norman Beckford v Jasmine Barrett and Anor.** SCCA 90/91 delivered 8 November 1993. When the case came up for trial four years after the accident had occurred, the plaintiff was still suffering from the injuries and would continue to suffer for some time… However due, to an oversight by the plaintiff's Attorney, no claim for future medical care expenses was alleged in the pleadings. It was most unfortunate that the

> plaintiff could not be compensated under this head of damages."

[35] On the strength of the authorities, the failure to plead this item of damage and the absence of an amendment to the statement of case to rectify the omission have rendered the damages for future medical care irrecoverable.

[36] Therefore, the appeal succeeds on issue (1).

Issue (2) – whether the learned judge erred in awarding damages in the sum of $2,000,000.00 for future medical care on the evidence adduced and in the sum awarded (grounds 1, 2, 3 and 9).

[37] It logically follows that the conclusion on the pleading point would obviate the need for the court to consider the second aspect of the appeal concerning the award of damages for future medical care. This second aspect of the complaint is that the evidence on which the award was based was insufficient to justify it, and the award is, in any event, excessively high. According to my reasoning regarding issue (1), even if the evidence were sufficient, that would not alter the finding that the claim for future medical expenses must fail because it was not pleaded.

[38] However, given the importance of this question to the overall administration of justice regarding the nature and type of evidence required for the respondent to discharge the evidential burden cast on her to establish her claim for future medical care, I consider it necessary to address this issue.

[39] The respondent's evidence regarding the alleged need for injections was to this effect in her witness statement:

> "**I cannot afford the injections I need to treat the condition as it costs $45,000 per month**, **an interim payment will assist with this**
>
> …**I am seeking damages for future medical expenses**." (Emphasis added)

On cross-examination, she testified:

> "The estimate of $45,000 per month is from Dr. Dr. [sic] Waite's office the doctor who would give me the injection. I spoke to him. He told me it would cost 45,00 [sic] per

month. I did not ask the Doctor to prepare a document confirming this cost…".

[40] Regarding that claim, the pertinent findings made by the learned judge in making her assessment after a review of the evidence were as follows:

(1) "The factors that are taken into consideration in an assessment under this head are; the time period for when the help will be required and the cost. However, the lack of an exact time period for the duration of the extra help/future care is not a bar to recovery under this head." (see para. [68])

(2) "[69]…**However, she has produced no documentary or supporting evidence of this cost. She does not even appear to be certain of this cost. On cross examination, she said it was someone at Doctor Waite's office who gave her an estimate of the cost of $45,000.00 per month. She has not said who that person is. At the time of her testimony in court it is clear that she is still not certain of the cost…She admits on cross examination that she did not ask any of the doctors to prepare any document concerning this cost**…" (see para. [69]) (Emphasis supplied)

(3) "Doctor Lawson found that her pain persists and does interfere with her ability to work as a cosmetologist but does not stop her completely. Therefore, based [sic] the evidence of Doctors Waite and Lawson I find that the pain in Ms. Hyman's lumbar spine persists. **Consequently, I have no doubt that Ms. Hyman will continue to need future medical care as it relates to the persistent pain in her lumbar spine. Her evidence is that the pain killer cost [sic] $45,000 per month. She has been challenged on this cost. She has produced no documentary or other viva voce evidence in support of this claim. Additionally, I have no**

precise evidence as to the period of time for which this treatment will be required." (see para. [71]) (Emphasis supplied)

(4) "…it is my view that in the instant case that 'justice demands that there should be an award" in the nature of a lump sum. In determining the sum to be awarded I take into consideration the evidence of Dr Waite, which I accept that there will be periods of remission. I also take into consideration the fact that his impairment rating for the lumbar spine between the 24th of September to the 16th of December had been reduced from 8% to 7%. This is indicative of an improvement, though slight in the state of Ms. Hyman's injury. Were this trend to continue it is expected that there will be a gradual reduction in her pain and also the need for future medical care. Consequently, it is my view that an award of 2 million for future care is reasonable." (see para. [75])

[41] As seen in the excerpts above, despite the learned judge's acknowledgement of the deficiency in the respondent's evidence and the absence of medical evidence regarding the necessity for injections as part of her future medical care, she awarded a lump sum of $2,000,000.00 for that head of damages.

[42] In response to the challenge regarding the insufficiency of the evidence, Mr Jarrett argued that the respondent's evidence was adequate to justify the award for future medical care for her pain. He maintained that disregarding the respondent's evidence concerning future medical care would be contrary to the "overriding objective of the CPR for justice and fairness". Therefore, he submitted that the respondent had provided the court with sufficient evidence to warrant an award of damages under that heading. He requested that the court award the respondent $10,800,000.00 for the costs associated with painkiller injections for the next 20 years. Remarkably, counsel made this submission despite the fact that the respondent had not filed a counter-notice of appeal for the court to increase the damages. Consequently, such a submission had no legal merit to commend it for serious consideration, and thus, with respect, it can be justifiably ignored.

[43] In reaching her decision, the learned judge relied, in part, on the case of Attorney General of Jamaica v Clarke (Tanya) (Nee Tyrell) ('AG v Clarke') (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2002, judgment delivered 20 December 2004, as well as the medical evidence of Dr Phillip Waite and Dr Konrad Lawson. In para. [75] of her judgment, the learned judge adopted the dictum of Cooke JA in AG v Clarke, when he stated:

> "I do not accept the appellant's contention that in the absence of strict proof there should be no award. Justice demands that there should be an award."

[44] Cooke JA, however, in this aspect of his judgment, was referring to visits to a gynaecologist as an item of special damages. In that case, the claimant provided a sum representing the costs of the visits, but the court rejected it and decided, nevertheless, to make an award because there was evidence that the claimant made the doctor visits for which she was claiming. Absent from the learned judge's extraction from Cooke JA's pronouncement was the next line of the judgment, which stated, "[t]here had to be visits to gynaecologists". It was in this context that Cooke JA indicated that justice demands that there should be an award, as it was obvious that the claimant would have expended funds on visits to the gynaecologist in order to treat the injuries arising from the defendant's negligence. Therefore, Cooke JA's statement was made in the context where it was clear that the claimant had to have expended some money in the past (which formed part of special damages). Unlike in the instant case, Cooke JA was not dealing with a claim for future expenses.

[45] Taking into account the evidence presented to the learned judge in the instant case, it cannot be said that the circumstances of this case are on all fours with those in **AG v Clarke**. In that case, the court addressed special damages based on past action and the resulting expenditures. In this case, the learned judge was considering prospective damages with no evidence that the claimed expenditures were currently being incurred or had been incurred in the past, from which evidence of future costs could have been determined with some degree of precision. In other words, there is no sufficiently satisfactory evidence that the respondent will, in the future, require injections and, moreover, will incur monthly expenses amounting to $45,000.00 or

otherwise for those injections. The necessity for future care must be established by credible evidence backed by equally credible supporting evidence of the likely cost of such care.

[46] In **United Dairy Farmers Ltd and Another v Goulbourne (by next friend Williams)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 65/1981, judgment delivered 27 January 1984, Carberry JA helpfully opined that:

> "Awards must be based on evidence. A [claimant] seeking to secure an award for any of the recognized heads of damage must offer some evidence directed to that head, however, tenuous it may be."

I accept this viewpoint. Unfortunately, in the instant case, everything surrounding the issue of the purported cost for future medical care in the form of injections, to which the respondent testified, found no support in the evidence provided by any of the four doctors who testified at the trial. Indeed, not only was the evidence not medically verified, but it was also called into question by the respondent's testimony during cross-examination, when she stated that Dr Waite informed her the injection would cost $45,000.00 per month. This was never confirmed by Dr Waite, who was present at the trial and who had indicated in his report dated 15 October 2015 that "the cost of such future services [orthopaedic management] cannot be predicted". Parenthetically, it should be noted, in fairness to the respondent, that the learned judge's statement that the respondent did not say who in Dr Waite's office had informed her about the cost of the injection was apparently incorrect. From the record of the proceedings, the respondent was clear in her evidence that Dr Waite was the person who advised her of the cost of the injections.

[47] Dr Waite's medical report, in which he stated that he was unable to speak to the costs of future medical care, was dated September 2015. The respondent, in her witness statement, prepared three years after Dr Waite's report, did not provide any credible evidence of the need for injections in the past, on or around the time of the trial, or thereafter, nor did she specify the costs that would have been incurred. Ultimately, the learned judge had no confirmatory or other reliable evidence regarding the respondent's need for injections, the likely duration of treatment by injections, and

the associated costs for the procurement and administration of those injections. The fact that the respondent might have required orthopaedic management (as stated by Dr Waite) did not imply a need for injections at a monthly cost of $45,000.00 or at all.

[48] Unfortunately, the basis for the respondent's assertion in her witness statement for damages to cover the future cost of injections was neither established nor proved by adequate and satisfactory evidence.

[49] To conclude, the award for future medical care was erroneous, in principle, for two reasons: (i) the failure to plead the claim for damages under that head as a discrete head of general damages in the statement of case; and (ii) insufficient evidence to support the claim. For these reasons, and having reminded myself of the caution regarding interference by the appellate court with a trial judge's findings of fact and exercise of discretion, I would hold that the learned judge erred in awarding $2,000,000.00 for future medical care. Accordingly, the appellant also succeeds on Issue (2).

Issue (3) – whether there was sufficient evidence before the learned judge to justify the award of $2,500,000.00 for loss of earning capacity and, if so, whether the award is inordinately high (grounds 4, 7 and 9).

[50] Regarding the learned judge's award of damages of $2,500,000.00 for loss of earning capacity (handicap on the labour market), there is no ground of appeal challenging the absence of pleadings in this regard. Similarly, no point was raised at the hearing in the court below regarding the absence of pleadings for damages under this head. Therefore, a consideration concerning the pleadings under this head is outside the scope of this review.

[51] The gravamen of the complaint in the relevant grounds of appeal is that the evidence adduced by the respondent was not sufficient to justify the award or, even if the award is justified, it is inordinately high. In support of these grounds, the appellant relies on the case of **Henriques Mills and another v George Powell** [2013] JMCA Civ 24, in which this court found that the claimant had not proved his alleged expenditure in order to recover construction costs in respect of damaged property for which he had claimed damages.

[52] With regard to the issue of loss of earning capacity, the relevant findings established by the learned judge, following a review of the evidence, were as follows:

> "[84] The unchallenged evidence of Ms Hyman is that prior to the accident she was a hair stylist, operating her own business. Currently, she maintains the same vocation. **It is also her evidence that as a result of the injuries to her back arising from the accident, she is operating at a reduced capacity. This is supported by the evidence of orthopaedic specialists, Doctor Waite and Doctor Lawson. According to Doctor Lawson the injuries could give rise to a 15% reduction in her capacity to perform her job.** It is also the evidence of the Claimant, that as a result of her inability to perform at her pre accident level her business has suffered loss. She indicates that she has filed for bankruptcy. Admittedly there is no documentary evidence that she has in fact done so…The imminent closure of her business relates only to whether there will be a risk of her being unemployed at some time in the future… Her evidence is that she has a particular skill as a hair technician. She at times utilizes her skills on a personalized level by doing house calls for "high profile women" Despite her lack of supporting evidence, she was not challenged on this aspect of her evidence. The evidence is that she is no longer capable of doing these house calls. This also has not been challenged. Therefore, I accept these statements as fact.
>
> [85] The house calls being in the nature of personalized individual service, do not automatically mean that anyone can be a substitute. It is an individual's choice as to who he or she allows in his or her personal space… **In light of the medical evidence and the evidence of the Claimant as previously outlined I find that her ability to perform her job as a cosmetologist has been reduced by 15% due to the injuries from the accident. I find that this reduction in capacity has negatively impacted her personalized house calls. Consequently, I find that the most likely effects of Ms. Hyman's reduction in capacity to work are; the loss of some clients; the loss of profit and quite possibly the closure of her business**. **Whereas a claim for loss of earnings falling under special damages must be strictly proven, in relation to loss of earning capacity which falls under general damages the strict rule does not apply. Having**

> **assessed Ms Hyman's demeanour and viva voce evidence I accept her evidence that she is no longer able to do personalized house calls. I accept her evidence that this has resulted in a loss of income in her business.**
>
> [86] … She is a sole business owner in the service industry who previously employed only two employees…. Therefore businesses including large companies are always at the risk of failing where the required capital to include human capital is not available to keep pace with the demands of the market and other businesses that are competing for the share of the market. The risk is greater for a small sole traders that for larger companies with greater resources. **Therefore based on the very nature and the size of Ms. Hyman's business I find that there is a real risk that her business will fail. Consequently, I find that there is a risk she will lose her present employment sometime in the future.**
>
> [87] … **Consequently, I find that the reduction in her capacity to perform at her pre-accident level will correspondingly affect her ability to acquire new employment with equal or higher pay. Therefore, I find that the conditions laid down in the case of Moeliker v A Reyrolle & Co Ltd (Supra) and applied in the case of The Attorney General of Jamaica v Ann Davis SCCA 114/2004) have been satisfied.**" (Emphasis supplied)

[53] From the extracts of the learned judge's reasoning above, and a broader consideration of the learned judge's reasoning on this issue, it is evident that the learned judge made several critical findings relevant to loss of earning capacity, namely: (i) the respondent's loss of capacity to work, which resulted in a loss of some clients, loss of profit and "quite possibly" closure of her business; (ii) the real risk that the business would fail and the respondent would lose her present employment sometime in the future, based on the nature and size of the business; and (iii) the reduction in the respondent's capacity to perform at her pre-accident level, which would correspondingly affect her ability to acquire new employment with equal or higher pay, if thrown onto the job market. She found support for the respondent's claim for damages for loss of earning capacity in the medical evidence regarding the respondent's impaired capacity to work due to her injuries.

[54] Even more crucial to note for present purposes is the applicable law that the learned judge employed as her guide in considering the evidence to arrive at her decision to make an award for loss of earning capacity. She explicitly stated that she applied the principles of law established in the well-known case of **Moeliker v A Reyrolle Ltd** [1977] 1 WLR 132 (**'Moeliker'**), which she specifically noted was followed by this court in **The Attorney General of Jamaica v Ann Davis** (unreported), Court of Appeal, Jamaica, Civil Appeal No 114/2004, judgment delivered on 9 November 2007. The operating principles from **Moeliker**, which were distilled by this court in **AG v Davis**, at para. 15, are these:

(a) Is there a 'substantial' or 'real' risk that the claimant will lose her present job at some time before the estimated end of her working life?

(b) If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the claimant will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the claimant's chances of getting a job at all, or an equally well-paid job.

[55] Having comprehensively analysed the evidence, the learned judge found that the requisite conditions laid down by the authorities were satisfied for such an award to be made. The burning question now is whether she was wrong to have so found.

[56] On behalf of the respondent, Mr Jarrett submitted that the respondent suffered significant whole-person impairment arising from her injuries, from which she continues to suffer, in a way which has impacted her significantly in terms of her ability to earn a living and her ability to enjoy the pain-free existence which she had before the accident. Counsel submitted that the evidence supports his argument. Therefore, the learned judge correctly decided to make an order for loss of earning capacity.

[57] In considering the appellant's submissions, I have taken into account the respondent's evidence and the medical evidence examined by the learned judge. The medical evidence clearly established a reduction in the respondent's capacity to

perform her work, which the learned judge accepted in fulfilling her role as the tribunal of fact. I conclude that it cannot be said that there was no factual or evidential basis for an award for loss of earning capacity. The learned judge's analysis for making an award under this head cannot be faulted. It was open to her to find, in all the circumstances, that there was a real or substantial risk that the respondent could close her business due to the ongoing effects of her injury, thereby necessitating her entry into the labour market to seek employment or establish a new business as a stylist, or risk being out of work.

[58] To put it another way, there is a real risk that, with her impairment, the respondent could be forced to enter the labour market, thereby placing her at a disadvantage to compete with non-disabled hairstylists. Additionally, given her age (born 1979) and the evidence she provided regarding her business operations, she may well suffer a significant loss of her business and need to seek alternative employment before the anticipated end of her working life. Alternatively, she could become unemployed and find it challenging to secure or retain employment as a stylist due to her malady. The learned judge, in considering loss of earning capacity (as distinct from loss of future income), was evaluating risk and the monetary value to be attached to that risk, which was not an easy feat.

[59] Even though there were deficiencies in the respondent's evidence, primarily, the absence of corroborating documentary proof of her income, the alleged bankruptcy status of her business and payment of taxes, as argued by Mr Johnson, I cannot accept that there was insufficient evidence to justify an award for loss of earning capacity.

[60] In **Monex Limited and Another v Camille** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 83/1997, judgment delivered 15 December 1998, at page 12, Rattray P explained the meaning of loss of earning capacity. He explained that:

> "Loss on the labour market, handicap on the labour market, loss of earning capacity, in my view, may be regarded as synonymous terms. They represent a specific

> categorisation. This head of damages arises where the said victim:
>
> (a) resumes his employment without any loss of earnings; or
>
> (b) resumes his employment, at a higher rate of earnings,
>
> but because of the injury he received, he suffered such a disability that there exists the risk that in the event that his present employment ceases and he has to seek alternative employment on the open labour market, he would be less able to vie because of his disability, with an average worker not so affected: (See Moeliker vs A. Reyvolle & Co. Ltd [1977] 1 All ER 9)."

[61] On the strength of Rattray P's pronouncements, the respondent could have resumed her employment, following her injury, without any loss of earnings or even at a higher rate of earnings, but still be entitled to damages for loss of earning capacity. Therefore, the fact that her exact income before and after the injury could not be precisely ascertained does not preclude her from recovering damages for loss of earning capacity. The learned judge accepted the respondent as a witness of truth regarding her vocation, business operations, and income-earning capacity. The medical evidence substantiated the claim of loss of earning capacity, which the learned judge also accepted. It cannot be said that the learned judge was plainly wrong to do so. Accordingly, having applied the relevant standard of review to the trial judge's findings of fact, I have no reason to interfere with her decision in this regard.

[62] It is reasonable to conclude that the respondent had discharged the burden of proving, on a balance of probability, that she was entitled to damages for loss of earning capacity. Therefore, it cannot be said that the learned judge erred in law or fact in making an award under that head on the evidence before her.

Whether the award for loss of earning capacity is inordinately high

[63] The remaining question on this issue relates to the quantum of the award; is it inordinately high? An apt starting point in considering this issue is the pithy observation of Browne LJ in **Moeliker** regarding the inherent difficulty in assessing damages under this head. He noted:

> "No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the [claimant] losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award,…will be appropriate."

[64] In **Patrick Thompson and others v Dean Thompson and others** [2013] JMCA Civ 42 (also referenced by the learned judge), Morrison JA (as he then was) opined on the appropriateness of the methods used to calculate the quantum of damages under this head. He stated:

> "[80]… **Therefore, once the judge decides that an award for loss of earning capacity is appropriate in a particular case, the choice of a suitable method of calculation is a matter for the court**. Among the factors to be taken into account are the actual circumstances of the claimant, including the nature of his injuries… **Although the decided cases can offer important and helpful guidance as to the correct approach, the individual circumstances of each claimant must be taken into account.** As Browne LJ observed (at page 15) in Moeliker, restating the oft-stated, 'the facts of particular cases may vary almost infinitely'." (Emphasis supplied)

[65] The authorities cited above have made it clear that an award for loss of earning capacity is predicated on the claimant providing sufficient proof of entitlement to such an award. Once the trial judge makes this determination in favour of the claimant, the choice of a suitable method of calculation is a matter for the judge's determination. As the authorities have recognised, no precise mathematical calculation is feasible. In the instant case, the learned judge, in determining the damages that should be awarded for loss of earning capacity, reasoned:

> "[89] In relation to her current income Ms. Hyman's evidence is that on some weeks she earns less than $15,000.00. However, she has presented no evidence as to approximately how many weeks she earns less than $15,000.00 or when it is that she earns over $15,000.00, approximately how much she earns and for approximately how many weeks that sum is earned. In the absence of a precise figure as to her actual earnings I am unable to determine her post accident income up to the date of trial. Additionally, I do not have sufficient evidence with regards

> to her income at the time of the accident. She states that before she could earn over $100,000.00 per week from her clients. However, I am not certain if this is what she earned on a consistent basis. **I have no precise figure or even an average of her pre accident earning in order to arrive at a correct multiplicand**.
>
> …
>
> **[93] Therefore despite the fact that I find that [the respondent] has failed to provide evidence with regards to her precise earnings, I find that I have sufficient basis for making an award of a lump sum payment to the Claimant for loss of earning capacity**. In making this lump sum award I take into consideration the following factors: (a) The claimant is a hair stylist (b) None of the doctors have indicated that the injury will be a lifelong injury. (c) The Claimant has filed for Bankruptcy. In light of this evidence I find that the risk of her losing her present employment (her own business) is imminent. I also take into account, the fact - 56 - that Doctor Waite indicates that her symptoms can go into remission or be exacerbated. In light of these circumstances I make a Lump sum award of 2.5 million dollars." (Emphasis supplied)

[66] There is no question that the evidence of income was imprecise and unsupported by acceptable documentary evidence. However, it was not seriously disputed that the respondent was a reasonably established hairstylist operating her small business and earning income at the time of the accident. She gave evidence of her clientele and the services she offered, which included house visits. She was, therefore, self-employed. In those circumstances, the learned judge found it difficult to employ the multiplier-multiplicand approach in assessing the loss of earning capacity and opted for a lump sum approach.

[67] The learned judge's failure to apply the conventional multiplier-multiplicand approach is not objectionable. The learned author of McGregor on Damages (seventeenth edition) recorded in para. 35-052 that:

> "…there are, exceptionally, situations in which the court is entitled, because there are too many imponderables in the case, to regard this conventional method of computation

> as inappropriate and to arrive simply at an overall figure after consideration of all the circumstances."

Reference was also made by the learned author to the description of this latter approach as "the broad brush approach" by Steyn LJ in **Blamire v South Cumbria Health Authority** [1993] PIQR Q1, CA. The author also acknowledged that the computation of loss of earning capacity or loss of future earnings by application of the multiplicand-multiplier approach is "rather more complex, where the claimant is self-employed" (see para. 35-061). Accordingly, in the instant case, the conventional approach would be inappropriate given the various imponderables emanating from the respondent's employment status as a self-employed individual. The fact that the assessment of damages is difficult or seemingly impossible does not justify refraining from making an award of damages. The court must simply do its best in the interests of justice.

[68] One thing that is clear, however, is that if the court were to utilise a multiplier-multiplicand approach, it would demonstrate that the sum awarded is not inordinately high, as contended by the appellant. This is because, even if the lowest average figure of $15,000.00 per week, which the respondent stated she was earning post-injury, is used as the multiplicand, and then the sum awarded by the learned judge is divided to ascertain the multiplier that results in that sum, it would indicate an amount that represents roughly three and a half years of income at $15,000.00 per week. Given the respondent's age, she would have had at least 15 years remaining before the end of her working life. In these circumstances, it could not fairly be said that an assumed multiplier of three and a half years would be unreasonable.

[69] Approaching the assessment of the impugned award from this perspective, the sum of $2,500,000.00 awarded by the learned judge as a lump sum by application of the broad-brush approach cannot reasonably be deemed inordinately high. This finding, therefore, renders the award sustainable as a matter of law.

[70] Having reviewed the evidence that was presented to the court, the applicable law, and the learned judge's considerations in determining the award for loss of earning capacity, I conclude that it was well within the learned judge's purview to

make that award. It cannot be fairly argued that there was insufficient evidence to justify the award. Furthermore, it cannot be said that the award is inordinately high to the extent of being a wholly erroneous estimate of the respondent's loss under that head. Accordingly, there is no reason, in fact or law, for this court to interfere with the damages awarded by the learned judge for loss of earning capacity. The appeal consequently fails on issue (3).

Issue (4) – whether the learned judge erred in ordering that the costs associated with the attendance of the medical experts commissioned by the respondent were to be borne by the appellant (grounds 5 and 6).

[71] The next challenge raised by the appellant concerns the costs awarded by the learned judge to the respondent for the attendance of two doctors called by her at the trial: Dr Waite and Dr Jerome Stern.

[72] In accordance with the relevant grounds of appeal, Mr Johnson submitted that the learned judge erred in awarding costs to the respondent, including the fees charged by the medical experts commissioned by the respondent to attend court, as this had not been pleaded. Furthermore, he argued that the learned judge failed to assess the reasonableness of the costs claimed for the doctors' attendance.

[73] Counsel argued that in determining whether the costs of an expert witness should be borne solely by a party, the acceptance or rejection of that expert witness's evidence should be a factor considered in the award of costs. He maintained that it was the respondent's duty to prove her case regarding the assessment of her damages, which includes presenting the requisite evidence for the court's consideration. Therefore, the instructing party in this case, the respondent, was liable for the payment of the expert witnesses' fees and expenses. Consequently, the award of costs made against the appellant for the doctors' attendance at the trial should be set aside.

[74] On behalf of the respondent, Mr Jarrett argued that the learned judge's award of costs should be upheld. He asserted that it would not serve the interests of justice to prevent the respondent from recovering legitimate costs arising from the admitted negligence of the appellant.

[75] In reaching her decision regarding costs, the learned judge considered rules 32.10 and 64.6 of the CPR. She noted that the court is empowered to make costs orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings. In other words, costs orders concerning expert witnesses are solely at the discretion of the court.

[76] Rule 64.6(1) of the CPR establishes the appropriate starting point for reviewing the learned judge's award of costs. Rule 64.6(1) states as follows:

> "64.6(1) If the court decides to make an order about the costs of any proceedings, **the general rule is that it must order the unsuccessful party to pay the costs of the successful party**." (Emphasis supplied)

[77] Rule 32.10 of the CPR, referred to by the learned judge, specifically provides for costs related to expert evidence when the court itself directs that evidence be given by a single expert witness. The rule states that where the court gives directions for a single expert witness, either party may instruct the expert. Additionally, the court may issue directions regarding the arrangements for the payment of the single expert witness's fees and expenses. The court may also limit the amount to be paid for the fees and expenses of the single expert witness. Unless the court directs otherwise, the instructing parties are jointly and severally liable for the payment of the single expert witness's fees and expenses. Then comes rule 32.10(6) in these terms:

> "(6) This does not affect any decision as to the party who is ultimately to bear the costs of the single expert witness."

[78] As can be seen, rule 32.10 had no bearing on the exercise of the judge's discretion in this case because no single expert witness was appointed at the court's direction. Therefore, no arrangement was made for the payment of fees and expenses for a single expert witness or any expert witness at all. In the circumstances where no single expert was appointed and the court permitted the parties to call their experts, rule 32.10 is irrelevant to the issue of costs. However, even if it were, sub-rule (6) makes it clear that the ultimate decision regarding which party should bear the costs of the single expert witness remains one for the court.

[79] The appellant has not demonstrated that the learned judge erred in principle in awarding costs in favour of the respondent for the attendance of the two doctors. The argument that these costs were not pleaded lacks merit. The particulars of claim specifically indicated that costs were being claimed in a general sense. In her particulars of claim, the respondent also stated her intention to rely on the medical reports of her doctors without calling them, which would have been a cost-saving strategy. However, in her defence, the appellant challenged the respondent to provide strict proof that the injuries (and losses) she alleged resulted from the accident. She even denied that the appellant sustained a brain concussion. The appellant further objected in her defence to the respondent's reliance on the medical report of Dr Stern and other hearsay evidence annexed to the particulars of claim, indicating that she wished for the makers to attend court to be cross-examined. The appellant went even further by having the respondent examined by her own doctors, whose reports conflicted with certain aspects of the evidence provided by the respondent's expert witnesses.

[80] Given the appellant's position regarding the medical evidence, as well as the conflicts in the medical evidence relied upon by the parties, this is not a case in which it can fairly be said that it was unreasonable for the respondent to have called her medical experts. Indeed, Dr Stern was the doctor whose report spoke of the brain concussion that the appellant denied. Furthermore, his permanent partial disability ('PPD') rating was contradicted by the evidence of other doctors called as witnesses. In these circumstances, it was not unreasonable for Dr Stern to attend court, especially considering the appellant's request for him to do so.

[81] The appellant's counsel also argued that material components of Dr Stern's evidence were rejected. The learned judge did not accept Dr Stern's evidence regarding the PPD rating, and understandably so, as Dr Stern himself indicated that, being a general practitioner, he would defer to the orthopaedic specialists on that issue. The learned judge reasonably accepted the orthopaedic surgeon's evidence on the PPD rating over Dr Stern's. However, in all other material respects, Dr Stern's evidence was considered and accepted by the court. There was no significant rejection of his evidence that would have rendered it nugatory. Therefore, there was no basis

for withholding costs for his attendance from the respondent due to anything done or omitted to be done by Dr Stern. The same reasoning applies to the evidence of Dr Waite, on which the learned judge relied in certain important respects.

[82] The respondent, faced with the conflicting evidence (in some critical respects) of the doctors called by the appellant, had a right to call her own. Thus, there is no discernible basis upon which this court could interfere with the learned judge's discretion for the award of costs for the two doctors' attendance, in keeping with the general rule that the unsuccessful party pays the costs of the successful party. The learned judge applied the general rule, which was not ousted simply because the respondent was the one who had instructed the two doctors who attended the trial and gave evidence in support of her claim.

[83] The question of whether the costs claimed for the doctors' attendance are reasonable in amount falls to be addressed when the parties seek to agree on the costs between themselves. If they cannot agree, then the reasonableness will be a matter for resolution upon taxation of the costs by the registrar of the Supreme Court. The learned judge was not obligated to conduct a summary assessment of the costs.

[84] The complaints under issue (4), regarding the order that the costs of the doctors' attendance at court are to be borne by the appellant, lack merit.

Issue (5) – whether the learned judge erred in awarding interest on general damages to be from the date of the accident and on special damages to be calculated from the date of service of the claim (ground 8).

[85] Counsel for the appellant contended that the interests awarded by the learned judge on general and special damages were incorrect. He argued that interest on general damages ought to be calculated from the date of service of the claim and not from the date of the incident. Similarly, interest on special damages ought to be calculated from the date of the accident and not from the date of service of the claim. The appellant is indeed correct on this ground.

[86] In the landmark case of **Central Soya of Jamaica Ltd v Junior Freeman** (1985) 22 JLR 152, this court established guidelines for our courts to follow when

awarding interest on general and special damages. Rowe P considered that in personal injury cases, the guideline for the award of interest should be that:

> "(a) interest be awarded on special damages at the rate of 3% from the date of the accident to the date of judgment;
>
> (b) interest be awarded on general damages at the rate of 3% from the date of the service of the writ to the date of judgment."

[87] The foregoing statements, undoubtedly, guided the learned judge in making the correct pronouncements at paras. [100] and [101] of her written reasons for judgment that interest on special damages should run from the date of the accident to the date of judgment, and on general damages (the award for pain and suffering and loss of amenities) from the date of the service of the claim form to date of judgment.

[88] However, a review of the formal order prepared by the respondent's attorneys-at-law and signed by the learned judge reveals a discrepancy between it and the written judgment in relation to the periods from which the interests on damages should run. By the terms of the formal order, interest on special damages should run from the date of service of the claim form, and interest on general damages would run from the date of the accident. It is the formal order, which is inconsistent with the **Central Soya** principles, that gave rise to the specific ground of appeal under review.

[89] Given the law as we have accepted it from **Central Soya** and the harmony of the orders at paras. [100] and [101] of the written judgment with that settled law, it would be prudent to conclude that the learned judge made an error in the formal order. Given her judgment, which would have preceded the formal order, her intention must have been to articulate what is contained in her judgment. The terms of the formal order applying the interest to the damages are, therefore, regarded as erroneous as contended by the appellant. The question now is: what is the impact of this error on the order of the learned judge and the appeal?

[90] Rule 42.10(1) of the CPR provides that:

> "The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission."

[91] In **American Jewellery Company Limited et al v Commercial Corporation Jamaica Limited et al** [2014] JMCA App 16, Morrison JA (as he then was) speaking of this court's power to correct an error in its judgment, noted that "this is the well-known 'slip rule', which has been a feature of the rules of civil procedure for many years".

[92] Given that the conflict between the judge's orders in her written judgment and the formal order must have been a clerical error or accidental slip, it would have been open to the learned judge, had it been brought to her attention, to correct the error in the formal order under rule 42.10(1) of the CPR.

[93] Regrettably, the error was not raised before the learned judge but rather before this court. However, that does not prevent this court from making the necessary correction. By virtue of rule 2.14 of the Court of Appeal Rules ('the CAR'), the court possesses all the powers and duties of the Supreme Court, which include applying the slip rule to correct the order of the Supreme Court. Additionally, it has the power under rule 2.14(b) of the CAR to make any order which, in its opinion, ought to have been made by the Supreme Court. By virtue of the powers vested in this court to make the necessary corrections and change the order, I would order that the required correction be made by this court to set matters right.

[94] The appellant succeeds on this ground.

Conclusion

[95] In light of the above reasoning and conclusions on the issues raised for determination, I find that the learned judge erred in awarding damages in the sum of $2,000,000.00 for future medical care, as it was neither pleaded nor supported by adequate and cogent evidence.

[96] The learned judge, however, acted well within her power, discretion, and the law by awarding $2,500,000.00 for loss of earning capacity. The award is justified on the evidence and is not inordinately high.

[97] There is also no justifiable reason for this court to interfere with the learned judge's discretion in awarding costs to the respondent for the attendance at court of the two doctors called by her.

[98] As it relates to the orders for interest on special and general damages, there was a clerical error in the formal order that resulted in a discrepancy between it and the written judgment. This error rendered the formal order incorrect in law. Therefore, the formal order should be amended to align it with the applicable law and what the learned judge clearly intended the order to be.

[99] I would, therefore, allow the appeal, in part, and propose that: (i) the award of damages in the sum of $2,000,000.00 for future medical care be set aside; (ii) the award of damages in the sum of $2,500,000.00 for loss of earning capacity, and the aspect of the order awarding costs to the respondent for the attendance of the two doctors are to be affirmed; and (iii) the formal order be corrected and varied for interest on general damages to run from the date of service of the claim form (18 October 2014), and on special damages, from the date of the accident (5 August 2014).

Costs

The Supreme Court proceedings

[100] In her notice of appeal, the appellant indicated that the details of the judgment being appealed included the entire costs order (para. 1e of the notice of appeal). However, the grounds of appeal challenging the costs order focused solely on the award of costs for the two doctors called by the respondent. Having considered that the respondent ought not to have succeeded on the claim for future medical care in the court below, she would have been partially successful in her claim for damages. This implies that, as a matter of fairness, the partial success should have influenced the costs order made following the assessment of damages. It is also noted that the

learned judge awarded costs specifically for the attendance of two doctors, which is not fully expressed in the formal order. This court, in exercising its power pursuant to rule 2.14 of the CAR, would correct that omission of the specificity in the formal order regarding the costs award being for the doctors' attendance.

[101] Accordingly, I would hold that the award of costs to the respondent in the proceedings below should be set aside and apportioned to reflect the respondent's partial success and the judge's order that the costs of the attendance of the two named doctors be borne by the respondent. Applying rules 64.6(1), (3) and (4b) of the CPR, I would propose that the respondent is awarded 80% of the costs of the proceedings below (including the attendance of the two doctors, whose evidence did not substantiate this head of damages) to reflect her failure on the claim for future medical care.

Costs of the appeal

[102] The remaining question for this court is whether the costs of the appeal should be apportioned to reflect the appellant's partial success on the appeal. I am of the view that they should be. Given the appellant's success on issues (1), (2), and (5), and taking into account that the error in the formal order could have been corrected by the court below, I propose that 60% of the costs of the appeal should be awarded to the respondent to be agreed or taxed.

EDWARDS JA

[103] I have read, in draft, the judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

SIMMONS JA

[104] I, too, have read the draft judgment of McDonald-Bishop JA. I agree with her reasoning and conclusion and have nothing to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed, in part.

2. The award of damages in the sum of $2,000,000.00 for future medical care is set aside.

3. The award of damages in the sum of $2,500,000.00 for loss of earning capacity is affirmed.

4. The award to the respondent of the costs contained in order 5 of the Formal Order on the Assessment of Damages filed 14 March 2019, is set aside and substituted therefor is the following as order 5:

> "80% of the costs, including the costs of the attendance of Dr Phillip Waite and Dr Jerome Stern, to the respondent to be agreed or taxed."

5. Orders 1 and 4 of the Formal Order On Assessment of Damages filed 14 March 2019 are varied to read:

> "1. General Damages of $1,600,000.00 less interim payment of $850,000.00, plus interest at the rate of 3% per annum ***from the date of service, 18th October 2014, to the date of Judgment***." (Variation emphasised)
>
> "4. Special Damages of $234,600.00, plus interest at the rate of 3% per annum **from the date of accident 5th August 2014 to date of Judgment**." (Variation emphasised)

6. 60% of the costs of appeal to the respondent to be agreed or taxed.