

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2023/0261

BETWEEN:

SASHIMA ROBINSON

Claimant

and

JACE AARON

Defendant

Appearances:

Mr. Wendel Alexander, Counsel for the Claimant

Mr. Kyle O. Nicholson and Ms. Mandi A. Thomas, Counsel for the Defendant

2026: February 5th;
March 31st.

DECISION ON ASSESSMENT OF DAMAGES

[1] **MICHEL, M.:** On 24th February, 2021 the Claimant was a front seat passenger in a vehicle parked which was struck from the back by a vehicle being driven by the Defendant ("**the Accident**"). The Claimant was injured in the Accident and subsequently commenced the present proceedings against the Defendant by claim form and statement of claim filed on 11th July, 2023. The Claimant alleged in her statement of claim that the Accident was caused by the negligent and/or reckless, dangerous, or careless driving of the Defendant and that as a result of the Accident, she suffered injuries, loss and damage.

[2] The Claimant claimed the following as set out in her statement of claim:-

- (1) Damages for pain, suffering, and loss of amenities of life as a result of the motor vehicle accident caused by the negligent and/or reckless, dangerous, or careless driving of the Defendant.
- (2) Special damages, including but not limited to: (a) Loss of earnings for four weeks in the sum of \$1,820; (b) Loss of further earnings, to be assessed; (c) Medical expenses incurred, including the cost of

physiotherapy sessions, consultations, tests, medications, and treatment, to be assessed; (d) Future medical expenses, including the potential cost of spinal surgery in the amount of \$60,000.00 or more, to be assessed; and (e) Travel expenses related to seeking medical treatment, to be assessed.

(3) Interest on the said special damages and general damages pursuant to Section 27 of the Eastern Caribbean Supreme Court Act and the Civil Procedure Rules at the rate of 5% from the date of filing the Claim to the date of judgement.

(4) Costs pursuant to the Civil Procedure Rules 2000.

(5) Fixed Cost in the sum of \$1,500.00.

(6) Such other orders/relief as the Court deems necessary or appropriate.

[3] The Defendant filed a defence to the Claimant's claim admitting liability but disputing quantum. The parties subsequently consented to judgment on liability being entered for the Claimant against the Defendant with damages to be assessed by the Court. Accordingly, the issue of the Defendant's liability having been determined by the consent judgment, the only task which remained for the Court was to determine how much compensation was due to the Claimant based on the evidence she adduced in support of her claim for special and general damages.

[4] The Claimant filed a witness statement and written submissions in support of the assessment of damages. The Claimant sought and obtained permission pursuant to Part 32 of the Civil Procedure Rules (Revised Edition) 2023 ("**CPR 2023**"), for Dr. Deepraj Gaekwad, Orthopedic Surgeon and Dr. Duane Hendrickson, Orthopedic Surgeon and Traumatologist, to be deemed expert witnesses and for each to provide the court with written expert reports in accordance with the provisions of Part 32 of CPR 2023. However, the expert reports of the doctors were not filed as directed by the Court.

[5] A witness statement of Andy Otto, Senior Claims Handler with Caribbean Alliance Insurance Company Limited ("**Caribbean Alliance**"), the Defendant's insurer, was filed on behalf of the Defendant, and written submissions were filed on behalf of the Defendant. The Defendant also sought and obtained permission for Dr. Peter Kowelessar, Adult and Paediatric Neurosurgeon and General Neurologist to be an expert witness and to prepare and file an expert report. Dr. Kowelessar's expert report was filed by the Defendant on 14th April, 2025. No written questions were put by the Claimant to Dr. Kowelessar about his report.

- [6] The matter was set down for assessment of damages on 6th November, 2025 and on that date, learned Counsel for the Claimant sought an adjournment of the assessment of damages hearing, to which counsel for the Defendant did not object. Learned Counsel for the Claimant also made an oral application for an order that the expert, Dr. Peter Kowlessar, attend the assessment of damages hearing to give oral evidence and to be cross-examined by the Parties. The Claimant's oral application was granted and the assessment of damages was rescheduled to 29th January, 2026. Days before the adjourned assessment of damages hearing, the Claimant filed an application to appoint another expert witness. The application was refused and the assessment of damages proceeded on 5th February, 2026 due to the early closure of the Court Office on 29th January, 2026.
- [7] Dr. Kowlessar attended the assessment of damages hearing and was cross-examined by Counsel for the Parties about his report in accordance with CPR 32.10.

General Damages

- [8] It is well settled that in assessing general damages, the Court will consider: (1) the nature and extent of injuries suffered; (2) the nature and gravity of the resulting physical disability; (3) the pain and suffering endured; (4) the loss of amenities suffered; and (5) the extent to which the Claimant's pecuniary prospects have been affected.¹
- [9] I will thus consider the Claimant's claim for general damages for pain, suffering and loss of amenities with the above principles in mind.

The Claimant's Evidence

- [10] The Claimant was born on 13th February, 1990. She was 31 years old at the time of the Accident and was just shy of 36 years old as of the date of the assessment of damages.
- [11] The Claimant's evidence as to how the Accident occurred, the injuries she sustained, and their effect, was set out in her witness statement.
- [12] The Claimant stated that as she prepared to get out of her friend's parked car, the Defendant's vehicle spun out of control and crashed into the rear of her friend's car. She stated that she was not wearing her seatbelt at the time and the force of the collision jolted her body back and forth several times and her head struck inside the car. She stated that she immediately felt pain.

¹ See *Cornilliac v St Louis* (1965) 7 WIR 491.

- [13] The Claimant further stated that after the Accident, she felt severe pain and could hardly walk and was taken to the Mount St. John's Medical Centre ("**the Hospital**") by emergency services with her friend, the driver of the car she was in. The Claimant stated that at the Hospital, she was examined by a doctor who prescribed medication for her pain and recommended physiotherapy.
- [14] The Claimant stated that whilst receiving treatment at the Hospital, she contracted COVID-19 and was required to isolate initially for two weeks, and then an additional two weeks before being released. She stated that as a result, she lost four weeks' wages amounting to \$1,820.00. The Claimant did not exhibit any document confirming that she contracted COVID-19 at the Hospital following the Accident.
- [15] The Claimant stated that following her release from the Hospital, her pain did not subside. She stated that she had to revisit the doctor at the Hospital who referred her to an Orthopedic Surgeon, Dr. Deepraj Gaekwad. The Claimant stated that following tests and an MRI on 22nd April, 2021 Dr. Gaekwad diagnosed her with L5/S1 diffuse intervertebral disc herniation, which he assessed as causing 7% whole person impairment.
- [16] The Claimant stated that on 28th April, 2023 she had a further MRI, which showed worsening of the herniation at L5/S1, increasing in size from the 2021 measurements. The Claimant stated that between October 2021 and January 2022, she attended supervised physiotherapy sessions at the Hospital before being discharged with instructions to continue self-directed exercises.
- [17] The Claimant stated that despite treatment, her condition deteriorated. She stated that she now suffers from constant pain, difficulty walking, constipation, urinary problems, and cannot sit or stand for more than 10 minutes without feeling excruciating pain.
- [18] The Claimant stated that Dr. Deepraj Gaekwad in his medical reports of 26th January, 2022 and 21st April, 2022 advised that she was unfit for work in any capacity, and warned that her condition could progress to require spinal surgery costing \$60,000.00 or more. The Claimant stated that in September 2024, she sought further advice from Orthopedic Surgeon and Traumatologist, Dr. Duane Hendrickson in St. Kitts and that he confirmed that her MRI showed worsening disc herniations at L4-L5 and L5-S1 with compromise of the lateral recess.
- [19] Under cross examination by Mr. Kyle Nicholson, learned Counsel for the Defendant, the Claimant stated that the Accident occurred as she was preparing to leave the vehicle and that she was still inside the vehicle, but her

seatbelt was off. The Claimant was cross-examined on a report from the doctor at the Hospital in which it was stated that the Claimant had reported having her seatbelt on when the Accident occurred. The Claimant stated that that part of the report was false and that she was not wearing her seatbelt when the Accident occurred. The Claimant was adamant that she was not wearing her seatbelt and I believed her.

- [20] Mr. Nicholson further stated to the Claimant that the impact of the Defendant's vehicle with her friend's vehicle was not as extreme as the Claimant was contending and that the impact was quite low voltage (velocity). The Claimant disagreed.
- [21] Under further cross examination by Mr. Nicholson, the Claimant agreed that when she was seen at the Hospital, her diagnosis was that she suffered soft tissue injuries, specifically soft tissue injury to the neck and back.
- [22] The Claimant confirmed under cross-examination that she has been engaged in physiotherapy exercises and that she is still doing the exercises at present. She indicated that the exercises include raising of the legs, exercising of the legs, strengthening of the core and strengthening motor skills. When asked by Mr. Nicholson whether she has experienced any relief from engaging in these exercises, the Claimant stated in response 'not substantially'.
- [23] The Claimant agreed with Mr. Nicholson that she stated in her witness statement that she is unable to work and had to give up custody of her son. The Claimant stated that to support herself financially, she gets assistance from her family, her siblings, her aunt, and social security. She stated that she lives by herself and she pays rent.
- [24] The Claimant was asked by Mr. Nicholson whether she has had any self-employment, such as food catering ventures or anything. The Claimant's reply was 'not at the moment' and that 'she had to give that up'. She stated that she had to give in up a few years back. The Claimant then confirm that she gave that work up in 2022.
- [25] The Claimant admitted under cross-examination that she had presented no documentation to the Court that she gave up custody of her son but stated that it was not done formally and it was a matter where she sat down and discussed between herself and her son's father that he would take primary custody of their son.
- [26] The Claimant confirmed under further cross-examination that she started working at Gore's Supermarket as a cashier in February 2021, the same month of the Accident, but stated that she was not sure of the exact date. She

confirmed that she was expected to sit and stand throughout the execution of her employment.

[27] The Claimant further confirmed that she resigned from her job as a cashier at Gore's Supermarket on 21st April, 2021. Learned Counsel for the Claimant stated to the Claimant that at the time she resigned from her job, she had no medical documentation that stated that she needed to quit or was unable to work. The Claimant stated in response that she did.

[28] Mr. Nicholson asked the Claimant whether she had looked for any type of work since she left her former place of employment. In response, the Claimant said no, because she is unable to stand for an extended time and she is unable to sit. Mr. Nicholson then asked the Claimant whether she had not been engaged in any type of work whether self-related or with an establishment. The Claimant responded 'no'. Mr. Nicholson then asked the Claimant if this was in spite of her earlier evidence where she acknowledged that around 2022, she was engaged in food services/catering. The Claimant responded that she was not engaged in catering and that she did little things here and there to provide for herself but she was unable to. Her voice then dropped and her last words were inaudible. She stated that she stopped in the beginning of 2022. The Claimant confirmed to Mr. Nicholson that yes, this would have been after she had resigned in 2021.

[29] Mr. Nicholson stated to the Claimant that she was quite able to continue working when she resigned in 2021. The Claimant stated in response that she disagreed. Mr. Nicholson further stated to the Claimant that just as she was able to work in 2021 she is still able to work in 2026. The Claimant stated in response that she disagreed.

[30] On re-examination by Mr. Wendel Alexander, learned Counsel for the Claimant, the Claimant confirmed that she was a cashier at Gore's supermarket. She stated she started that month to provide income as she was also going to school.

The Expert Evidence

[31] Dr. Peter Kowlessar, the Court appointed expert stated in his expert report filed on 15th April, 2025 that he reviewed the following documents in preparing his report:-

- (i) Medical report by Dr D Gaekwad, Orthopaedic Surgeon, dated 03/06/2021;
- (ii) Medical report by Dr D Gaekwad, Orthopaedic Surgeon, dated 26/01/2022;

- (iii) Medical report by Dr D Gaekwad, Orthopaedic Surgeon, dated 21/04/2022;
- (iv) Cervical MRI radiology report by Dr E Samuel, Radiologist, dated 22/04/2021;
- (v) Thoracic RMI radiology report by Dr E Samuel, Radiologist, dated 22/04/2021;
- (vi) Lumbar MRI radiology report by Dr E Samuel, Radiologist, dated 22/04/2021; and
- (vii) Photos x 2: alleged vehicle involved in the subject accident (Hyundai i10 model, registration A 41388), submitted 21/06/2022.

[32] Dr. Kowlessar noted in his report that the Claimant attended the Hospital on the same day following the Accident and was treated by a doctor. The Claimant later returned to visit the doctor who referred her to an orthopedic surgeon, Dr. Gaekwad. Dr. Kowlessar further noted that an MRI was ordered and an MRI report of the cervical, thoracic and the lumbar dated 22nd April, 2021 was prepared.

[33] The following was reported by the radiologist, Dr. E Samuel in the Claimant's MRI report dated 22nd April, 2021:-

- (1) 3.48 mm x5.51 mm diffuse disc herniation at L5/S1;
- (2) mass effect on the thecal sac and cauda equine
- (3) lateral recesses not compromised and no nerve root contact

[34] The radiologist reported that the MRI findings were consistent with diffuse disc herniation L5/S1, mass effect on cauda.

[35] Dr. Kowlessar examined the Claimant on 20th June, 2022. In his expert report, he stated that he reviewed the cervical MRI scan of the Claimant dated 22nd April, 2021 and that the scan revealed a straightened cervical spinal column and relatively healthy, hydrated discs. He stated that the central canal was capacious and there was no neural compression. Dr. Kowlessar stated that the thoracic MRI scan dated 22nd April, 2021 showed no structural abnormality. He stated that the lumbar MRI scan dated 22nd April, 2021 demonstrated a desiccated L5/S1 disc with mildly decreased disc height and no disc annular tear. He noted that there was a small focal right paracentral L5/S1 disc bulge making contact with the traversing right S1 nerve root. He stated that there was no cauda equina compression.

[36] Dr. Kowlessar's report on his clinical impression of the Claimant was much more positive than the Claimant's evidence and stood somewhat in contrast to the conclusions reached in various medical reports of the Claimant over the years. Dr. Kowlessar was also perplexed by the Claimant's self-reports of pain

given his clinical impressions of the Claimant supported by the radiographic studies.

[37] In his expert report, Dr. Kowlessar stated the following in relation to the Claimant's clinical impression:-

"Certainly, cranial and whole spine CT scans did not reveal any major structural damage. Whole spine MRI scans done soon after the accident (2 months) did not reveal any acute disc pathology that would have arisen from the accident. However, there was a focal right-sided L5/S1 disc bulge in contact with a traversing nerve root but clinical features did not support this causing a neurological deficit. There were no significant degenerative disc changes as preexisting features. Whether this disc bulge represented an acute or pre-existing entity is equivocal. Nevertheless, her pain symptoms are not neurological in nature.

I note that the accident happened almost 1 ½ years ago to the date of my assessment and Ms Robinson remained symptomatic of chronic paraspinal pain despite the benefit of regular supervised physical therapy twice weekly from April, 2021.

As stated, her pain is likely to have originated as musculocutaneous in nature but would resolve spontaneously after a short period from such a minor accident. There was no pre-condition, either radiologically identified or from self-reporting, that would aggravate such a traumatic condition.

When I examined her, I was surprised that truncal rotation and lateral bending did not elicit her paraspinal pain should this be muscular in nature. My opinion is that her symptoms are currently exaggerated and inconsistent with clinical and radiological findings. Also, tissue trauma associated with such an accident from her description and supporting evidence would have resolved after a short time period and not be severe.

There is no physical reason why she should be incapable of sitting or standing for an extended time period (up to 2 hours). While I appreciate she may currently have muscle-related back pain depending on the moderate-high intensity of physical activity, there is no physical reason that would render her incapable of occupational and ADL (activities of daily living) functions, acknowledging that she previously worked as a Cashier.

In this state, such a patient's complaint of chronic pain is considered to be part of illness behaviour in which her pain chronicity is psychologically generated from fixed false beliefs about the cause of her pain. Alternatively, there may be the possibility of malingering though this is difficult to identify from only one encounter. In both situations, the patient's state tends to be reinforced by secondary gain."

- [38] Under cross-examination by Mr. Wendel Alexander, learned Counsel for the Claimant, Dr. Kowlessar indicated that he had not examined MRI reports for the Claimant from 2023, 2024 and 2025. He confirmed that in his expert report he stated that he examined the Claimants MRI reports of the thoracic and lumbar spine dated 22nd April, 2021.
- [39] Mr. Alexander asked Dr. Kowlessar whether there was anything in the medical reports of Dr. Gaekwad that he disagreed with. In relation to Dr. Gaekwad's report dated 3rd June, 2021 Dr. Kowlessar stated that he did not disagree with what Dr. Gaekwad reported in relation to what the Claimant reported to Dr. Gaekwad and he did not disagree with Dr. Gaekwad's summary of the Claimant's cervical, thoracolumbar and brain MRI scan as was stated according to the radiologist.
- [40] Dr. Kowlessar stated that Dr. Gaekwad goes on to talk about his evaluation of the Claimant on 22nd April, 2021. He stated that that is Dr. Gaekwad's evaluation and he did not disagree with that. Dr. Kowlessar further stated that Dr. Gaekwad speaks about the Claimant's permanent impairment, and that Dr. Gaekwad has given as his opinion, a rating of 7% whole person impairment. Dr. Kowlessar stated that whilst he understands how this figure is calculated, he did not regard that as permanence and so he would disagree with that assessment. He explained that he does not disagree with the calculation of Dr. Gaekwad's determination that there is whole person impairment of 7%, but he disagrees with making the judgment that because whole person impairment is 7% then that means there is permanent impairment equivalent to this amount.
- [41] Dr. Kowlessar further indicated to Mr. Alexander that he disagreed with the statement of Dr. Gaekwad in his report dated 26th January, 2022 that the Claimant's clinical status had the potential of transition to complex regional pain syndrome (CRPS). Dr. Kowlessar explained that complex regional pain syndrome is more than something that is just a possibility of transitioning the way Dr. Gaekwad described it.
- [42] Dr. Kowlessar further indicated to Mr. Alexander that Dr. Gaekwad made statements in his report that the Claimant's clinical condition is progressing towards frontal regional pain syndrome involving lower limbs caused by the

negligent traumatic event and that as a consequence she was recommended for invalidity benefits and so forth. Dr. Kowlessar stated that he appreciated that that was Dr. Gaekwad's statement when he examined the Claimant on 21st April, 2021 and that he had no comment about that.

- [43] When Dr. Kowlessar was asked by Mr. Alexnader, whether he would agree that he did not say in his written expert report that he disagreed with anything stated in the written reports, whether the radiology reports of Dr. Samuel or the written reports of Dr. Gaekwad, Dr. Kowlessar stated that he could not comment yes or no.
- [44] Dr. Kowlessar was further asked by Mr. Alexander whether in his expert report he was suggesting that the Claimant was exaggerating her illness. In response, Dr. Kowlessar stated that what he was suggesting goes beyond that. He stated that there are a number of things that need to be considered. He stated that he raised the possibility of fixed false beliefs about the cause of her pain. He stated that it is called the triad: if you have false beliefs about something, it leads to false thoughts, then that leads to false actions and the false actions reinforce your false beliefs. Dr. Kowlessar stated that he is saying that in this situation, that is a possibility, and that to him, it is a strong possibility as to what is ongoing with the Claimant. Dr. Kowlessar further stated that he is also saying that he feels that there is a possibility of some of the Claimant's symptoms at times may be exaggerated.
- [45] Mr. Alexander pointed out to Dr. Kowlessar that in his expert report he also made a statement that there was a possibility of malingering by the Claimant. He asked Dr. Kowlessar whether his statement in his expert report that there was an exaggerating of illness by the Claimant or malingering, was a final conclusion or just a possibility. Dr. Kowlessar in response stated that he was saying that there is a possibility of malingering. When prompted by Mr. Alexander as to whether or not this was conclusive, Dr. Kowlessar stated that it was not.
- [46] Mr. Alexander further pointed out to Dr. Kowlessar that in his expert report, he stated that in his opinion, the Claimant's symptoms are currently exaggerated and inconsistent with clinical radiological findings. Dr. Kowlessar stated that the basis explained stated that the inconsistency is between those two elements, the clinical and radiological findings and what the Claimant has described as her self-reported symptoms and the extent of those symptoms. He stated that it is primarily about the extent of the symptoms and that is what he feels is exaggerated.
- [47] Dr. Kowlessar further explained to Mr. Alexander that from his perspective, the Accident happened a year and a half before he examined the Claimant and

given the circumstances of that Accident and particularly what is regarded as the extent of energy transfer on impact, the effects of this energy transfer, on the human body would have been negligible, small, not sufficient for a condition to be carrying on for this length of time as a direct consequence of that event.

[48] Under further cross-examination by Mr. Alexander, Dr. Kowlessar admitted that he is at variance with what Dr. Gaekwad said in the reports of Dr. Gaekwad that he reviewed, but that it did not mean that he disagreed with what was said because Dr. Gaekwad's approach is different.

[49] Finally, Mr. Alexander asked Dr. Kowlessar whether the extent of his expertise encompasses collision type injuries and their impact based on damages to a vehicle. Upon being prompted by Dr. Kowlessar, Mr. Alexnader clarified that he was asking the extent of Dr. Kowlessar's expertise and whether his expertise encompasses the impact of a vehicle collision and injuries to a victim in a vehicle. In response, Dr. Kowlessar stated that as a neurosurgeon for the past 22 odd years that encompasses spinal surgery and spinal pathology, it puts him in a competent position to assess situations of trauma that may involve motor vehicle accidents and the effects that it has on the patient. He stated that this is supported by the fact that he has been involved in court matters of this nature for the past 18 odd years.

[50] Under cross-examination by Mr. Nicholson, learned Counsel for the Defendant, Dr. Kowlessar stated that based on the pictures from the Accident he reviewed, it would seem that the Accident was a low velocity collision. He confirmed that based on Accident, he expected that the Claimant sustained multiple soft tissue injuries

[51] Mr. Nicholson cross-examined Dr. Kowlessar in relation to the injuries the Claimant sustained. As it relates to the focal right sided disc bulge in the L5/S1 revealed in the Claimant's MRI scans, and resulting neurological deficit, Dr. Kowlessar stated that even though there may be this radiological appearance of a disc abnormality, a disc bulge, that because you have a disc bulge does not mean or imply that there is a clinical problem and that in case of the Claimant the nature of it and where it was, it was inconsistent with clinical findings. He stated that sometimes, colleagues of his or specialists in other areas may comment about disc bulges as if that is something of great worry or pathology – not necessarily. He stated that the issue most of the time is not the disc bulge. The issue is the effect of the disc bulge.

[52] When asked by learned Counsel for the Claimant what he meant when he stated in his report that the Claimant's pain symptoms are not neurological in nature,

Dr. Kowlessar responded by pointing to the nature of the Claimant's pain symptoms, as she described them and the clinical findings. He explained that determining whether the pain is neurological or musculoskeletal is not on the basis of an MRI scan. He stated that it is on a clinical basis and you use the MRI scan to support that.

[53] Mr. Nicholson pointed out to Dr. Kowlessar that in his report he stated that when he examined the Claimant, he was surprised that truncal rotation and lateral bending did not elicit her paraspinal pain should it be muscular nature, and asked Dr. Kowlessar to explain this. In response, Dr. Kowlessar stated that paraspinal pain would have been expected because patients would complain of muscular pain and it is usually what would be regarded as the paraspinal muscles. He stated that "para" refers to along the central spine itself and that with those movements of rotation and lateral bending, you tend to pull on those muscles specifically. Accordingly, there is an expectation of a patient to complain about discomfort if it was really so.

[54] Dr. Kowlessar agreed that based on the expert report, a combination of the Claimant's self reporting, his examination, and her responses to the said examination would have led to his opinion that her symptoms were exaggerated at the time that he saw her and it was inconsistent.

[55] Mr. Nicholson pointed out to Dr. Kowlessar that the Claimant in her evidence stated that she has been involved in home exercises until present and that Dr. Kowlessar stated in his report that he expected recovery if that were the case. I think it is useful to set out Dr. Kowlessar's response in full:-

"Okay, so the thing is that, you know, even...up to the time when I saw her in June 2022, you know, she reported that she had been seeing the physiotherapist twice weekly since April 2021. So that's, that's a year now. Okay. And that uh, so we're talking about a year, right, of supervised therapy, right, and, you know, plus or minus so, with, you know, homebased exercises and so on, program, alright, to achieve umm spinal or paraspinal muscle rehabilitation because of complaint of pain. Well, why hasn't that happened? That is more than expected, right? If, for instance, you know, I have a cut and I take care of it and, you know, I expect the cut to heal and that's a natural response. Okay. Understand that all of this is guided by the patient's self-reporting that she has pain, which is a personal, subjective and emotional response. And that okay if we saying that this extent of supervised therapy, right, even up till current time now. So we are talking since 2021. We are now in 2026. Five odd years, right. And then it brings a question, well. I would say first and foremost, something is wrong. And the question is what? And why hasn't this issue been resolved?

Discussion

- [56] Following the Accident, the Claimant was diagnosed by doctors at the Hospital as having soft tissue injuries to the neck and back. The MRI scans of the cervical, thoracic and the lumbar dated 22nd April, 2021 as reported by the radiologist, Dr. E. Samuel revealed: (i) 3.48 mm x5.51 mm diffuse disc herniation at L5/S1; (ii) mass effect on the thecal sac and cauda equine; and (iii) later recesses not compromised and no nerve root contact. The radiologist further reported that the MRI findings were consistent with diffuse disc herniation L5/S1, mass effect on cauda.
- [57] Dr. Kowlessar's assessment of the Claimant's injuries in his expert report is that the thoracic MRI scan of the Claimant dated 22nd April, 2021 showed no structural abnormality and the lumbar MRI scan dated 22nd April, 2021 demonstrated a desiccated L5/S1 disc with mildly decreased disc height and no disc annular tear. Dr. Kowlessar was also of the view that the Claimant had a small focal right paracentral L5/S1 disc bulge making contact with the traversing right S1 nerve root. He stated that there was no cauda equina compression.
- [58] The above clearly delineates the nature and extent of the Claimant's injuries following the Accident, as of June 2022 when the Claimant was seen by Dr. Kowlessar.
- [59] When the Claimant was seen by Dr. Kowlessar in June 2022, she complained of posterior neck pain that extended to the central low back as pain and was aggravated by sitting or standing for more than 10 minutes. This pain had been intermittent and persistent since the Accident.
- [60] Since the Claimant was seen by Dr. Kowlessar in June 2022, the Claimant has continued to complain of persistent pain. She has undergone physiotherapy both under the guidance of a physiotherapist and self-directed at home. However, the Claimant's evidence is that despite treatment, her condition has deteriorated and she now suffers from constant pain, difficulty walking, constipation, urinary problems, and she cannot sit or stand for more than 10 minutes without feeling excruciating pain. I note that except for the initial medical report of Dr. Gaekwad dated 16th June, 2021 where it was mentioned that the Claimant complained of decreased frequency of bowel actions with no associated abdominal pain, none of the medical reports speak to the Claimant experiencing constipation and urinary problems or providing an explanation of same.

- [61] Dr. Gaekwad's opinion based on his expert report and his oral testimony is that the Claimant's symptoms appear to be exaggerated and are inconsistent with clinical radiological findings. He is of the view that the inconsistency is between the clinical and radiological findings and what the Claimant has described as her self-reported symptoms and the extent of those symptoms. He stated that it is the extent of the Claimant's symptoms that feels exaggerated.
- [62] Dr. Kowlessar also opined in his report and his oral testimony that the Claimant's pain may be psychologically generated from fixed false beliefs about the cause of her pain. Alternatively, there may be the possibility of malingering. He admitted in his report that it was difficult to identify from only one encounter and under cross examination by counsel for the Claimant, Dr. Gaekwad stated that his opinion was not conclusive but it was a possibility.
- [63] What is clear is that the Claimant is still reporting that she is in pain from the Accident. I observed her on more than one occasion shifting her body weight from side to side whilst seated in Chambers during the assessment of damages hearing; however, the assessment hearing went on well over an hour and there was no complaint from the Claimant about being unable to be seated for that period.
- [64] It is also noteworthy that during cross-examination by Mr. Nicholson, Dr. Kowlessar acknowledged that the Claimant's self-reporting that she has pain, is a personal, subjective and emotional response. He acknowledged that the Claimant has said she has been undergoing physiotherapy and is still complaining of pain. Dr. Kowlessar acknowledged that in the circumstances something appeared to be wrong, but the question remained, what is wrong and why has the Claimant's issues not resolved.
- [65] Since the Claimant was examined by Dr. Kowlessar in June 2022, she has had follow-up medical visits and MRI scans performed. The Claimant received a further MRI reported dated 28th April, 2023 which was attached to her witness statement, and a medical report of Dr. Duane Henderickson dated 5th September, 2024 which was filed with her amended statement of claim and attached to her witness statement.
- [66] It is noteworthy that in the MRI report dated 28th April, 2023 the radiologist, reported: there is a 5.33 mm x 6.4 mm diffuse disc herniation at L5/S1, well seen on PDW images; and mass effect is on the thecal sac and cauda equina, well seen on T2W images. The radiologist further commented that compared to the MRI study of 2021, there is progression of the disease process. The radiologist concluded by stating that the MRI findings are consistent with

partial disc desiccation, substance degeneration, diffuse disc herniation L5/S1, mass effect on cauda equina.

- [67] The notable difference between the Claimant's MRI report of April 2021 and April 2023 is the increase in size of the disc herniation; substance degeneration, a breakdown of the disc's internal material; and the radiologist's comment that there is progression of the disease process.
- [68] The only MRI report reviewed by Dr. Kowlessar in the preparation of his expert report was from April 2021. The Claimant's more recent MRI scan, which was not reviewed by Dr. Kowlessar appeared to show a progression of the disease process. The medical significance and impact of this is unclear and these matters were not put to Dr. Kowlessar by the Claimant. Unfortunately, whilst the Claimant had the opportunity and permission of the Court to file updated medical reports of Dr. Gaekwad and Dr. Hendricksen, the Claimant failed to do so. Thus the Court does not have the benefit of an updated clinical impression of the Claimant and the extent to which the 2023 MRI report supports the updated impression.
- [69] In light of the above, considering Claimant's evidence as to the pain she experiences, the fact that the Claimant was examined by Dr. Kowlessar some five years ago, and the results of recent MRI report, I accept that the Claimant is still experiencing pain from the injuries sustained in the Accident even though there may not be a conclusive clinical explanation for the Claimant
- [70] I would also accept that the Claimant's has experienced some level of disability as a result of the injuries she sustained in the Accident. Dr. Kowlessar explained that the 7% permanent disability assessed by Dr. Gaekwad in his report did not necessarily mean the claimant was permanently disabled to that extent. Dr. Kowlessar however did not provide his own assessment of the Claimant's permanent whole person impairment.
- [71] Thus in conclusion, having considered the Claimant's evidence, the expert report of Dr. Kowlessar, and the oral testimony of Dr. Kowlessar, I accept that the Claimant's injuries following the Accident were as reported in the MRI report dated 22nd April, 2021 and as confirmed by Dr. Kowlessar, being desiccated L5/S1 disc with mildly decreased disc height including the disc bulge. Even though Dr. Kowlessar had suggested in his expert report that whether the disc bulge represented an acute or pre-existing entity was equivocal, I noted that in the same report, Dr. Kowlessar stated in relation to the Claimant that there was no past medical history that was contributory and she reported no previous complaint of paraspinal pain. Thus, considering the evidence before, on a balance of probabilities, I am of the view that it is more likely than not that the Claimant's diagnosed injuries including the disc bulge

were because of the Accident. I accept that the Claimant is experiencing some pain still, but the precise nature and reason are unclear. I am also of the view that there is evidence before the Court showing some progression of her injuries, but no clear explanation of the possible progression is before the Court. I also accept that the Claimant has suffered some whole person impairment, but based on the expert evidence of Dr. Kowlessar, which I accept, the extent of the permanence of the impairment is unclear.

Discussion on General Damages

- [72] The purpose of compensation in personal injury cases is to attempt to put the injured party back in the position he or she was in before the injuries occurred. The assessment of damages is not a precise calculation as the aim is to provide reasonable compensation for the pain and suffering endured and loss of amenities suffered. The Court must strive for consistency in its awards by using comparative cases tailored to the specific facts of the individual case.
- [73] Lord Hope of Craighead in **Wells v Wells**² explained the approach in the following terms: “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 basic estimate of the [claimant’s] damage”.
- [74] In considering the approach in arriving at an award for general damages, the guidance provided by Rawlins J in **Kathleen McNally v Eric Lotte and CITCO (BVI) Ltd.**,³ is instructive. Rawlins J stated that:-
- “The practice is to grant a global sum for general damages for pain and suffering and loss of amenities, considering these against the background of the nature and extent of the injuries sustained and the nature and gravity of the resulting impairment and physical disability.”
- [75] Learned Counsel for the Claimant submitted that the Claimant should be awarded general damages for pain, suffering and loss of amenities of no less than \$75,0000.00. Learned Counsel for the Claimant did not provide any cases to the Court to compare for the Court to arrive at an appropriate award to the Claimant for pain, suffering and loss of amenities.
- [76] Learned Counsel for the Defendant in his written submissions, submitted that the Claimant should be awarded the sum of \$20,000.00 as general damages

² [1998] 3 All ER 481.

³ BVIHCV2001/0068 (delivered 2nd July 2003, unreported).

for pain suffering and loss of amenities. Learned Counsel for Defendant submitted the following cases for the Court's consideration:-

- (1) **Anita Tobitt v Grand Royal Antiguan Beach Resort Limited et al**:⁴ The claimant was a passenger in a bus hired by the defendant. She was injured when the bus struck an object which caused it to bounce and skid off the road. As a result of the accident, the claimant suffered a prolapsed lumbar intervertebral disc/Lumbo-sacral disc with diminished sensation in the dermatome distribution of L5-S1. The Claimant's MRI revealed central and left lateral disc herniation at L5/S1 with impingement of the thecal sac. She was found to be 8% disabled. The claimant was awarded general damages for pain, suffering and loss of amenities in the sum of \$50,000.00.
- (2) **Harvey Taliam et al v Kurt Duncan et al**:⁵ The 1st claimant was injured when the vehicle he was in was rear ended by a vehicle owned by the 1st defendant and driven by the 2nd defendant. The 1st claimant suffered soft tissue injury to the cervical spine (whiplash injury); soft tissue injury to the upper and lower back and a right index finger sprain. The 1st claimant was awarded the sum of \$25,000.00 in general damages for pain, suffering and loss of amenities.
- (3) **Antoinette Hobson v Denroy Harrigan**:⁶ The claimant was in a stationary motor vehicle when the vehicle was rear ended by a vehicle driven and owned by the Defendant. The claimant's injuries as born out by expert evidence revealed that the claimant suffered soft tissue whiplash injuries to her neck (cervical spine). The expert medical evidence also revealed that the MRI findings of a disc bulge at L4/L5 was arguable and was not as a result of the accident. The court did not accept that the MRI finding of a disc bulge or disc herniation was a direct result of the accident and awarded damages for soft tissue injury only. The Claimant was awarded general damages of \$18,000.00 for pain, suffering and loss of amenities.

⁴ ANUHCv2006/0026 (delivered 13th October 2010, unreported).

⁵ SLUHCv2018/0418 (delivered 26th April 2019, unreported).

⁶ ANUHCv2014/0428 (delivered 15th January 2021, unreported).

- (4) **David Saunders et al v Grace Rhymer**:⁷ The 3rd claimant was injured in a vehicular accident caused by the defendant. The 3rd claimant's evidence was that her neck struck the inside of the vehicle resulting in a terrible headache and pain in her neck and upper back region. She was diagnosed with residual whiplash injury of the neck. An MRI revealed mild spasms, with cracking in the neck, range of movement full, sensation and reflexes normal and diminished sensation in the right med nerve. The MRI findings were consistent with neck strain and right carpal tunnel syndrome. The claimant was awarded the sum of \$14,000.00 for pain and suffering.
- (5) **Collin Hope Jr v Edmond Lake**:⁸ The claimant was a passenger in a vehicle which was struck head on by a vehicle driven and owned by the Defendant. As a result of the collision, the claimant suffered a L5-S1 disc bulge along with muscle spasm, a cervical sprain due to whiplash injury to the cervical spine and injury to the L3-L4, L4-L5 and L5-S1 discs without significant herniation. Surgical intervention was not recommended as the claimant's symptoms were found to be because of annular tears which the court found are notorious for taking a long time to resolve. The court awarded the claimant \$40,000.00 as general damages for pain, suffering and loss of amenities.
- (6) **Simone Sparman v Jolly Beach Resort & Spa**:⁹ The claimant had an accident in the workplace due to a wet surface and suffered injuries. The claimant suffered a sprain with L5/S1 disc bulge and sensation of pins and needles which progressed to mild discal dehydration, that is, degenerative disc disease with mild annular bulge of the L4/L5. The court considered the claimant's injuries to be serious. She was recommended surgery, was hospitalized twice, had been confined to bed for several weeks to await the birth of her child, suffered severe pain and was still under serious disability at the time of the assessment of damages. The claimant could no longer work in her former employment and perform her usual duties in the home. There was no indication whether she would suffer any permanent disability after the recommended surgery. The claimant was awarded

⁷ St. Christopher and Nevis Civil Suit No. 41 of 2001 (delivered 26th November 2004, unreported).

⁸ ANUHCv2020/0022 (delivered 23rd February 2022, unreported).

⁹ ANUHCv2012/0292 (delivered 4th December 2018, unreported).

\$65,000.00 in general damages for pain suffering and loss of amenities.

- [77] I have read and considered each of the above cases in full.
- [78] Having carefully considered the Claimant's injuries, I am of the view that the cases of Tobitt, Collin Hope Jr and Sparman are most comparable for the Court to make an appropriate award to the Claimant.
- [79] None of the above cases are on all fours with the present cases and I have considered the similarities and differences. The claimant in Collin Hope Jr was experiencing pain due to annular tears which do not feature in the present case. The injuries of the Claimant in Tobitt appear to some extent to be of a similar type to that of the Claimant in the present case but the injuries of the claimant in Tobitt in my view are more serious. The circumstances in Sparman are quite similar to the present case but the effects of the injury of on the claimant in Sparman, who was pregnant at the time, appear to be more severe.
- [80] Having formed my assessment of the evidence before the Court and having considered the pain and suffering that the Claimant in the present case endures, although unexplained, and having considered the above cases and the dates the awards were made, I am of the view that an award of \$40,000.00 for pain, suffering and loss of amenities is fair compensation to the Claimant.

Special Damages

- [81] Special damages are quantifiable pre-trial losses suffered by a claimant as a result of the wrong of a Defendant. It represents the out-of-pocket expenses or loss incurred prior to the trial of a claim and which is capable of substantially exact calculation, for example past loss of earnings, past travel expenses, past care and the like. It is well settled so as to be considered trite that special damages must be strictly pleaded and proved to be recovered.¹⁰ The learned authors of *Mc Gregor on Damages*¹¹ put it thus:-

“Where the precise amount of a particular item of damage has become clear before the trial, either because it has already occurred and so become crystallised or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage.”

¹⁰ *Ikiw v Samuels and others* [1963] 1 W.L.R. 991; see also *Steadroy Matthews v Garna O'Neal* BVIHCVP2015/0019 (delivered 16th January 2018, unreported).

¹¹ 18th Edition at 44-012.

[82] In the Court of Appeal judgment of **Terrance Amedee v Marcus Modeste**,¹² Michel JA delivering the judgment of the Court of Appeal, explained a claim for special damages as follows:-

“It is trite that special damages must be specifically pleaded and strictly proved, and one is not sufficient without the other; so pleading an item of special damages without proving it does not earn you an award of damages, neither does proving an item of special damages without pleading it. It is of the very nature of special damages that it has occurred before the trial and is either quantified or quantifiable by the time of the trial.”

[83] The Claimant pleaded in her amended statement of claim that she was claiming special damages, including but not limited to:-

- (a) Loss of earnings for four weeks in the sum of \$1,820.00;
- (b) Loss of further earnings; to be assessed;
- (c) Medical expenses incurred, including the cost of physiotherapy sessions, consultations, tests, medications, and treatment, to be assessed;
- (d) Future medical expenses, including the potential cost of spinal surgery in the amount of \$60,000 or more, to be assessed;
- (e) Travel expenses related to seeking medical treatment, to be assessed.

[84] Loss of further earnings and future medical expenses by their very nature, being expenses expected to be incurred in the future after trial, do not form part of special damages. It is unclear whether travel expenses relate to pre-trial expenses incurred by the Claimant when she was previously seeking medical treatment, which would be special damages, or expected future expenses, which would form part of general damages. These three heads of damages will therefore be considered later in this decision.

[85] It is noteworthy that the Claimant did not attach a schedule of special damages to her amended claim form or amended statement of claim, nor has she provided a schedule in her amended statement of claim as required by CPR 8.10(6).

Loss of Earnings for Four Weeks

[86] The Claimant claims loss of earnings for a period of four weeks in the sum of \$1,820.00.

¹² SLUHCVP2022/0001 (delivered 9th November 2023, unreported) at para. 80.

- [87] The Claimant was admitted to the Hospital following the Accident on 24th February, 2021. The Claimant alleged in her statement of claim that during the period of hospitalization following the Accident, she contracted COVID-19 and had to isolate at the Hospital. Her evidence is that she was required to isolate for two weeks followed by an additional two weeks before release. She stated that as a result, she lost four weeks wages from Gore's Supermarket amounting to \$1,820.00.
- [88] The Claimant did not provide any documentation as proof of having contracted COVID-19 at that time. The Claimant also did not furnish the Court with any documentary evidence of her earnings, whether by way of salary slips or other supporting documentation, to substantiate the amount she alleges she would have earned during the period in question.
- [89] Mr. Andy Otto, Senior Claims Handler with Caribbean Alliance, the Defendant's insurer, filed a witness statement on behalf of the Defendant. In his witness statement, Mr. Otto stated that on 29th March, 2021 Caribbean Alliance paid the Claimant the sum of \$1,598.03 which comprised the sum of \$1,470.23 in respect of loss of wages for the period 24th February to 21st March, 2021 and \$127.80 in respect of medical expenses that had been incurred by the Claimant up to that time. These payments were evidenced by a settlement breakdown form and a copy of a cheque dated 29th March, 2021.
- [90] Mr. Nicholson, learned Counsel for the Defendant in his written submissions submitted that in light of the payment made by the Defendant's insurer to the Claimant for loss of wages from 24th February to 29th March, 2021 even if the Court were to accept that Claimant's evidence without documentary proof, the Claimant is not entitled to recover a further sum as this has been paid on behalf of the Defendant. I agree.
- [91] The Claimant having received payment for loss of wages from the Defendant's insurer in the sum of \$1,470.23, and the Claimant not having provided proof in support of any greater loss, I am satisfied that the Claimant has already recovered loss of wages from the Defendant for a period of four weeks. I would therefore make no further award to the Claimant in respect of this item of special damage.

Medical Expenses incurred, including the Cost of Physiotherapy Sessions, Consultations, Tests, Medications and Treatment

- [92] The Claimant seeks to recover previously incurred medical expenses. No breakdown of the medical expenses that the Claimant alleged that she incurred was pleaded by the Claimant or set out in a scheduled of special damages with her pleadings, nor was evidence of the expenses incurred set

out in her witness statement. There were no receipts or copies of paid invoices accompanying her amended statement of claim or witness statement.

[93] Mr. Otto, in his witness statement on behalf of the Defendant set out various payments made to the Claimant after the Accident for medical and other expenses. As previously stated, by cheque dated 29th March, 2021 the Claimant was paid the sum of \$1,598.03 by Caribbean Alliance which included the sum of \$127.80 for medical expenses incurred by the Claimant up to that time.

[94] In his witness statement, Mr. Otto provided details, supported by documentary evidence, of the other various payments made by Caribbean Alliance to the Claimant on behalf of the Defendant. Learned Counsel for the Claimant helpfully provided a breakdown of the payments as set out in the witness statement of Mr. Otto:-

- (i) A cheque dated 31st March, 2021 in the sum of \$3,282.78 in settlement of a medical bill issued by the Hospital dated 29th March, 2021. Of that amount, \$2,382.28 represented the Claimant's bill and the balance related to Ms. Ireland, who was seated in the driver's seat of the vehicle at the time of the Accident with the Defendant;
- (ii) A cheque dated 26th April, 2021 issued to Belmont Clinic in the sum of \$7,945.00 in payment of medical expenses incurred for MRIs conducted for the Claimant.
- (iii) Payment in the sum of \$836.65 on 21st May 2021 for various medical expenses incurred between 8th April 2021 and 10th May 2021.
- (iv) Issued cheque dated 11th June, 2021 in the sum of \$920.00 to Caribbean Ortho Centre in respect of a medical report concerning the Claimant.
- (v) Issued cheque dated 19th November, 2021 in the sum of \$429.26 to the Claimant for medical expenses, including consultation fees and medication expenses.
- (vi) Issued cheque dated 27th June, 2022 in the sum of \$450.00 to Caribbean Ortho Centre in payment for a consultation attended by the Defendant.

- [95] The above payments in respect of the Claimant only total \$12,963.19 in addition to the sum of \$1,598.03 paid for earlier medical expenses and lost wages. In her witness statement, the Claimant stated that the Defendant's insurer, Caribbean Alliance has paid her \$4,816.96 as partial payment for medical expenses and lost wages. The unchallenged evidence of Mr. Otto shows that the sums paid to cover the Claimant's medical and other expenses totaled \$12,963.19 in addition to the sum of \$1,598.03 paid for loss of wages and earlier medical expenses. None of payments have been disputed by the Claimant.
- [96] The Claimant failed to plead the expenses she alleges that she has incurred, and did not provide proof of the expenses she incurred. In the circumstances, the Court is unable to determine whether there were any further expenses incurred by the Claimant which have not already been covered by the Defendant's insurer. In the circumstances, I make no further award to the Claimant for medical expenses incurred.

Future Medical Expenses

- [97] The Claimant pleaded in her amended statement of claim that she was claiming future medical expenses including the cost of physiotherapy sessions, consultations, tests, medications, and treatment, to be assessed and future medical expenses, including the potential cost of spinal surgery in the amount of \$60,000 or more, to be assessed.
- [98] The Claimant pleaded and her evidence is that Dr. Gaekwad in his report dated 21st April, 2022 noted that her condition could progress to flank disc herniation with nerve root compromise, which would require spinal surgery costing \$60,000.00 or more.
- [99] Annexed to the Claimant's amended statement of claim was a medical report of Dr. Gaekwad dated 21st April, 2022. As previously noted, in the medical report, it was stated that the Claimant's clinical condition is progressing towards truncal regional pain syndrome involving the lower limbs caused due to the negligent traumatic event which, will continue to affect her with occasional exacerbation of the painful episodes and that the percentage of permanent impairment will continue to increase with advancing age.
- [100] Dr. Gaekwad further stated that the Claimant is recommended for invalidity benefits and compensation for further treatment inclusive of supervised physiotherapy and surgical spinal decompression surgery of the L5/S1 intervertebral disc, in the event of worsening neurology/annular bulge leading to flank disc herniation with nerve root compromise.

- [101] Dr. Gaekwad further stated that presently, the Claimant is recommended physiotherapy (self-directed exercises and supervised by a qualified physiotherapist) and evaluations at three monthly intervals to assess the prognosis as a sitting base on the permanent physical impairment with consideration given with the increasing percentage of permanent impairment.

Future Spinal Surgery

- [102] The award the Claimant seeks for spinal surgery is based on statements made by Dr. Gaekwad in his medical reports. As noted, Dr. Gaekwad's medical reports were not filed by the Claimant pursuant to Part 32 of CPR as ordered by the Court.
- [103] The Court appointed expert, Dr. Kowlessar, although accepting Dr. Gaekwad's assessment of the Claimant having 7% whole person impairment as a result of the Accident, specifically disagreed that the result of this assessment is equivalent of the permanence of impairment.
- [104] Further, Dr. Kowlessar's clinical impressions of the Claimant in no way suggests a need and no recommendation was made by him in his expert report or oral testimony for future spinal surgery. The difficulty the Claimant faces is that Dr. Gaekwad's report on which she has based her claim for future medical expenses including possible surgery is not properly before the Court and there has been no opportunity afforded to the Defendant to challenge his report.
- [105] It is noted however that even if the expert report of Dr. Gaekwad is considered, he only expressed the possibility of surgery in the future depending on whether the Claimant's condition worsened. There is no updated medical evidence before the Court as to whether the Claimant's medical condition is now such that spinal decompression surgery is required. Further, the Claimant has not given evidence that she would undergo spinal surgery. In the absence of evidence before the Court that spinal surgery is required and that the Claimant intended to undergo the surgery, I make no award to the Claimant for future surgery.¹³

Other Future Medical Expenses

- [106] The evidence before the Court shows that the Claimant still has complaints of continued pain and based on the evidence of Dr. Kowlessar there is also some uncertainty as to why the Claimant is still experiencing pain. The Claimant has

¹³ See: Claudette Francis v Cecilia Martin BVIHCAP2009/0007 (delivered 20th September 2010, unreported) and Jameson Mannix and Osaze Mannix v Hamish Anthony ANUHCv2020/0219 consolidated with ANUHCv2020/0220 (delivered 27th January 2025, unreported) at para. 38.

also indicated that she is continuing to do self-directed physiotherapy but improvement has not been substantial.

- [107] In light of the foregoing, I would accept that it is likely that the Claimant will incur medical expenses in the future which may include supervised physiotherapy and future medical consultations. Looking at the past medical expenses paid by the Defendant's insurer, I consider that the sum of \$5,000.00 should be awarded to the Claimant to cover the possibility of future medical expenses.¹⁴

Loss of Further Earnings

- [108] In **Terrance Amedee v Marcus Modeste**,¹⁵ Michel JA delivering the judgment of the Court of Appeal explained loss of future earnings as follows:-

"Loss of future earnings is the loss occasioned to an injured party consequent on his inability to work as a result of the injuries which he sustained or the diminution in his income consequent on his diminished capacity to work as a result of his injuries. To qualify for this award, the injured party must satisfy the court by medical or other cogent evidence that he was rendered incapable of working or his ability to work was impaired to the extent that the income which he earned from his employment was lessened as a result of his injuries."

- [109] The Claimant's evidence is that because of her injuries, she cannot work and cannot provide for herself or her son. To support this contention, the Claimant relies on medical reports of Dr. Gaekwad attached to her amended statement of claim and witness statement. In a medical report of Dr. Gaekwad dated 3rd June, 2021 the Claimant was assessed as having 7% whole person impairment. The report stated that the percentage of impairment will increase with advancing age. The report further stated that the Claimant would need supervised physiotherapy and pain management for a minimum of six months initially and evaluation at three monthly intervals and that presently her clinical condition affected the activities of daily living.
- [110] In a medical report addendum dated 16th June, 2021 it was stated by Dr. Gaekwad that the Claimant is limited in her activities of her daily living on account of lower back pain with sporadic paraesthesia to the lower limbs resulting in inability to sit/stand for more than 10 minutes; muscle spasms while changing posture; and inability to forward flex at the lumbo-sacral region. The report goes on to state that due to aforementioned limitations, the Claimant is unable to pursue her occupation and advised rest to regularly

¹⁴ Seepersad v. Persad & Anor (Trinidad and Tobago) [2004] UKPC 19.

¹⁵ SLUHCVP2022/0001 (delivered 9th November 2023, unreported) at para. 18.

follow up with the supervised physiotherapy regimen and pain management. The report further stated that the Claimant is recommended to continue the supervised physiotherapy for the next six months minimum with adjuvant pain management and that clinical evaluations at three monthly interval to assess her progress are recommended. The report further stated that the Claimant suffered loss of wages on account of her clinical condition and will need assistance for the same in the future as well.

- [111] It is noteworthy that the medical report addendum dated 16th June, 2021 does not state that the Claimant was incapable of working in the future, but was addressing the clinical impressions of the Claimant at that time.
- [112] In a medical report of Dr. Gaekwad dated 21st April, 2022 it was stated that the Claimant was unfit to pursue an occupation either in the sedentary or standing capacity with the permanent impairment assessed as 7% whole person impairment as detailed in the initial medical report dated 3rd June, 2021.
- [113] The report further stated that the Claimant's clinical condition was progressing towards truncal regional pain syndrome involving the lower limbs caused due to the negligent traumatic event, which will continue to affect her with occasional exacerbation of the painful episodes. In addition, the percentage of permanent impairment will continue to increase with advancing age. The report stated that the Claimant is recommended for invalidity benefits and compensation to cover the cost of further treatment inclusive of supervised physiotherapy and surgical spinal decompression surgery of the L5/S1 intervertebral disc in the event of worsening neurology/annular bulge leading to frank disc herniation with nerve root compromise.
- [114] As has already been noted, Dr. Gaekwad's medical reports were not filed in compliance with CPR 8.10(4). The medical reports, however, were reviewed by Dr. Kowlessar who has been deemed an expert for the purpose of these proceedings. Dr. Kowlessar's evidence is that whilst he agrees with the calculation to arrive at the Claimant being assessed as having 7% whole person impairment, he disagrees with the conclusion that the permanence of her impairment is 7%. It is also noteworthy that the Dr. Kowlessar examined the Claimant after the 21st April, 2022 medical report was prepared. Dr. Kowlessar has concluded in his expert report filed in these proceedings that there was no physical reason why the Claimant should be incapable of sitting or standing for an extended time period (up to 2 hours). He further stated that he appreciated that the Claimant may currently have muscle-related back pain depending on the moderate-high intensity of physical activity, but there was no physical reason that would render her incapable of occupational and activities of daily living (ADL) functions, acknowledging that she previously worked as a cashier.

- [115] The Claimant's evidence is that she left job as a cashier in April 2021. Learned Counsel for the Defendant has correctly submitted and it was put to the Claimant under cross examination, that the Claimant had not provided medical evidence to the Court which shows that she had to give up her job in April 2021 because of injuries she sustained in the Accident. I note that it is in Dr. Gaekwad's medical report addendum dated 16th June, 2021 after April 2021 when the Claimant resigned, where it was first indicated that she had limitations in her functioning preventing her from pursuing her occupation. It is also noted that the statement in the medical report addendum dated 16th June, 2021 was not to the effect that the Claimant's limitations were permanent.
- [116] It was further revealed under cross-examination of the Claimant that between 2021 and 2022 the Claimant was engaged in odd jobs doing catering to support herself. There was no clear indication from the Claimant as to why this did not continue but her evidence under cross-examination demonstrated that the Claimant was capable of doing work to earn a living after the Accident.
- [117] I do note the evidence of the Claimant that she is still experiencing pain, and there is some evidence of the worsening of her condition since then. Unfortunately, Dr. Gaekwad's reports were not properly placed before the Court for his opinion to be considered and probed by the Defendant and further updated medical reports on the Claimant's present condition were not put before the Court in a timely manner despite accommodations previously being given to the Claimant by the Court to do so. The medical evidence of the expert witness that is properly before the Court is that there is no reason why the Claimant's occupational and daily activities should be affected by her injuries.
- [118] Even if Dr. Gakwad's report were to be considered, he did not make an unequivocal statement that the Claimant is unable to work at all and the Claimant's own evidence under cross-examination is that after she stopped working at Gore's Supermarket in 2021, she was engaged in catering to support herself but stopped in 2022.
- [119] Based on the evidence before the Court, I am unable to conclude that the Claimant is no longer able to work. The Claimant has not placed cogent evidence before the Court that she is permanently rendered incapable of working, nor has she placed cogent evidence before the Court that her injuries have diminished her previous earning capacity.
- [120] It is possible that because of her injuries from the Accident, the Claimant is somewhat disabled in her capacity to earn as much as she previously did, but there would need to be clear medical evidence before the Court to make a

conclusive determination. Further, the Claimant did not provide documentary evidence to support her earnings before the Accident, and it is notable that no claim was made for loss of previous earnings before trial. The Court also has no indication of how much the Claimant is presently able to earn as the Claimant's evidence is that she is not presently in employment. Thus, to make any assessment of possible reduced future earnings would be entirely speculative.

[121] Given my above conclusions, no award can be made to the Claimant for loss of earning capacity as her evidence is that she is not presently in regular employment. I am also unable to employ any sort of multiplier-multiplicand approach for loss of future earnings because, firstly, the Claimant has not established what her earnings were before the Accident. Secondly, the evidence before the court does not support a conclusion that she is unable to work. I also have no sufficient evidence to assess a risk of financial loss to make a **Blamire v South Cumbria Health Authority** ("Blamire")¹⁶ type award.

[122] In light of the foregoing, I make no award to the Claimant for loss of future earnings.

Travel Expenses related to Seeking Medical Treatment, to be Assessed

[123] It was unclear to the Court whether this head of damages referred to special damages or general damages. The Claimant did not plead any pre-trial travel expenses. In the circumstances, she would not be entitled to recover travel expenses on this basis. The Claimant has also failed to plead any facts to support a claim for future travel expenses, therefore, no award should be made for future travel expenses.

Interest

[124] The Claimant is entitled to interest on her claim. In awarding interest to the Claimant, the Court is guided by the judgment of the Court of Appeal in **Alphonso v Ramnath**¹⁷. The Claimant is awarded pre-judgment interest on her award of general damages for pain suffering and loss of amenities at the rate of 5% per annum from the date of service of the claim on the Defendant to the date of the order made herein. No pre-judgment interest is awarded on the sum for future medical care. Post judgment interest shall be at the statutory rate of 5% per annum.

¹⁶ [1993] PIQR Q1.

¹⁷ (1997) 56 WIR 183.

Costs

[125] As it relates to the issue of costs, the Claimant is entitled to costs on a prescribed basis in accordance with CPR 65.5 and Part 65 of CPR 2023, appendices B and C.

Disposition

[126] In light of the foregoing, the Defendant shall pay the Claimant the following:-

1. General damages for pain, suffering and loss of amenities in the sum of \$40,000.00 together with interest from the date of service of the claim on the Defendant to the date of this Order at the rate of 5% per annum.
2. The sum of \$5,000.00 for future medical care. No interest is awarded before judgment.
3. Prescribed costs in accordance with rule 65.5 of the Civil Procedure Rules (Revised Edition) 2023 and Part 65 of the Civil Procedure Rules (Revised Edition) 2023, appendices B and C.
4. Post judgment interest at the statutory rate of 5% per annum.

[127] I wish to thank learned Counsel on both sides for their assistance to the Court.

Carlos Cameron Michel
High Court Master

By the Court

Registrar