

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2024/0125

BETWEEN:

DIANNE HILLHOUSE

Claimant

and

[1] CHARMAINE MILLER

[2] JAKEEM MILLER

Defendants

Appearances:

Mr. Kendrickson Kentish KC and Mr. Ralph Bowen, Counsel for the Claimant
Mr. Rushaine Cunningham, Counsel for the Defendants

2025: December 2nd;
2026: March 19th.

DECISION ON ASSESSMENT OF DAMAGES

- [1] **MICHEL, M.:** On 4th April, 2021 the Claimant was struck by a motor car whilst she was walking along the Sea View Farm main road ("**the Accident**"). The motor car that struck the Claimant was owned by the 1st Defendant and was driven by her son, the 2nd Defendant.
- [2] The Claimant subsequently commenced the present proceedings against the Defendants alleging that the Accident was caused by the negligence of the Defendants and that as a result of the Accident, she suffered serious injuries. The Claimant sought general damages, special damages in the sum of \$91,118.46, interest and costs on her claim, as amended.
- [3] The Defendants filed a defence to the Claimant's claim but the Parties later consented to judgment on liability being entered for the Claimant with damages to be assessed by the Court. The Claimant filed witness statements and written submissions for the assessment of damages. The Claimant also sought and obtained permission to file an expert medical report of Dr. Deepraj Gaekwad in accordance with Part 32 of the Civil Procedure Rules (Revised Edition) 2023 ("**CPR 2023**"). The expert report dated 29th April, 2025 was filed

by the Claimant on 14th May, 2025. The Defendants subsequently put questions to Dr. Gaekwad about his report and written answers to the written questions of the Defendants were provided by Dr. Gaekwad. These answers are treated as part of the expert report pursuant to CPR 32.8(3). Both parties filed written submissions for the assessment of damages.

General Damages

- [4] 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
- [5] I will thus consider the Claimant's claim for general damages for pain suffering and loss of amenities based on the above principles.

The Nature and Extent of Injuries Suffered

- [6] The Claimant was born on 21st September, 1971. She was 49 years old at the time of the Accident and 54 years old at the date of the assessment of damages. She pleaded the following particulars of injuries in her amended statement of claim:-
- (i) Left lateral malleolus fracture with diastasis;
 - (ii) Right shoulder subscapularis partial tear and internal derangement;
 - (iii) Right wrist and scaphoid injury;
 - (iv) Blunt trauma to chest;
 - (v) Multiple contusions.
- [7] The Claimant's injuries were detailed in the expert report of Dr. Gaekwad dated 29th April, 2025. Dr. Gaekwad indicated in his expert report that the Claimant was first evaluated by him on 28th April, 2021. He stated that according to the Claimant's narration, following the Accident, the Claimant suffered a transient loss of consciousness with retrograde amnesia and was primarily treated at Mount St. Johns Medical Center ("**the Hospital**") for injuries to the face, chest, neck, head and the left lower limb. She was attended by the orthopaedic firm and treated with immobilization of the left ankle in a below-the-knee cast following a posterior ankle slab initially.
- [8] Dr. Gaekwad indicated that the Claimant is a known hypertensive with past history of stroke (CVA- cerebro vascular accident) in 2017 following which she

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

experienced occasional left upper-lower limbs radiation of pain prior to the Accident.

- [9] A computed tomography (CT) scan of the Claimant's cervical spine and brain reported by the radiologist revealed no evidence of acute intracranial and spinal injury, with the clinical impression of:-
- (i) right shoulder subscapularis partial tear and internal derangement;
 - (ii) right wrist and scaphoid injury and blunt trauma to the chest;
 - (iii) left lateral malleolus fracture with diastasis (confirmed via plain radiographs).
- [10] The Claimant was advised plain radiographic study of the right wrist and scaphoid, CT scan of the chest and MRI scan of the right shoulder.
- [11] At a follow up evaluation on 4th May, 2021 the Claimant presented with clinical signs of right interosseous neuralgia and right shoulder internal derangement (crepitus with restricted active abduction) concurred by an MRI study of the right shoulder which revealed:-
- (i) SLAP (Superior Labrum, Anterior to Posterior) II tear
 - (ii) Biceps tendinitis
 - (iii) Partial tear subscapularis
 - (iv) Moderate bony contusion
 - (v) Degenerative disease
- [12] No fracture was reported on the plain radiographs of the wrist and scaphoid and CT chest was normal.
- [13] The Claimant was advised open reduction and internal fixation of the displaced left lateral malleolus fracture with fibular plate and syndesmotic reconstruction with cancellous screws of the distal tibia-fibular articulation. She was also advised right shoulder arthroscopic SLAP repair for the joint debridement and subscapularis partial tear.
- [14] The Claimant subsequently underwent open reduction internal fixation (ORIF) and syndesmosis reconstruction under general anesthesia on 18th June, 2021. Post operative, she was advised to continue the peroral administration of antibiotics, analgesic, anti-inflammatory and calcium supplements. Immobilization of the left ankle was continued with the recommendation of ambulation with support non weight bearing on the operated left lower limb and limb elevation at rest. Physiotherapy initially comprised of active toes movements, static calf pumps and ipsilateral knee range of movements exercises.

- [15] At follow up on 20th August, 2021 the plain radiographic study of the Claimant's left ankle dated 7th August, 2021 revealed osteopenia around the left ankle (both post traumatic and post immobilization) owing to the duration since injury decreased ankle joint space, suggestive of chondromalacia.
- [16] In his expert report, Dr. Gaekwad recommended the following for the Claimant:-
- (i) MRI scan of right shoulder joint;
 - (ii) implant removal from the left lower limb followed by non-weight bearing ambulation with support for minimum six weeks;
 - (iii) shoulder arthroscopic surgery for SLAP and rotator cuff repair followed by supervised and self-directed rehabilitation at minimum two sessions per week for initial eight weeks;
 - (iv) Perioperative antibiotics and analgesics are standard for initial two weeks.
- [17] Dr. Gaekwad noted that the implant removal procedure and shoulder arthroscopic surgery procedure would be staggered (not overlapped) with a minimum of three months recovery for each.

Resultant Physical Disability

- [18] Dr. Gaekwad reported that at an evaluation on 22nd March, 2024 the Claimant reported occasional limitation of movements of the right shoulder joint with clinically palpable tenderness over the supraspinous portion of the right scapula, coracoid process attachments. Occasional right upper limb sensory alteration with grade four grip strength clinically. Left leg proximal pain and standing for duration exceeding thirty minutes was endorsed and use of specific shoes (sneakers) to alleviate this challenge was mentioned.
- [19] In his expert report, Dr. Gaekwad assessed the Claimant's total percentage of disability arising out of the Accident, based on the Guides to the Evaluation of Permanent Impairment as 5% WPI (five percent Whole Person Impairment).

The Pain and Suffering Endured

- [20] In her witness statement, the Claimant described the pain and suffering she experienced following the Accident. The Claimant stated that on a daily basis,

she is enduring torment and hardship that no one should have to face due to her injuries.

- [21] The Claimant stated that upon impact, she was violently hurled into a ditch at the roadside. She stated that she experienced unbearable physical pain and suffered transient loss of consciousness accompanied by episodes of retrograde amnesia.
- [22] The Claimant stated that the pain from the Accident continues to be relentless and overwhelming. She stated that she endured persistent pain in her neck, jaw, and upper limbs with every movement, intensifying her suffering.
- [23] The Claimant stated that her journey to recovery is ongoing. She stated that the pain in her shoulder has not subsided over the years and continues to cause her agony. She stated that she has been advised that additional surgeries are required and this has added to her anxiety.
- [24] The Claimant stated that the limitations she now faces are unimaginable. She stated that she is experiencing consistent pain on the shoulder of her dominant hand and the pressure from the pain in her ankle restricts her from standing for more than 30 minutes. She stated that she can no longer perform simple tasks without feeling the searing pain in every movement. She stated that the daily agony she endured is constant and unyielding, forcing her to rely on painkillers to get through the day. She stated that surgeries are her only hope, yet they are a daunting reminder that her life will never return to the way it once was.
- [25] In their written questions to Dr. Gaekwad, the Defendants asked Dr. Gaekwad whether from his medical examinations of the Claimant, he made a diagnosis of chronic pain and/or chronic pain syndrome. Dr. Gaekwad's response was that chronic pain/chronic pain syndrome were not diagnosed by him, however signs and symptoms of sympathetic dystrophic changes were noted as mentioned in his medical report.
- [26] Dr. Gaekwad attended the assessment of damages. Under cross-examination by Mr. Kenderick Kentish KC for the Claimant, Dr. Gaekwad stated that the Claimant is still suffering from pain and that most of the pain is just from the right shoulder because she has injuries to the right shoulder as was confirmed on the MRIs.

The Extent to which the Claimant's Pecuniary Prospects have been affected

- [27] The Claimant stated that she is the sole proprietor of Dianne's Brokerage Services, a self-established business which she once operated with pride and independence. The Claimant stated that her business was the lifeblood of her

existence, and she was responsible for the delivery, processing and customs brokerage of items via air and seaports. She stated that she was the independent operator of her business.

- [28] The Claimant stated that the Accident crippled her ability to work and she has been made to feel as though her livelihood has been taken from her. The Claimant stated that due to her inability to run her business independently, she was forced to hire two independent contractors, Arthur Tuitt and Keith Merchant, at a combined cost of \$83,321.16 in order to continue operations. She stated that the financial strain has been relentless and she continues to suffer economic loss.
- [29] The Claimant stated that the cost of her rehabilitation will continue to rise as she is unable to carry out her business independently, and will need to employ others at an estimated cost of \$45,000.00.
- [30] This aspect of the Claimant's claim is covered in greater detail later in this decision.

Award of General Damages for Pain, Suffering and Loss of Amenities

- [31] 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 and loss of amenities. The Court must strive for consistency by using comparative cases tailored to the specific facts of the individual case. 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.'
- [32] 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."

² [1998] 3 All ER 481.

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

- [33] In **Bonny Alexander v Stanislaus James and James Enterprises Limited**,⁴
Actie M stated:-

“An award for general damages is not strictly for the injuries sustained, but for the pain and suffering and the loss of amenities which resulted from them. Where multiple injuries are sustained there will be an immediate loss of amenities and an accumulation of pain and suffering. The pain and suffering and loss of amenities may develop to either a greater or lesser degree to the individual. Each case will be tailored to its specific facts and considered with a view to determining a figure which reflects the combined effect of the injuries.”

- [34] In the written submissions filed on behalf of the Claimant, learned Counsel for the Claimant submitted that the medical reports and expert opinions, particularly those provided by Dr. Gaekwad, confirm the Claimant's persistent and debilitating pain, which severely diminishes her quality of life and emotional state. Learned Counsel for the Claimant submitted that it is further established that the Claimant will suffer from chronic pain for the remainder of her life, necessitating ongoing pain management, physiotherapy, and further surgical procedures to address her left ankle and right shoulder injuries.

- [35] Learned Counsel for the Claimant submitted the following five cases for the Court's consideration to arrive at an appropriate award to the Claimant for pain suffering and loss of amenities:-

- (i) **Monica Lansiquot v Geest PLC**.⁵ The claimant tripped and fell at work. She suffered a prolapse of the left C4-C5 disc space, or a slipped disc. She suffered discal protrusions and subsequently underwent percutaneous laser disc decompression in London, United Kingdom. The claimant was found to suffer persistent pain in her lower back radiating down the left leg, pain in both knees, and increased pain associated with travelling, causing her to avoid travel with heavy luggage. The claimant avoided lifting, sitting, or standing for long periods. The claimant was recommended surgery but there was no guarantee it would provide relief, although it was likely. The claimant's award of general damages for pain suffering and loss of amenities made by the High Court on 18th December 1998 was overturned on appeal. The Court of Appeal awarded the claimant \$40,000.00 for pain and suffering and \$20,000.00 for loss of amenities.

⁴ SLUHCV2017/0280 (delivered 9th March 2018, unreported).

⁵ Saint Lucia Civil Appeal No. 1 of 1999 (delivered 7th February 2000, unreported).

- (ii) **Marcel Fevrier et al v Bruno Canchan et al**: The claimants were injured in a motor vehicle accident. The 1st claimant suffered injuries including a six inch laceration to the right knee region, a six inch laceration to the outer aspect of the right leg, a commuted fracture of the left tibia and fibula, fracture dislocations of the metacarpals and metatarsal joints in both feet. The 1st claimant suffered tremendous pain. He was hospitalized for two months and remained out on sick leave for a further four months. The 1st claimant underwent operative reduction and K wire fixation of the fractures and dislocation of his feet. The fractured tibia and fibula were manipulated, reduced and immobilized in a plaster cast and the 1st claimant was incapacitated for about six months. The medical expert told the court that the injuries in the 1st claimant's feet may result in chronic pain and produce permanent disability of about 2%. The 1st claimant was awarded general damages of \$50,000.00.

The 2nd claimant was a young outgoing 25 year old female. Her injuries included abrasions and superficial laceration over her body and a commuted fracture of the right femur. The 2nd claimant was discharged from the hospital after three months and remained on sick leave for a further six months. Surgery was performed on the 2nd claimant and a K wire was inserted into her femur. The 2nd claimant was incapacitated for about six months. The 2nd claimant's injuries resulted in a one inch shortening of the right lower limb which would produce chronic joint pains in that limb, resulting in a permanent disability of about 10%. The 2nd claimant was awarded general damages of \$150,000.00.

- (iii) **Halina Dushynski v Frederick D. Rumsey**:⁶ This is a Canadian case where a claimant was awarded general damages of CA\$125,000.00.
- (iv) **Evans v Pontypridd Roofing Ltd**:⁷ This is an English case in which the Court of Appeal upheld an award of £100,000.00 in general damages for pain, suffering and loss of amenities;
- (v) **Rosetta Elouise Mayers v Deep Bay Development Company Ltd**:⁸ The claimant sustained a fractured L2 vertebra which gave rise to the condition of post traumatic fibromyofacial syndrome and reflex dystrophy syndrome. RSD is an incurable condition characterized by chronic pain, swelling and affects the proper functioning of the lower extremity of the body. The court found that the claimant had suffered

⁶ 2001 ABQB 513.

⁷ [2001] EWCA Civ 1657.

⁸ Antigua and Barbuda Civil Suit No. 241 of 1993 (delivered 7th November 2003, unreported).

excruciating pain for substantial periods in the past and even up to the assessment of damages, with prolonged treatment and therapy which included epidural steroid blocks, nerve blocks, acupuncture, Botox injections, trigger point management, physical therapy and an electrical spinal stimulator which was surgically implanted on 17th March 1993 she was not free from pain. The claimant had relief from the severe and unremitting pain she suffered before but she continued to have severe flare-ups. The court found that the claimant would never be free from pain for the rest of her life. The claimant was awarded general damages for pain suffering and loss of amenities in the sum of \$230,000.00.

- [36] The learned Counsel for the Claimant submitted that taking into account the vintage of the authorities, costs of living adjustment, and the increase of consumer price indices, the Claimant should be awarded the sum of \$350,000.00 for pain suffering and loss of amenities.
- [37] Learned Counsel for the Defendants on the other hand submitted that the cases on which the Claimant relies upon as the basis for the determination of the award do not align with the circumstances of the present case. Learned Counsel for the Defendants submitted that when the various cases submitted by Counsel for the Claimant as comparable awards for general damages are carefully reviewed, the confirmed medical findings in each case demonstrate that the injuries suffered by the claimants in those matters were significantly different, more severe, or involve permanent disabilities and chronic pain conditions.
- [38] Learned Counsel for the Defendants submitted that these cases are not appropriate comparators, as they involve more serious injuries and medical conditions with permanent and debilitating consequences, whereas the Claimant in the present matter has not demonstrated a comparable level of disability, nor has she produced any medical evidence indicating that her injuries have rendered her permanently incapacitated. Learned Counsel for the Defendants submitted that the 5% Whole Person Impairment (WPI) assessment by Dr. Gaekwad occurred before the Claimant's shoulder surgery and ankle implant removal. Furthermore, it is a relatively low figure and should not be deemed to be an unequivocal finding of permanent disability by a medical practitioner. Learned Counsel for the Defendants urged the Court to assess general damages based on the actual, verifiable medical evidence before it, rather than the awards in the cases submitted by the Claimant which were based on far more serious and lasting impairments.

[39] Learned Counsel for the Defendants submitted the following cases for the Court's consideration as comparable cases to make an award to the Claimant for general damages for pain, suffering and loss of amenities:-

- (i) **Irvin Baptiste v. Carlton Lewis**.⁹ The claimant was injured in a motor vehicle accident when a truck negligently collided with the claimant's vehicle. The claimant was 45 years old at the time, and as a result of the accident, he suffered tears to the rotator cuff, pain in the neck, shoulders, and back, a 10% impairment of the right shoulder, impingement syndrome, and tenosynovitis of the long head of the biceps tendon. The court considered the impact of these injuries on the claimant's lifestyle, including his inability to perform his duties as a refrigerator technician without pain, sleep disturbances, and limitations in physical activities such as lifting heavy objects. The court awarded the claimant the sum of \$40,000.00 as general damages for pain, suffering and loss of amenities.
- (ii) **Ellina Turnbull et al v Renard Benjamin**.¹⁰ the 1st claimant was injured when the defendant's vehicle collided with the back of the claimants' vehicle which at the time was being driven by the 1st claimant. The 1st claimant was 67 years old at the time of the accident. As a result of the accident, the 1st claimant suffered an injury to her right shoulder, neck and back. She was diagnosed as having suffered a rotator cuff tear with decreased range of motion and strength in the right shoulder, as well as twisted neck muscles. She underwent surgery and her right arm was placed in a cast for three months followed by physiotherapy. It should be noted that this case emanated from the Territory of the Virgin Islands where the United States Dollar is used. The court awarded the Claimant US\$35,000.00 or EC\$94,500.00¹¹ for pain, suffering, and loss of amenities.

In relation to the case of **Ellina Turnbull**, learned counsel for the Defendants in the present case suggested that Dr. Gaekwad has recommended arthroscopic surgery for the tear to the Claimant's shoulder which is minimally invasive, and an initial eight weeks of physiotherapy. Learned counsel for the Defendants submitted that since the Claimant is younger than the claimant in **Elina Turnbull**, the court may consider the age disparity and the potential for greater loss of amenities in this case.

⁹ ANUHCv2014/0482 (delivered 11th August 2020, unreported).

¹⁰ BVIHCv2016/0311 (delivered 21st June 2019, unreported).

¹¹ US\$1.00 = EC\$2.70.

(iii) **Charmaine Ephraim as representative of The Estate of Carl Baynes, Deceased v Ed Meyer:**¹²

The deceased claimant sustained personal injuries as a result of the negligent driving of the defendant. He was 73 years old at the material time. The claimant's injuries as a result of accident were: (i) bilateral tear of tibi-fibula ligament; (ii) bilateral strain to medial collateral deltoid ligaments of both ankle joints; (iii) fracture of the left osteophytes at medial malleolus left ankle joint (fracture of calcification distal to medial malleolus of left ankle). The deceased underwent therapy to rehabilitate himself with the injuries. He had remained partially disabled in the functions of his lower limbs for two and a half years after the accident. He had since completely healed and had not ended up with any permanent disability. He would have developed post traumatic degenerative joint disease giving rise to partial physical impairment in the future when he grew older, but no updated or further medical report post 2014 was provided which concluded that this in fact occurred. The court considered that the injuries affected the claimant's ability to participate in athletic activities for two and a half years post-injury. The court awarded the claimant \$20,000.00 for pain, suffering, and loss of amenities.

(iv) **Raymond v Joseph:**¹³ The claimant was struck down by a car being driven by the defendant. He was at the time of the accident about 60 years old. He was hospitalized for four days after the accident. The claimant testified that after his release from hospital he remained at home for one year and six months not being able to do anything or to move because of the broken ankle. He had a lot of pain from the ankle injury. He used crutches for six months. The claimant suffered fractures of the lateral and medial malleoli (the end of the tibia and ankle). A Plaster of Paris cast was applied below the claimant's knee. The claimant's fractures healed well without complications; however, the claimant had some residual swelling and discomfort at the ankle. At the time of the assessment of damages the claimant had full movement at the ankle joint and mild pain at the extremes of movement. The medical doctor had recently seen the claimant and testified that for all intents and purposes the claimant had healed, however, the claimant had some residual swelling and discomfort at the ankle. At present there is full movement at the ankle joint and mild pain at the extremes of movement. The court awarded \$20,000.00 in general damages for pain, suffering and loss of amenities on 1st August 2001.

¹² ANUHCv2014/0057 (delivered 23rd June 2020, unreported).

¹³ Commonwealth of Dominica High Court Civil Claim. No. 289 of 1994 (delivered 1st August 2001, unreported).

- [40] Learned Counsel for the Defendants submitted that in the present case, the Claimant suffered a fracture to her ankle and has ambulated with an implant, which has not been removed as of 2nd April, 2024. However, Dr. Gaekwad has not indicated that the removal of the implant will result in any permanent or significant effects.
- [41] Learned Counsel for the Defendants submitted that taking into account the cumulative effect of the Claimant's injuries, a reasonable award for pain, suffering, and loss of amenities would be \$60,000.00. Learned Counsel for the Defendants submitted that this figure is consistent with the awards in the comparable cases cited above and reflects the nature and extent of the injuries sustained, as well as the impact on the Claimant's quality of life.

Discussion

- [42] I have carefully considered the expert report of Dr. Gaekwad and his oral testimony as well as the evidence of the Claimant in relation to her injuries, the pain and suffering she endured, and the loss of amenities suffered. I have also reviewed and considered the cases referred to by the Parties. In my view, the award being sought by the Claimant as general damages for pain suffering and loss of amenities is out of scale, however, I also consider that the award proposed by the Defendants is too low.
- [43] The Claimant sought to rely on cases from Canada and the United Kingdom as comparable cases for the Court's consideration of an award to the Claimant. As was stated by Webster JA [Ag.] in **Collin Hope Jr. v Edmond Lake**,¹⁴ 'the well-established practice in the Eastern Caribbean courts in assessing damages is to look first to similar cases in the region and apply them to the cases being decided'. It is only where there are no local comparable cases will the Court look out of the OECS to other regions and also have regard to relevant guidelines such as the Judicia College Guidelines for the Assessment of Damages in Personal Injury Cases. Several other comparable cases from the OECS have been referred to the Court to make an estimation of what level of compensation is appropriate for the OECS and there is no need to refer to cases from Canada or the United Kingdom where economic and social realities are different.
- [44] Unlike in most of the cases referred to the Court by the Defendants where the claimants' injuries were either upper limb injury or lower limb injury, in the present cases the Claimant suffered a serious injury to her shoulder and leg. Whilst her leg injury may now be somewhat resolved, based on the Claimant's evidence and that contained in the expert report of Dr. Gaekwad, she still

¹⁴ ANUHCv2020/0022 (delivered 23rd February 2022, unreported) at para. 5.

experiences some leg pain when standing for prolonged periods. Dr. Gaekwad has recommended implant removal from the left lower limb. The Claimant is also still suffering from pain in her right shoulder due to her shoulder injury. Dr. Gaekwad has recommended that she undergo shoulder arthroscopic surgery to repair this injury.

[45] I note that in **Marcel Fevrier**, the 2nd claimant received a comparatively higher award to the claimants in the other relevant cases submitted by both parties. However, in relation to the 2nd claimant in **Marcel Fevrier**, the Court took into account the 2nd claimant's young age, the shortening of her right leg, and her diagnosis of chronic pain in that limb, which resulted in a higher 10% permanent disability. The Claimant in the present case is older, has not been diagnosed with chronic pain by Dr. Gaekwad, although her pain persists due to her ongoing shoulder injury (which is to be repaired), and the Claimant in the present case has been diagnosed with a lower percentage of permanent disability.

[46] I also note that in **Rosetta Eloise Mayer**, where general damages of \$230,000.00 was award to the claimant, the claimant's injuries in that case gave rise to the condition of post traumatic fibromyofacial syndrome and reflex dystrophy syndrome (RSD), incurable conditions characterized by chronic pain. The Claimant in the present case has not been diagnosed with any similar type condition. The ongoing pain she experiences appears to be directly related to her ongoing injuries where surgical procedures have been recommended to alleviate pain and repair damage.

[47] Having considered the Claimant's injuries and their combined effect, her evidence as to her ongoing pain and suffering, and the other factors identified in **Cornilliac v St. Louis**¹⁵ that the Court must have regard to on an assessment of damages, and considering the similarities and differences between the cases referred to the Court and the present case, and taking into account the vintage of the awards in the comparable cases, I am of the considered view that an award in the sum of \$130,000.00 as general damages for pain, suffering and loss of amenities is fair compensation to the Claimant.

Special Damages

[48] 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 expenses, past care and the like. It is well settled so as to be considered trite that special damages

¹⁵ (1965) 7 WIR 491.

must be strictly pleaded and proved to be recovered.¹⁶ The learned authors of McGregor on Damages¹⁷ 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.”

- [49] In the recent Court of Appeal judgment of **Terrance Amedee v Marcus Modeste**,¹⁸ Michel JA delivering the judgment of the Court, explained a claim for special damages as follow:-

“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.”

- [50] The judgment of the Court of Appeal in **Carl Webster v Historic Beacon Point Anguilla Ltd. et al**¹⁹ has settled the position in the OECS that the failure of a claimant to include a particular out-of-pocket expense or pre-trial loss of earnings in a schedule of special damages in or attached to the claim form or statement of case or to amend the statement of case to include particulars of a claim for such expense or loss in a schedule of special damages, will disentitle a defaulting claimant from recovering the claimed sum.

- [51] Bennett JA [Ag.] delivering the judgment of the Court of Appeal in **Carl Webster** and citing with approval the judgment of the Court of Appeal in **Steadroy Matthews v Garna O’Neal**,²⁰ stated:-

“[22] From the foregoing it is clear that the principle, spelt out in **Ilkiw v Samuels and others** that a statement of case must be amended to bring the pleaded case in line with the evidence sought to be presented at trial continues to be applicable under the CPR. This is so even if that evidence had been set out in a witness statement. A witness statement

¹⁶ *Ilkiw v Samuels and others* [1963] 1 W.L.R. 991; see also *Steadroy Matthews v Garna O’Neal* BVIHCVAP2015/0019 (delivered 16th January 2018, unreported).

¹⁷ 18th Edition at 44-012.

¹⁸ SLUHCVP2022/0001 (delivered 9th November 2023, unreported) at para. 80.

¹⁹ AXAHCVP2020/0020 (delivered 21st June 2023, re-issued 19th September 2023, unreported).

²⁰ BVIHCVAP2015/0019 (delivered 16th January 2018, unreported).

is not a substitute for a statement of case; rather it serves to amplify or provide particulars or further particulars of the allegations set out in the statement of case. Failure to include a particular out of pocket expense or pre-trial loss of earnings in the schedule of special damages attached to the claim form or statement of case or to amend the statement of case to include particulars of a claim for such expense or loss in the schedule of special damages will disentitle a defaulting claimant from recovering the claimed sum. This was the position in **Steadroy Matthews v Garna O'Neal** where Michel JA in setting aside an award for special damages stated at paragraph [36]:

“[36] In light of the failure of the respondent (as the claimant in the court below) to comply with the requirements of rule 8.9(5) of the CPR by including in or attaching to the claim form or statement of claim a schedule of the special damages claimed for loss of earnings, and in the absence of both specific pleading and strict proof of the damages awarded, it was not open to the master to make the award that she did for special damages of \$197,155.00 for loss of earnings.”

[52] With the above in mind, I will now consider the Claimant's claim for special damages.

[53] The Claimant pleaded the following particulars of special damages in her amended statement of claim:-

- (i) Unpaid medical expenses from date of injury to present \$20,432.11;
- (ii) Loss of income from date of injury to end of sick leave \$67,539.46

[54] The Claimant did not set out her medical expenses in a scheduled of special damages, however, in support of her claim for medical expenses, the Claimant attached a bundle of receipts and paid invoices to her amended statement of claim. In relation to her loss of income, the Claimant attached an unsigned financial statement for Dianne's Brokerage Services to her amended statement of claim. As it relates to the period of sick leave, the Claimant only pleaded in her amended statement of claim that she was given sick leave until May 2021.

[55] I will first consider the Claimant's claim for loss of income.

Loss of Income

- [56] At paragraph (aa) of her amended statement of claim, the Claimant pleaded that at the time of the Accident, she was the sole employee of her business, Dianne's Brokerage Services. She further pleaded that given the nature of her injuries she was forced to hire an employee to service her many clients and to ensure that her business did not fold. The Claimant further pleaded that for the period that she was unable to work she incurred employee expenses of \$67,539.46, income that would otherwise have accrued to her had she been able to work. Exhibited to the Claimant's amended statement of claim were financial statements for Dianne's Brokerage Services for 2021 and 2022 dated 14th December, 2023 and 10th November, 2023 respectively.

The Claimant's Evidence

- [57] The Claimant's evidence as set out in her witness statement is that she is the sole proprietor of Dianne's Brokerage Services, a self-established business. She stated that her business was the lifeblood of her existence, and she was responsible for the delivery, processing and customs brokerage of items via air and seaports. The Claimant stated that the Accident crippled her ability to work. She stated that due to her inability to run her business independently, she was forced to hire two independent contractors, Arthur Tuitt and Keith Merchant, at a combined cost of \$83, 321.16, in order to continue operations. The Claimant stated that the financial strain has been relentless and she continues to suffer economic loss. She stated that she would rely on her financial statements to substantiate these claims.
- [58] The Claimant stated that after the Accident she was given an initial period of sick leave until May 2021. She stated that on 18th June, 2021 she underwent surgery on her left ankle, followed by a period of post-operative leave, initially extended until August 2021, and further prolonged by an additional four weeks. The Claimant later stated that her sick leave was extended to December 2021.

Evidence of Arthur Tuitt

- [59] Mr. Arthur Tuitt filed a witness statement on behalf of the Claimant. He stated that on or about 6th April, 2021 he was hired as an independent contractor by the Claimant on a temporary basis due to the Claimant's inability to work from injuries sustained in an accident.
- [60] Mr. Tuitt stated that he worked for the Claimant's company until June 2022 and that he was compensated from April 2021 to June 2022 in the amount of \$55,023.16. Mr. Tuitt stated that this payment was made bi-weekly by electronic funds transfers, according to services provided. Mr. Tuitt stated that

he intended to rely on the financial statements referred to in the Claimant's statement of claim.

- [61] Mr. Tuitt further stated that he was rehired by the Claimant in February 2024, as an independent contractor. He stated that the Claimant informed him that on account of her injuries and the pain suffered from standing or walking for long periods as required for her business, she would be requiring his services. Mr. Tuitt further stated that the Claimant further indicated to him that due to her injuries, she will require additional surgeries which may impair her mobility and ability to work. Mr. Tuitt stated that he is currently receiving a fixed compensation of \$1,600.00 on a bi-weekly basis.

Evidence of Keith Merchant

- [62] Mr. Keith Merchant filed a witness statement on behalf of the Claimant, however, Mr. Merchant did not attend the assessment of damages hearing to have his witness statement tendered as his evidence in chief. In the circumstances, little regard if any could be placed on Mr. Merchant's witness statement.

Discussion

- [63] Looking at the Claimant's pleadings and evidence for loss of income, it seems to me that what the Claimant is truly seeking to recover are pre-trial expenses – wages paid to independent contractors to work at Dianne's Brokerage Services during her absence from work between 2021 and 2022 – not "loss of income" or "loss of earnings."²¹ The Claimant is seeking to be compensated for the expenses she incurred hiring employees ("employee expenses"). Thus, to recover such sums, the Claimant would have been required to plead and prove these pre-trial expenses.
- [64] The Claimant and her witness Mr. Tuitt relied on financial statements for 2021 and 2022 for the Claimant's business Dianne's Brokerage Services to substantiate payments made to Mr. Tuitt for his services as an independent contractor. The financial statements were attached to the Claimant's statement of claim and amended statement of claim and are also contained in the Claimant's evidence bundle for the assessment of damages. I note that the financial statements are not signed, they are not stamped, nor do they indicate who they were prepared by.
- [65] The financial statement for Dianne's Brokerage Services for 2021 lists total payroll expenses as \$2,006.46. The financial statement for 2022 lists total payroll expenses as \$33,938.48. This totals \$35,944.94. The Claimant

²¹ See *Carl Webster v Historic Beacon Point Anguilla Ltd et al.*

pleaded her employee expenses as \$67, 539.46. It is quite evident that the financial statements provided by the Claimant do not support the sums pleaded in her amended statement of claim in relation to employee expenses.

[66] Matters are put in further doubt when the Claimant's witness statement is considered. In her witness statement, the Claimant stated that due to her inability to run her business independently, she was forced to hire two independent contractors at a combined cost of \$83,321.16. This is higher than the pleaded sum of \$67,539.46 for employee expenses, and higher than the payroll expenses shown on the financial statements for Dianne's Brokerage Services provided to the Court by the Claimant.

[67] The Claimant's witness, Mr. Tuitt, stated that he was compensated in the sum of \$55,023.16 for the period 2021 to 2022. I note that the Claimant's other witness, Mr. Merchant, who did not attend the assessment of damages hearing, stated in his witness statement that he was compensated in the sum of \$20, 778.00 in 2021. If these two sums are combined, the total compensation would be \$75,911.16.

[68] Thus what the Claimant has pleaded in her amended statement of claim, is different from what she states in her witness statement and is different from the total compensation her witnesses say they received and is different from the total payroll expenses in the financial statements she and her witnesses relied on.

[69] To add further to the mix, in the written submissions filed on behalf of the Claimant, it was submitted that:-

"In addition, as reflected by the Witness Statement of Arthur Tuitt, he has been rehired on a permanent basis as a direct result of the Claimant's continuing inability to perform the physical aspects of her work, receiving a bi-weekly salary of \$1,600.00, equating to \$41,600.00 annually. The Claimant has already paid Mr. Tuitt \$7,520.00 for services rendered from February 2024 to the date of filing this claim. Additionally, the Claimant would have lost income for a period of 3 months when she was placed on sick leave following the accident. With her income totaling \$11,000.00 per month, the Claimant lost a total of \$33,000.00."

[70] It is to be noted that none of what is set out in the submissions of the Claimant as it relates to loss of income, has been pleaded in the Claimant's amended statement of claim. There is no pleading for loss of income in the sum of \$7,520.00 from February 2024 to the filing of this claim on 3rd April, 2024.

Further, there is no pleading for loss of income for three months after the Accident at \$11,00.00 per month totaling \$33,000. This is also a curious submission since the evidence before the Court is that Mr. Tuitt's services were engaged on 6th April, 2021 two days after the Accident and the Claimant was seeking loss of income on this basis.

[71] I note the submission of learned counsel for the Defendants to the effect that the Claimant has not provided the Court with evidence as to her income before the Accident to determine the loss suffered. Further, learned Counsel for the Defendants pointed out that the financial statement for Dianne's Brokerage services for 2021 provided by the Claimant shows payroll expenses of \$2,006.46 with total net earnings of \$130,378.58 and further pointed out that based on the financial statement of 2022, payroll expenses increased to \$33,938.48, and even with the higher payroll expenses, net earnings increased to \$135,950.31.

[72] As I have stated above, in my view, the Claimant's claim is properly one for pre-trial expenses incurred hiring employees when she was on sick leave. I accept that the Claimant was the sole proprietor of Dianne's Brokerage Services and that as a result of her injuries, she was unable to run her business for a period after the Accident. I accept that the Claimant engaged the services of persons in the period after the Accident to assist with the running of the business due to her injuries. I accept that the Claimant would have had to spend money on engaging the services of persons to carry on the work in her business in the period after the Accident when she was recuperating, and that the payment of wages would have been a pre-trial expense.

[73] In her amended statement of claim, the Claimant relied on the financial statements for Dianne Brokerage Services for 2021 and 2022 exhibited to her amended statement of claim to support her claim for loss of income. In her witness statement, the Claimant stated that she was relying on the financial statements to substantiate her claim for the cost of hiring independent contractors. Although Mr. Tuitt stated in his witness statement that the payment for the work he did for Dianne's Brokerage Services was made bi-weekly by electronic funds transfers, Mr. Tuitt did not rely on any documentary evidence showing receipt of these transfers. Instead, Mr. Tuitt stated that he intended to rely on the financial statements referred to in the Claimant's statement of claim. Accordingly, it is the financial statements relied upon by the Claimant in support of her claim which must be examined.

[74] As previously noted, payroll expenses for Dianne's Brokerage Services for 2021 as stated in the financial statement totaled \$2,006.46. Payroll expenses for Dianne's Brokerage Services for 2022 as stated in the financial statement totaled \$33,938.48. Thus, according to the financial statements relied upon by

the Claimant, the combined payroll expenses for Dianne's Brokerage Services for 2021 and 2022 were \$35,944.94.

[75] The financial statements do not support the evidence of the Claimant set out in her witness statement in relation to the sums she stated she expended hiring help for the business, nor do they support Mr. Tuitt's evidence as to the compensation he received. What the financial statements show are employee expenses in the total sum of \$35,944.94. I am therefore satisfied that the Claimant has proven pre-trial expenses incurred hiring employees in the sum of \$35,944.94. Therefore, although the Claimant pleaded special damages of \$67,539.46 as employee expenses from the date of injury to the date of sick leave, on the evidence accepted by the Court, the Claimant has only proven the expenses in the sum of \$35,944.94.

[76] In light of the foregoing, the Claimant is only entitled to recover the sum of \$35,944.94 which has been proven.

Past Medical Expenses

[77] The Claimant pleaded at paragraph (y) of her amended statement of claim that since the Accident she has incurred out of pocket medical expenses including, but not limited to, doctor visits, surgery, medicine, medical equipment and physical therapy, in the amount of at least \$59,253.83. She exhibited to her amended statement of claim a bundle of receipts of medical expenses. The Claimant further pleaded that the Defendants' insurance company has reimbursed her in the amount of \$38,820.71 leaving an outstanding amount owed for medical expenses paid by the Claimant of at least \$20,433.12.

[78] The Claimant's evidence in her witness statement is consistent with her pleadings. The Claimant stated that she has incurred over \$59,253.83 in medical expenses. She further stated that despite receiving some reimbursement from the Defendants' insurance, she is still burdened with a staggering out-of-pocket cost. She stated that she intended to rely on sundry receipts of medical expenses and Insurance receipts.

[79] Learned Counsel for the Defendants submitted that the Claimant's evidence bundle includes receipts of various medical services which total EC\$38,810.17. As accepted by the Claimant, CG United Insurance Ltd. has defrayed the Claimant's expenses in the amount of EC\$38,820.00. Learned Counsel for the Defendants submitted that the Claimant alleges that there is an outstanding balance of \$20,433.12, but this is not supported by evidence in the form of receipts, bills, or invoices. Learned Counsel for the Defendants urged the Court to dismiss this request as this expense has not been proved by the Claimant.

Discussion

[80] I have reviewed each receipt and paid bill provided by the Claimant in support of her claim for special damages for her various medical expenses. The receipts and paid bills provided in her evidence bundle for the assessment of damages and the bundle exhibited to her amended statement of claim both total \$38,820.17. The Claimant has confirmed that she received an interim settlement from the Defendant's insurer in the sum of \$38,820.17 and this is supported by documentary evidence.

[81] I am unable to locate any further receipt to support the Claimant's contention that there is an outstanding balance of \$20,433.12 for her medical expenses. The Claimant did not attach a schedule of special damages to her amended statement of claim or amended claim form and did not give a breakdown of what these outstanding expenses were and has not provided any evidence to support that there is a balance \$20,433.12 for medical expenses outstanding. The paid receipts and bills provided to support the Claimant's claim for medical expenses have been covered in full by the interim settlement by the Defendants' insurer. In the circumstances, I make no further award of special damages to the Claimant for outstanding medical expenses as this has not been proven by the Claimant.

Future Expenses

[82] The Claimant pleaded in her amended statement of claim that it is further anticipated that she has to undergo further surgical procedures and that during the rehabilitation period of over six months she will again be required to hire an employee to carry on her business at a cost of at least \$45,000.00.

[83] In her witness statement, the Claimant stated that further surgery was necessary to repair the damage to her shoulder and that Dr. Gaekwad has also recommended that the implants in her left ankle be removed, followed by extensive rehabilitation. The Claimant stated that as she is unable to carry out her business independently, she will need to employ others at an estimated cost of \$45,000.00.

[84] I also note the following in the written submissions on behalf of the Claimant under the rubric of Future Loss of Earnings:-

"This head of damage is Intended to compensate the Claimant for the income she would have earned had the accident not occurred. In accordance with *Sariu v.Walker* (1973) 21 WIR 86, and *Heeralall v. Hack Bros* (1977) 25 WJR 117, we respectfully submit that future loss

of earnings should be computed as the Claimant's income over her expected working life, accounting for her diminished capacity due to the injuries sustained. As such, actuarial or similar professional evidence is not used to calculate this head of damage.

The Claimant, who previously earned a monthly salary of \$11,000.00, is now unable to perform her work at the pre-accident levels. The Claimant was then placed on sick leave for 3 months totaling \$33,000.00. Consequently, the Claimant has been compelled to hire a permanent employee, thus incurring additional costs to her business. The new hire is paid a bi-weekly salary of \$1,600.00, a direct consequence of the Claimant's diminished capacity. The details of which are further mentioned below. As a result, this is a permanent reduction in her income. It is instructive to note that prior to the accident, the Claimant had no employees and conducted her entire business operations on her own. Now, having to hire a new permanent employee based on her diminished capacity occasioned by the injuries suffered in this accident, such wages paid to the said employee is a permanent dollar for dollar reduction of claimant's income into the foreseeable future. The said employee is paid \$1,600 bi-weekly. Such amounts represent the future loss of earnings based on her diminished capacity. Such future loss should be calculated based on the formula described on the special damages which in essence is the present value of the future salary payments with a discount factor to be determined by the court. The Court is invited to assess future loss of earnings based on the present value of the future salary payments, utilizing a discount factor of 5%."

[85] It was further submitted in the written submissions on behalf of the Claimant that:-

"The Claimant further demands future loss of earnings, considering the permanent nature of her injury and the need to retain an employee on a permanent basis. The Plaintiff, being 53 years old would have an expected 12 years of working before reaching retirement age. The Plaintiff is also going to pay Mr. Tuitt a monthly salary of \$3,446.67 for the next 12 years (unadjusted for inflation for the purposes of this calculation) Using the present value of future payments at an annual cost of \$41,600.00 with a 5% discount factor for 12 years, the total future loss of earnings amounts to \$527,476.45."

[86] These matters stated in the submissions filed on behalf of the Claimant do not form part of the Claimant's case and are not borne out in the Claimant's testimony. The pleadings and evidence before the Court does not support a

contention that because of the Accident, the Claimant's future earnings will be permanently reduced or that the Accident has permanently diminished the Claimant's earning capacity. Further, the medical evidence before the Court does not support the contention that the Claimant's injuries are permanent. Further, the Claimant has not given evidence that she needs to retain an employee on a permanent basis. The Claimant's evidence is that she would need to engage persons to assist with a business during the period when she has to undergo surgery and during her recovery period thereafter.

[87] I further note that the evidence before the Court does not properly explain why the Claimant re-engaged Mr. Tuitt three years after the accident, and two years after he initially ceased providing services on her behalf. Mr. Tuitt's evidence is that he worked with the Claimant temporarily until June 2022. He further stated that he was rehired in February 2024. These details are absent from the Claimant's own witness statement.

[88] There is no contention from the Claimant and no evidence from the Claimant or Dr. Gaekwad that beyond the rehabilitation period after her future surgeries, she will be required to permanently engage an employee because of the injuries she sustained in the Accident. In **Terrane Amedee v Marcus Modeste**,²² Michel JA cited with approval the following by Sir John Donaldson MR in the judgment of the Court of Appeal of England and Wales in **The Solholt**.²³

"A Plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly caused by the defendant's breach of duty."

Thus, whilst the Claimant is free to hire a permanent employee as submitted on her behalf, it does not follow that the Defendants are liable for all losses for her so doing. But in any event, the Claimant has not given evidence to this effect and this only appears in the written submissions filed on her behalf.

[89] Turning back to the Claimant's pleaded case, and the Claimant's evidence, it appears to me that the Claimant's claim is properly one for future expenses, on the basis of the cost of employing persons to carry on the work of her business during the period when she will be undergoing surgery and

²² At para. 42.

²³ [1983] Lloyds Rep. 605 at 608.

recuperating from surgery. This is not a claim for loss of future earnings or loss of future income.

[90] In **Carl Webster**, in relation to a claimant's arguments on loss of future earnings, Bennett JA [Ag.] stated:-²⁴

"To advance a claim for loss of future earnings Mrs. Hodge had to show that because of the injuries that she had sustained in the assault she was unable to earn the income that she would otherwise have earned and that in consequence she had sustained a continuing loss of income. For this purpose, she would have had to prove the (net) income that she had, and would, but for the injury have continued to earn, the income that she was actually able to earn given her current condition, the claimed annual loss of earnings and the projected duration of that loss."

[91] To my mind, the Claimant in the present case has not properly established by way of pleadings and evidence future loss of income of the type set out in the written submissions filed on the Claimant's behalf. What the Claimant has claimed, and what she has set out in her evidence, is the temporary expenses she had to incur before trial to hire independent contractors and the expense she will have to incur in the future to hire an employee or independent contractor during her surgery and recovery period.

[92] Thus, based on the Claimant's evidence, and that of Dr. Gaekwad, the Claimant will have to undergo two further surgical procedures. The two procedures will be staggered (not overlapping) with a minimum of three months' recovery for each. I agree that at a minimum, the Claimant would need six months' recovery time. Due to the uncertainty of recovery, I am prepared to accept that the Claimant may require assistance for her business for a further period of six months. To estimate the loss occasioned by hiring an employee for this total 12-month period, I note that Mr. Tuitt in his witness statement stated he received a salary of \$1,600.00 bi-weekly. For a 12 month or 52-week period, this would amount to \$41,600.00. I am prepared to accept that there may be some further costs associated with hiring a temporary employee, and in the circumstances, I would award the Claimant the total sum of \$45,000.00 for loss of future earnings.

Future Medical Care

[93] The Claimant pleaded in her amended statement of claim that she will be required to undergo two further surgical procedures. In her witness statement, the Claimant stated that in 2024, she underwent another evaluation by Dr.

²⁴ At para. 36.

Gaekwad, who recommended that the implants in her left ankle be removed, followed by extensive rehabilitation. The Claimant stated that she will need two more surgeries within the year, costing her an estimated \$75,000.00 for both procedures, including all necessary post-operative care. The Claimant stated that she intended to rely on the medical estimates done by Dr Gaekwad. The Claimant further stated that these surgeries, coupled with the associated rehabilitation and medications, will require more than \$75,000.00, a sum she can scarcely afford.

- [94] Dr. Gaekwad's expert report confirms that the Claimant has been recommended to undergo implant removal from the Claimant's left lower limb followed by non-weight bearing ambulation with support for minimum six weeks as well as shoulder arthroscopic surgery for SLAP and rotator cuff repair followed by supervised and self-directed rehabilitation at minimum two sessions per week for initial eight weeks. Dr. Gaekwad in his expert report also advised that perioperative antibiotics and analgesics are standard for initial two weeks.
- [95] In the Claimant's evidence bundle for the assessment of damages are two estimates for the Claimant's recommended procedures. An estimate of \$43,150.00 for the left shoulder arthroscopic SLAP and rotator cuff repair, inclusive of medication, and physiotherapy. The second is an estimate of \$30,500.00 for left ankle plant removal, inclusive of medication and physiotherapy for eight days. This totals \$73,650.00.
- [96] Based on Dr. Gaekwad's recommendations for these procedures and the Claimant's evidence of the need for and her willingness to undergo these procedures, I am satisfied that the Claimant is entitled to an award for future medical expenses to cover these procedures and any attendant costs.
- [97] I accept the estimates provided for the costs of the surgical procedures and the Claimant is therefore entitled to the sum of \$73,650.00 for the cost of the surgeries. I also accept that there may be some additional medical expenses which may arise in the future for which an award should be made to the Claimant. In the written submissions on behalf of the Claimant, it was submitted that the Court should award the sum of \$250,00.00 for future medical care to cover the costs of the surgical procedures and ongoing medical expenses for prescription, medications, personal care, and travel costs, as she is unable to drive.
- [98] In my view, the evidence does not support an award of an additional \$176,350.00 for future medical care on top of the cost of the surgery. This is not supported by the evidence before the Court, and even considering the past

medical expenses covered, this sum is far out of scale. An award in this sum is not substantiated in my view.

[99] Learned Counsel for the Defendants submitted that in addition to the costs of the surgeries, which are accepted by the Defendants, an additional sum of \$2,800.00 could be awarded to the Claimant for physiotherapy and \$15,000.00 for any other possible medical expenses.

[100] I consider that it is reasonable to make an additional award to the Claimant to cover future physiotherapy sessions after the surgery beyond what is included in the estimates for the surgeries and to cover any other medical expenses. In my view, considering the Claimant's past medical expenses, I believe that a further award of \$25,000.00 to cover any further medical or rehabilitation expenses including physiotherapy, in addition to the cost of the surgeries, is reasonable. I would therefore award the Claimant the sum of \$98,650.00 for future medical care.

Interest

[101] The Claimant is awarded interest on her awards of special damages and general damages. In making the awards of interest, the Court is guided by the judgments of the Court of Appeal in **Martin Alphonso et al v Deodat Ramnath**²⁵ and **Terrance Amedee v Marcus Modeste**.

Costs

[102] The Claimant is entitled to 70% of prescribed costs in accordance with CPR 65.5 and Part 65 of CPR 2023, appendices B and C.

Disposition

[103] In light of the foregoing the Defendants shall pay the Claimant the following:-

1. General damages for pain, suffering and loss of amenities in the sum of \$130,000.00 together with interest from the date of service of the claim to the date of this Order at the rate of 5% per annum.
2. Special damages in the sum of \$35,944.94 for pre-trial employee expenses with interest from the date of the Accident to the date of this Order at the rate of 2.5% per annum.
3. The sum of \$45,000.00 for future employee expenses. No interest is awarded before judgment.

²⁵ (1997) 56 WIR 183.

4. The sum of \$98,650.00 for future medical care. No interest is awarded before judgment.
5. 70% of prescribed costs in accordance with CPR 65.5 and Part 65 of CPR 2023, appendices B and C.
6. Post judgment interest at the statutory rate of 5% per annum.

[104] I wish to thank learned Counsel on both sides for their helpful oral and written submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar