

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2016/0221

BETWEEN:

NATRECIA MUSSINGTON

Claimant

and

1. JASON PERCIVAL

2. VERONICA JOSEPH

Defendants

Appearances:

Ms. Asheen Joseph, Counsel for the Claimant

Mr. Loy Weste and Ms. Tiwana Martin, Counsel for the Defendants

2025: November 4th, 7th;
2026: March 11th.

DECISION ON ASSESSMENT OF DAMAGES

- [1] **MICHEL, M.:** On 19th October, 2015 the Claimant Ms. Natrechia Mussington (“**Ms. Mussington**”) was the driver of a motor vehicle which was in a stationary position at a stop light, when the 1st Defendant, Mr. Jason Percival (“**Mr. Percival**”) driving a vehicle owned by the 2nd Defendant, Veronica Joseph (“**Ms. Joseph**”) collided with the vehicle being driven by Ms. Mussington.
- [2] Ms. Mussington subsequently commenced these proceedings against Mr. Percival and Ms. Joseph (collectively, “**the Defendants**”), by claim form and statement of claim filed on 29th April, 2016. In her claim, Ms. Mussington alleged that the collision was caused solely by the negligence of Mr. Percival as servant or agent of Ms. Joseph and that Ms. Joseph was therefore vicariously liable for Ms. Mussington’s loss and damage. Ms. Mussington further alleged that by reason of Mr. Percival’s negligence, she suffered personal injuries, continuing pain and suffering and loss of amenities. Ms. Mussington claimed special damages to be assessed, general damages for personal injuries caused by the negligence of Mr. Percival to be assessed, interest and costs.

- [3] Ms. Mussington's claim was duly served on the Defendants, however the Defendants failed to file a defence to the claim. At the request of Ms. Mussington, judgment in default of defence was entered for her against the Defendants for an amount to be decided by the Court.
- [4] The issue of the Defendants' liability having been crystallised by the default judgment, the only task remaining for the Court is to determine how much compensation is due to Ms. Mussington based on the evidence she has adduced in support of her claim for special and general damages.
- [5] Ms. Mussington relied on her witness statement filed on 5th February, 2019 and supplemental witness statement filed on 5th June, 2020 in support of the assessment of damages. She also relied on written submissions filed on her behalf on 18th December, 2020. Ms. Mussington sought and obtained permission to deem Dr. Jeremy Deazle as an expert witness and for Dr. Deazle to file an expert report for the assessment of damages pursuant to Part 32 of the Civil Procedure Rules (Revised Edition) 2023 ("**CPR 2023**"). The expert report of Dr. Deazle was not filed by Ms. Mussington before the assessment of damages and Ms. Mussington instead relied on the witness statement of Dr. Deazle filed on 29th October, 2020. Dr. Deazle attended the assessment of damages as a witness of fact for Ms. Mussington and was cross-examined by counsel for the Defendants.
- [6] The Defendants relied on the witness statement of Salem Khouly, Managing Director of the Defendants' insurer, Antigua Insurance Company Limited, for the assessment of damages. The Defendants also relied on written submissions filed on their behalf on 10th September, 2025.
- [7] The assessment of damages therefore proceeded based on the evidence before the Court and the applicable law.

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

The Nature and Extent of Injuries Suffered

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

- [9] Ms. Mussington was born on 16th December, 1987. She was 27 years old at the time of the accident and just shy of 38 years old as of the date of the assessment of damages.
- [10] Ms. Mussington pleaded the following particulars of injuries in her statement of claim:-
- (a) Whiplash trauma of the cervical spine;
 - (b) Anterior tendonitis or right shoulder girdle;
 - (c) Bilateral epicondylitis laterally;
 - (d) Partial tear of the lateral collateral ligament.
- [11] Attached to Ms. Mussington's statement of claim was a patient discharge summary form from Dr. K. Callender at the Mount St. John's Medical Centre ("**MSJMC**" or "**the Hospital**"), a report of Dr Jasunella Gore dated 16th November, 2015 and a report of Dr. A. Aaron dated 11th March, 2016. The reports of Dr. Gore and Dr. Aaron support the particulars of injury pleaded by the Claimant.

Ms. Mussington's Evidence

- [12] In her witness statement filed on 5th February, 2019 Ms. Mussington stated that after the accident on 19th October, 2015 she was admitted to the Mount St. John's Medical Centre ("**the Hospital**"). She stated that she was diagnosed with and treated for whiplash injury to her neck and tear to the posterior longitudinal ligament of the neck. She was discharged from the Hospital the next day.
- [13] Under cross examination by Mr. Loy Weste, learned Counsel for the Defendants, Ms. Mussington stated that she did her first MRI in 2016 and the MRI did not show any disc herniations. Learned Counsel for the Defendants further asked Ms. Mussington if it was true to say that she has degenerative disc disease. In response, Ms. Mussington stated that according to Dr. Geoffrey Liburd, when she saw him in 2017, after reviewing scans from 2016 and 2017, they showed a progression in the injury and that it was labeled as that.

Dr. Jeremy Deazle's Evidence

- [14] Dr. Jeremy Deazle provided a witness statement on behalf of Ms. Mussington. Dr. Deazle is Ms. Mussington's doctor. In his witness statement, he stated that both Dr. Auriel Aaron, the Emergency Room Doctor and Dr. Derek Yearwood, who worked in the orthopedics at the time and who attended to Ms. Mussington at the Hospital after the collision, reported in their medical

reports that Ms. Mussington had suffered whiplash injury along with posterior ligament complex tear. Dr. Deazle stated that the doctors recommended physiotherapy and follow up at the orthopedic outpatient clinic.

- [15] Dr. Deazle further indicated in his witness statement that Ms. Mussington later complained that she was still experiencing pain to her neck and on 2nd December, 2016 and again in February 2017 she was reviewed and examined by Dr. Geoffrey Liburd, a neurosurgeon who concluded in a medical report that Ms. Mussington had cervical whiplash Grade 2 injury.
- [16] Dr. Deazle further indicated that he saw Ms. Mussington on 13th June, 2019 and she reported that she was still experiencing neck pain and had then she started to complain of weakness to the right upper limb with numbness at the fingertip. Dr. Deazle stated that an MRI of Ms. Mussington's cervical spine revealed muscle spasm, diffuse disc herniation, mass effect on cord, intact posterior elements, no nerve root contact.
- [17] Under cross-examination by Mr. Loy Weste, learned Counsel for the Defendants, Dr. Deazle agreed that Dr. Liburd stated in his medical report relating to Ms. Mussington that there was no disc herniation in 2018. Dr. Deazle also agreed that Dr. Liburd noted in his medical report that Ms. Mussington had mild disc degenerative disease at C3/4, C4/5 and C6/7 levels.
- [18] When asked by learned Counsel for the Defendants whether when he saw Ms. Mussington in 2019, she had a whiplash injury, Dr. Deazle responded that when Ms. Mussington came to see him, she had muscle rigidity in the neck which can be considered whiplash or muscle spasm. He stated that he did not use the term whiplash in his statement.
- [19] Learned Counsel for the Defendants further asked Dr. Deazle whether given what Dr. Liburd said in his report, and given the fact that Dr. Deazle saw Ms. Mussington in 2019, whether Dr. Liburd could say that the symptoms that Ms. Mussington had are directly related to the collision. Dr. Deazle's response was that it would be hard to say after so many years.
- [20] During re-examination by Ms. Asheen Joseph, learned Counsel for Ms. Mussington, Dr. Deazle clarified that in his position, having seen Ms. Mussington four years after the alleged incident, it would be hard to say whether her injuries are a direct result of the collision.

Discussion

- [21] Although Dr. Geoffrey Liburd's medical report is not properly before the Court as an expert report, it was referenced by Dr. Deazle in his testimony and

learned Counsel for the Defendants questioned Dr. Deazle about the report. I think it is appropriate in the circumstances that the Court has regard to what was referenced in the report.

[22] In his 2018 medical report, Dr. Liburd reported that Ms. Mussington has degenerative disease in the cervical spine which is likely contributing to her neck symptoms. Dr. Liburd noted that it could not be said with utmost certainty how much of Ms. Mussington's neck pain was due to the changes brought on by the degenerative disease and what percentage was due to her injury in 2015. Dr. Liburd did opine that it is possible that the injury Ms. Mussington sustained in 2015 may have aggravated symptoms related to degenerative changes noted on the cervical spine MRI as Ms. Mussington had reported that these symptoms were not present prior to the collision.

[23] The opinion of Dr. Liburd in his medical report in relation to Ms. Mussington's continuing pain is consistent with Dr. Deazle's testimony that Ms. Mussington was exhibiting further symptoms but it could not be said with certainty whether they were as a result of the injury she sustained in 2015. Dr. Deazle was in a more disadvantageous position than Dr. Liburd as Dr. Deazle did not examine Ms. Mussington until 2019, some four years after the accident.

[24] Considering the evidence before the Court, I find that Ms. Mussington suffered a whiplash injury along with a tear to the posterior ligament as a result of the Accident. I also find that on a balance of probabilities, that Ms. Mussington's injuries aggravated her symptoms related to the degenerative disease noted in the report of Dr. Liburd which was referred to by Dr. Deazle and learned counsel for the Defendants.

[25] I am unable to conclude that the diffuse disc herniation noted by Dr. Deazle and reported in a MRI of Ms. Mussington in 2019 was as a direct result of the Accident as this was not reported contemporaneously with the collision and is not consistent with the other medical evidence reported closer in time to the collision.

The Nature and Gravity of the Resulting Physical Disability

[26] Dr. Deazle did not give evidence as to the Claimant's resulting physical disability from the injuries she sustained in the Accident. I note that in the report of Dr. Liburd referred to by Dr. Deazle, that Dr. Liburd assessed Ms. Mussington's impairment as 3% whole person impairment related to the cervical spine. This presumably would have taken into account Ms. Mussington's degenerative disease in her cervical spine, however, Dr. Liburd's evidence could not be tested as he was not called as a witness of fact or deemed expert witness in this matter.

Pain and Suffering Endured

- [27] In her witness statement, Ms. Mussington stated that after being discharged from the Hospital, she continued to experience and suffer from pain in her neck, lower back, abdomen, and right knee along with weakness to the hands. She stated that during a follow-up visit at the Hospital on 19th November, 2015 she was referred to physical therapy to increase the range of her knee and neck motion which were expected to reduce her pain and speed up her recovery.
- [28] Ms. Mussington stated that on 21st April, 2016 though the pain was less and she was able to ambulate better, there was wasting of the right quadricep muscles and she was advised to do knee strengthening exercises and further outpatient clinic follow up.
- [29] Ms. Mussington stated that later on 2nd December, 2016 and 24th February, 2018 she consulted with Dr. J. Geoffrey Liburd, Medical practitioner/Consultant Neurosurgeon as a result of experiencing:-
- (i) Intermittent exacerbation of pain, interspersed with occasional underlying low grade pain
 - (ii) Neck pain aggravated strenuous activities,
 - (iii) Continuous radicular symptoms down her upper limbs, with objects occasionally falling from her right hand;
 - (iv) Difficulty combing her hair, buttoning her clothes and difficulty carrying out her job as a massage therapist
 - (v) Having to take time off work when symptoms flare up.

Loss of Amenities Suffered

- [30] Ms. Mussington stated at paragraph 9 of her witness statement that although the pain she now suffers is continuous and low grade, it does flare up and becomes severe from time to time. She stated that she is severely restricted from carrying out mundane tasks and most importantly going to work to earn an income as she is a massage therapist by trade.
- [31] In her supplemental witness statement filed on 5th June, 2020 Ms. Mussington stated that although she has continued with the treatment and medication recommended by her medical specialist, she continues to experience pain and disability on a daily basis as she struggles to resume life as she knew it prior to the Accident.

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

- [32] As previously noted, Ms. Mussington indicated in her witness statement that she is a massage therapist by trade and as a result of her injuries she is severely restricted from carrying out mundane tasks and most importantly going to work to earn an income. The Claimant's pecuniary prospects will be discussed in further detail under the head of loss of past earnings.

Discussion on General Damages

- [33] 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.
- [34] 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".
- [35] 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."
- [36] In the written submissions filed on behalf of Ms. Mussington for the assessment of damages, Counsel for Ms. Mussington submitted that the Court should award her general damages for pain, suffering and loss of amenities in the sum of \$70,000.00.
- [37] The following cases were submitted on behalf of Ms. Mussington as comparable cases for the Court's consideration:-

² [1998] 3 All ER 481.

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

- 1) **Anselma Mederick v Sylvester James et al:**⁴ The claimant was a passenger in a motor vehicle and was injured when the driver of the vehicle lost control of the vehicle and collided with a tree. The claimant's injuries included a whiplash injury and laceration to the face and swelling of the upper lip. She suffered from headaches, neck pains and back pains. The claimant was awarded general damages in the sum of \$55,000.00 for pain and suffering and \$25,000.00 for loss of amenities.
- (2) **Peter Douglas v Sean Roberts et al:**⁵ The claimant was injured in a vehicular accident. He suffered a severe whiplash injury from which he was still incapacitated at the time of the assessment of damages. The claimant was experiencing excruciating pain, exacerbated by sudden sharp movement. The claimant was awarded the sum of \$85,000.00 as general damages for pain, suffering and loss of amenities.
- (3) **Oscar Frederick v LIAT (1974) Ltd:**⁶ The claimant was injured in the outdoor premises of the defendant when he slid on some gravel and into a hole. The claimant twisted his right ankle and fell heavily to the ground causing injury to his back. He was 56 years old at the time of the accident and 61 years old by the trial of his claim. The court found that this accident was a result of the defendant's negligence. The claimant fell a year later but the defendant was found not to be liable for that fall. The claimant's injuries as accepted by the court were injury to his lumbar spine manifested by disc desiccation at L3/L4 and L4/L5, with mild to moderate disc bulges at L3/L4 and a small disc bulge at L5/S1. The claimant also appeared to have signs of a herniated synovial cyst. The claimant's second fall exacerbated or aggravated his injuries to the extent of producing additional disc desiccation and disc bulges at L2/L3. The claimant had severe lower extremity pain, weakness and gait dysfunction. The claimant was assessed as having a permanent physical impairment of 17%, however his assessed physical impairment resulted not only from the incident giving rise to his claim but also from the claimant's subsequent fall for which the court determined that the defendant was not liable. At the trial of the claimant's claim, he complained of extreme pain and discomfort as a result of the injury for over five years with no end in sight. He took painkillers and other sedatives for the pain. The claimant's social life and self-esteem were also negatively affected as a result of the injuries he sustained. In 2010, the court awarded the claimant \$80,000.00 for pain and suffering and \$60,000.00 for loss of amenities.

⁴ SLUHCV2018/0511 (delivered 27th May 2020, unreported).

⁵ SVGHCV2010/0125 (delivered 8th April 2014, unreported).

⁶ ANUHCV2007/0391 (delivered 31st May 2010, unreported).

(4) **Temicia Smith v Brian Dean et al:**⁷ the claimant was a passenger in a motor vehicle when it was violently struck in the rear by another vehicle. The claimant was 17 and a half years old at the time of the accident. The claimant was diagnosed with a soft tissue injury, and whiplash of the cervical spine. She was outfitted with a neck collar. The claimant continued to experience back and neck pains, tingling of the fingers and increased weakness of the hands. A later MRI report revealed (i) loss of cervical lordosis, compatible with muscle spasms; (ii) posterior annular tear in C5-6 intervertebral disc; (iii) posterior central small disc protrusion at C5-6 level causing mild narrowing of spinal canal. The claimant was likely to have increased pain and would need surgical intervention. The claimant was awarded general damages of \$70,000.00 for pain, suffering and loss of amenities.

[38] Learned Counsel for the Defendants submitted that Ms. Mussington should be awarded no more than \$20,000.00 as general damages for pain, suffering and loss of amenities on the basis that the medical evidence to support her claim is scant. Learned Counsel for the Defendants submitted the following cases for the Court to consider in making an award to Ms. Mussington:-

(1) **Halley Glasgow v Cameron Veira et al:**⁸ The claimant was injured in a motor vehicle accident and suffered a whiplash injury as a result of the accident. The claimant was treated at the hospital after the accident and was ordered to wear a soft collar around his neck. He suffered intense pain for the next three days. The pain became more moderate but would not go away. The pain would become more intense when he turned his head and he had problems sleeping. He was later prescribed a hard collar to be worn continuously for three months. His condition improved and at trial his only complaints were that at times he had problems looking upward or bending over. This affected his work as a cabinet maker, and he could not work for four months. The claimant was awarded general damages in the sum of \$15,000 for pain and suffering and \$5,000.00 for loss of amenities.

(2) **Sheena David et al v Kingston Bowen et al:**⁹ The claimants were passengers in a vehicle which ran off the road and capsized. The 1st claimant suffered soft tissue injury to the neck and shoulders, ligamentous strain and muscle spasms, and significantly reduced range of motion of the cervical spine and neck pain. Her prognosis was that the shoulder symptom would resolve and in the future she may have

⁷ SVGHCV2013/098 (delivered 25th August 2014, unreported).

⁸ Saint Vincent and the Grenadines Civil Suit No. 571 of 1998 (delivered 11th April 2001, unreported).

⁹ GDAHCV2007/0055 (delivered 7th June 2013, unreported).

intermittent pain in the neck according to activities such as lifting or moving her head to the extremes. Her neck and lower back pain continued and the doctor found that she had chronic ligamentous inflammation in these regions and that her pains would continue off and on into the future. She also had arthritis developing in the cervical and lumbosacral spine which would contribute to the pains. The 1st claimant was awarded general damages of \$37,000.00 for pain, suffering and loss of amenities.

The 2nd claimant was noted to have tenderness of the back and neck after the injury. She suffered with knee and hip pain associated with her lower back injury. She had radiological findings of scoliosis. Her neck pain was due to cervical spine soft tissue injury from the accident and the pain would continue into the future. There was also an increased chance of cervical spondylosis (arthritis) developing in the cervical spine. The 2nd defendant was awarded general damages of \$35,000.00 for pain, suffering and loss of amenities.

[39] Having carefully reviewed the cases referred to the Court, I have found them to be helpful, particularly **Temecia Smith** and **Sheena David**. Based on the injuries I have accepted that Ms. Mussington has proved, I consider that the injuries received by the claimant in **Temecia Smith** were a bit more serious than Ms. Mussington's injuries. The claimant in **Temecia Smith** was also much younger than Ms. Mussington and she was injured just as she was about to start her adult life. This severely impacted her future and her career ambitions. I do however consider Ms. Mussington's injuries to be more extensive than the 1st claimant in **Sheena David**. Ms. Mussington's initial injuries in addition to a whiplash injury also included tear to the posterior longitudinal ligament, and like the 1st claimant in **Sheena David**, it appears that her injuries may have contributed to degenerative disease.

[40] Taking the Claimant's injuries into account, the factors outlined in **Cornilliac v St Louis**, and having regard to the cases referred to the court, the similarities and differences in the cases, and the vintage of the cases, I consider that the sum of \$65,000.00 for pain suffering and loss of amenities is fair compensation to Ms. Mussington.

Special Damages

[41] 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 are 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 McGregor on Damages¹¹ 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.”

- [42] As it relates to special damages, Ms. Mussington pleaded at paragraph 4 of her statement of claim that after the Accident, she was unable to continue her employment as a driver with YIDA International Investment Group (“YIDA”). Ms. Mussington further pleaded that she was given an initial period of sick leave from 19th October, 2015 to 7th December, 2015 and exhibited a sickness benefit form to her statement of claim.
- [43] Ms. Mussington went on to plead at paragraph 5 of her statement of claim that despite several follow up visits, different prescriptions, medication and physical therapy treatment, she continued to suffer from constant and continuous pain and she continued to be unable to pursue her previous employment as a driver as she cannot sit for long periods and that this has affected her way of life.
- [44] Ms. Mussington pleaded the following as particulars of special damages:-
- (a) The Claimant’s medical expenses to date remain outstanding and have not been paid for by the Defendants.
 - (b) The Claimant intends to claim her basic salary from 19th October 2015 and continuing as well as any future loss and damages incurred as a consequence of her injuries.
- [45] Ms. Mussington’s statement of claim did not include a schedule of special damages nor did she attach a schedule of damages to her claim form or statement of claim as required by rule 8.9(5) of the Civil Procedure Rules 2000. Further, Ms. Mussington pleaded no further facts in support of her claim for special damages, and no receipts or paid invoices were attached to her statement of claim.
- [46] In her witness statement filed on 5th February, 2019 Ms. Mussington stated that the medical expenses she has incurred to date as a result of her injuries were as follows:-

¹⁰ Ikiw 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).

¹¹ 18th Edition at 44-012.

(a) MSJMC user fee	\$80.00
(b) Rehab and therapy	\$1,670.00
(c) Prescriptions	\$3,047.98
(d) Transportation	\$1,385.00
(e) Legal fees	\$1,287.50
(f) Other (Police/NSA/MSJMC)	44,762.69
(g) Loss of earnings (i.e. from 19 th day of October, 2015 to January 2019, 1,168 days/7 weeks x \$1,000	\$166,000.00

[47] In a supplemental witness statement filed on 5th June, 2020 Ms. Mussington stated that she was exhibiting a medical report of Dr. Jeremy Deazle dated 15th June, 2019 along with receipts, invoices and assorted prescriptions, some of which she said she inadvertently omitted to give her attorney-at-law and some of which she obtained for expenses incurred subsequent to the date of her first witness statement. Ms. Mussington stated that as a result of these additional expenses, the special damages claimed by her have increased as follows:-

(a) Total from witness statement filed on 5 th February 2019	\$178,232.48
(b) Total shown by exhibits from Supplementary Witness Statement	\$69,088.98
Total Special Damages	\$247,321.46

[48] Ms. Mussington also attached to her supplemental witness statement, a letter dated 16th November, 2015 from the manager of Dela-Electronics Ltd which stated that Ms. Mussington was employed with Dela-Electronics Ltd and that she had been employed with the company since October 2014 and that she was currently employed full time as a Personal Assistant with a net monthly salary of \$4,000.00. No reference is made to this letter in Ms. Mussington's witness statement or supplemental witness statement.

Mr. Khouly's Evidence on behalf of the Defendants

[49] As previously stated, Mr. Salem Khouly is the Managing Director of the Defendants' insurer, Antigua Insurance Company Limited. In his witness statement, Mr. Khouly sought to refute the sums Ms. Mussington was seeking for special damages, essentially stating that Ms. Mussington did not plead the items of special damages including loss of past earnings, and that Ms. Mussington has not provided proof of her salary and has not proved loss of earnings.

[50] During cross-examination of Mr. Khouly, Ms. Joseph, learned Counsel for Ms. Mussington, stated to Mr. Khouly that Ms. Mussington, in putting the documents with her witness statements has acted in accordance with the rules

of court. Mr. Khouly in response indicated that he could not agree nor disagree because he did not know what the rules of court were.

- [51] During further cross-examination of Mr. Khouly, learned Counsel for Ms. Mussington pointed out to Mr. Khouly a letter in Ms. Mussington's bundle of documents attached to her supplemental witness statement, which Counsel for Ms. Mussington said is a letter from Ms. Mussington's employer with respect to her salary of \$4,000.00 per month. Mr. Khouly stated that he sees the letter but he is not sure if it is evidence. Learned Counsel for Ms. Mussington asked Mr. Khouly whether he agreed or disagreed that the letter was evidence of Ms. Mussington's salary. Mr. Khouly's response was that he could not say because Ms. Mussington mentioned in her testimony that she worked at YIDA at the time and so he is unsure because he sees a conflict before him.

Discussion

- [52] None of what Ms. Mussington has sought to evidence in her witness statement and supplemental witness statement as it relates to special damages was pleaded in her statement of claim. And as previously indicated, the items of special damage and past loss of earnings set out in her witness statement are not contained in a schedule in her statement of claim or in a schedule attached to her statement of claim or claim form.
- [53] Learned Counsel for the Defendants vigorously opposed an award of special damages being made to Ms. Mussington in light of the deficiency in her pleadings. Learned Counsel for the Defendants, relying on ***Ilkiw v Samuels***,¹² submitted that it is a well-established principle that special damages which are generally capable of exact calculation must be specifically pleaded and proved and that where such damages are not pleaded or proven, they are not recoverable.
- [54] Learned Counsel for the Defendants further submitted that Ms. Mussington did not comply with the provisions under the Civil Procedure Rules which require a claimant in a claim for personal injuries to include in or attach to the claim form or statement of claim a schedule of any special damages claimed. Learned Counsel for the Defendants submitted that in the circumstances, no award should be made for special damages for medical or out of pocket expenses on behalf of Ms. Mussington despite the sums set out in her witness statement and supplemental witness statement.
- [55] Learned Counsel for the Defendants further submitted that no award for past loss of earnings should be made to Ms. Mussington on the basis that a claim for past loss of earnings is a claim for special damages which was required to

¹² [1963] 1 WLR 991.

be specifically pleaded and proven. Learned Counsel for the Defendants submitted that this claim has not been pleaded in the statement of claim and no evidence of the Claimant's salary has been stated in the witness statements filed on 5th February, 2019 and 5th June, 2020.

[56] In her oral submissions, learned Counsel for Ms. Mussington indicated that there was disclosure for the assessment of damages in respect of all the figures Ms. Mussington claimed notwithstanding it was not pleaded. She submitted that these documents were not critical at the filing of the claim and that what was critical then were the medical reports. She stated that all the evidence for Ms. Mussington's claim is in her witness statement.

[57] The judgment of the Court of Appeal in **Carl Webster v Historic Beacon Point Anguilla Ltd. et al**¹³ 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 the schedule of special damages in or attached to the claim form or statement of case, or the failure 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 sums.

[58] Bennett JA [Ag.], delivering the judgment of the Court of Appeal in **Carl Webster**, 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 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]:-

¹³ AXAHCVP2020/0020 (delivered 21st June 2023, re-issued 19th September 2023, unreported).

“[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.”

[59] Ms. Mussington has in essence set out her case for special damages in her witness statement but has failed to plead her claim for special damages including past loss of earnings in her statement of claim. In the circumstances, Ms. Mussington is not entitled to recover these sums.

[60] I pause to note that during cross-examination by learned Counsel for the Defendants, Ms. Mussington confirmed that she had received an interim payment of \$15,000.00 from the Defendants’ insurer towards her past expenses. Receipt of this payment was not set out in Ms. Mussington’s witness statements.

Loss of Earnings

[61] Ms. Mussington did make some attempt in her statement of claim to plead a basis for her claim for past loss of earnings, but did not plead the exact pre-trial loss. If I am wrong in reaching my above conclusion that Ms. Mussington is not entitled to recover past loss of earnings due to her failure to plead this loss, for the reasons which follow, I nevertheless hold the view that Ms. Mussington has not proved such a claim for loss of earnings.

[62] Ms. Mussington’s pleaded basis for her claim of past loss of earnings can be found at paragraphs 4 and 5 of her statement of claim which I have already set out at paragraphs [42] to [44] above.

[63] Attached to her statement of claim was a sickness benefit certificate dated 20th October, 2015 signed by a medical doctor which indicates that Ms. Mussington was examined on 19th October, 2015 and that it was the doctor’s opinion that she would be fit to resume work on 7th December, 2015. No further medical certificate was provided by Ms. Mussington.

[64] In her witness statement filed on 5th February, 2019 Ms. Mussington stated that she is severely restricted from carrying out mundane tasks and most importantly going to work to earn an income as she is a massage therapist by trade.

- [65] There were several inconsistencies in Ms. Mussington's evidence. Firstly, it is curious that she pleaded that after her injury she could no longer work as a driver, but in her witness statement she stated that she was unable to earn an income as she is a massage therapist by trade. Ms. Mussington says nothing in her witness statements about an inability to continue working as a driver after the Accident because of her injuries.
- [66] Under cross examination, Ms. Mussington first confirmed to learned Counsel for the Defendants that she worked with the Chamber of Commerce from 2022 to 2023. When asked by learned Counsel for the Defendants where did she work before that, Ms. Mussington first responded that she did not, then stated that she was self-employed. When asked self-employed doing what, Ms. Mussington responded that she was the driver and had not worked between the period from 2015 until then. Learned Counsel for the Defendants then asked Ms. Mussington to clarify whether she did not work from 2015 to 2022. There was a long pause by Ms. Mussington before she gave a lengthy response that she was self-employed at the time and she stopped driving and she had not driven until 2021 and that COVID happened between 2020 and 2021 and that she had just started to work as a clerk at the end of 2019 until COVID hit. Thus, Ms. Mussington did not directly answer the question.
- [67] Learned Counsel for the Defendants then asked Ms. Mussington when did she leave her work with YIDA as a driver. Ms. Mussington indicated that after a six-week period of sick leave she went back to work with YIDA and did not work with YIDA for more than a month. Learned Counsel for the Defendants then asked Ms. Mussington if she worked as a driver when she returned to YIDA. Ms. Mussington responded that when she went back to work she was doing clerical work and she went back to work in 2016. She clarified that it was February 2016 and stated that she next started to work in 2019.
- [68] Ms. Mussington provided no explanation as to why she left her job doing clerical work at YIDA in February 2016. Her witness statement only made reference to her being a massage therapist by trade, but she made no mention of this trade when being cross-examined by Counsel for the Defendants as to what work she did.
- [69] Further, Ms. Mussington supported her claim for loss of earnings by exhibiting to her supplemental witness statement a letter dated 16th November, 2015 from the manager of Dela-Electronics Ltd which stated that Ms. Mussington was employed with Dela-Electronics Ltd as a personal assistant with a net monthly salary of \$4,000.00.

- [70] It is unclear to the Court if Dela-Electronics Ltd is the same as YIDA and whether the claimant being a personal assistant was the same as being a driver for YIDA. This is the same point Mr. Khouly made under cross-examination. This has not been reconciled as Ms. Mussington seems to be seeking to substantiate a salary from an employer which is different from her testimony before the Court. Ms. Mussington simply has not provided clear evidence as to her salary at the time of the Accident, further Ms. Mussington did not plead what her salary was at the time of the Accident.
- [71] I found Ms. Mussington to be evasive when being cross-examined. She was unable to answer questions directly and it took several questions from Counsel for the Defendants for Ms. Mussington to explain her work history since the Accident. In my view, Ms. Mussington appeared to be avoiding providing a direct answer as to whether she worked in the period between when the Accident occurred and 2019 when she said that she was about to start working with a company in English Harbour. When Ms. Mussington finally gave a direct answer that she did not work during that period, however, having had the benefit of hearing her and observing her throughout the line of questioning, I was unconvinced that it was a truthful response.
- [72] Further, when one considers the medical evidence of Ms. Mussington, there is no indication that Ms. Mussington was incapable of working after her initial six-week period of sick leave following the Accident. The sick leave certificate accompanying her claim indicated that she would be fit to resume work on 7th December, 2015. There is no evidence that Ms. Mussington sought and obtained sick leave for a further period thereafter.
- [73] Dr. Deazle's evidence provides no assistance to Ms. Mussington. He does not state that Ms. Mussington would have been unable to work because of her injuries, and in any event, his own evidence was that he did not examine Ms. Mussington until 2019, four years after the accident.
- [74] I further note that attached to Ms. Mussington's statement of claim was a report of Dr. Aaron from the Mount St. John's Medical Centre dated 11th March, 2016. The report indicates that Ms. Mussington was discharged from the Hospital on 20th October, 2015 and that as a result of her injury she was unable to work for a period of 6 weeks and had required ongoing physiotherapy.
- [75] This letter is dated after February 2016 when Ms. Mussington indicated under cross examination that she left working with YIDA. No mention was made in the letter that Ms. Mussington was unable to work as at the date of the letter of 11th March, 2016.

- [76] I further note Ms. Mussington's evidence that she got a job in 2019 and that she was again working from 2022 to 2023. There is no evidence before the Court as to how circumstances changed which enabled Ms. Mussington to work then, but not during the period 2015 to 2019.
- [77] Looking at the evidence before the Court, Ms. Mussington has not proved on a balance of probabilities that the injuries she sustained caused any loss of income between 2015 and 2019. Further, Ms. Mussington has not provided adequate evidence to substantiate the loss of income she allegedly suffered.
- [78] In light of the foregoing, even if I took the view that Ms. Mussington has properly pleaded her claim for past loss of earnings, I am not satisfied that she has proved the loss.

Future Medical Care

- [79] In her statement of claim Ms. Mussington pleaded that she intended to claim any future loss and damages incurred as a consequence of her injuries.
- [80] In her witness statement filed on 5th February, 2019 Ms. Mussington stated that Dr. Geoffrey Liburd, in his report dated 18th February, 2018 stated that there is a possibility of other costs if there is no improvement in her condition, which would include:-
- (a) Neck brace: US\$150.00 - \$3,000.00;
 - (b) Spinal surgery – inclusive of surgical fees and implants but excluding hospital fees, at US\$48,000.00 (cervical discectomies) and US\$70,000.00 (artificial disc replacement).
- [81] In her supplemental witness statement filed on 5th June, 2020 Ms. Mussington exhibited a medical report from Dr. Deazle dated 15th June, 2019. In that report, Dr. Deazle stated that when he saw Ms. Mussington on 13th June, 2019 she was still experiencing neck pain and had started to complain of weakness to the right upper limb along with numbness at the fingertips.
- [82] Dr. Deazle was called as a witness in this matter as Ms. Mussington's doctor, but made no recommendation for Ms. Mussington to undergo surgery.
- [83] As previously stated, the report of Dr. Liburd is not properly before the Court but it was referred to by Dr. Deazle in his witness statement and counsel for the Defendants in cross-examination. As I have already accepted, Dr. Liburd stated that Ms. Mussington had degenerative disease in the cervical spine which is likely contributing to her neck symptoms but it could not be said with

certainty how much of the neck pain is due to these changes and what percentage is related to the injury.

- [84] He further stated that at the time he was of the opinion that Ms. Mussington did not have surgically significant cervical and lumbar disease and as such cervical intervention was not indicated at the time, but that it may become necessary in the future. Dr. Liburd goes on to give possible costs of surgery. No updated medical report has been furnished to the Court as to whether the Claimant now requires surgery, or that circumstances have changed that now make surgery likely. There is also no evidence from Ms. Mussington that she has already undergone surgery or that she intends to undergo surgery.

Discussion

- [85] In **Aubrey Smith v Calvert Fleming et al**,¹⁴ Blenman J citing the judgment of the Court of Appeal in **Claudette Francis v Cecilia Martin**¹⁵ held that to base a claim for future medical expenses on the cost of medical procedures where there is no evidence that it is necessary, and the claimant has shown no intention of undergoing future medical care, is to take into account irrelevant considerations. In **Claudette Francis v Cecilia Martin**, the Court of Appeal struck down an award for further medical care in similar circumstances to the case at bar and stated that to 'base a claim for future medical expenses upon the cost of a particular surgical procedure where there is no evidence that it is necessary and where the Claimant has given no indication of any intention to undergo is to take into account irrelevant material.'
- [86] More recently, in the case of **Jameson Mannix and Osaze Mannix v Hamish Anthony**,¹⁶ Williams J disallowed a claim for future surgery where the expert medical report merely stated that the claimant may require surgery in the future
- [87] There is no evidence before the Court that it is necessary for Ms. Mussington to undergo surgery. Further, as I have already stated, there is no evidence from Ms. Mussington that she has undergone surgery or that she intends to undergo surgery. I also note that there is no evidence that Ms. Mussington is required to purchase a neck brace.
- [88] It is noteworthy that no written submissions were filed on behalf of Ms. Mussington in relation to future medical care. I see no further basis to

¹⁴ AXAHCV0050/2008 (delivered 27th May 2011, unreported).

¹⁵ BVIHCAP2009/0007 (delivered 20th September 2010, unreported).

¹⁶ ANUHCV2020/0219 consolidated with ANUHCV2020/0220 (delivered 27th January 2025, unreported) at para. 38.

substantiate a claim for future medical care. Accordingly, in light of the foregoing, I make no award to Ms. Mussington for future medical care.

Interest

[89] The Claimant is awarded pre-judgment interest on her award of general damages. In making the award of interest, the Court is guided by the judgment of the Court of Appeal in **Martin Alphonso et al v Deodat Ramnath**.¹⁷

Costs

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

The Interim Payment

[91] By order dated 6th October, 2020 the Court ordered that the Defendants pay Ms. Mussington an interim sum of \$15,000.00 within 14 days. The evidence of Ms. Mussington and Mr. Khouly is that this payment was made to Ms. Mussington by the Defendants' insurer. In the circumstances, the final sum to be paid by the Defendants to Ms. Mussington shall be less the sum of \$15,000.00 already paid to her as an interim payment.

Disposition

[92] In light of the foregoing, the Defendants shall pay Ms. Mussington the following:-

- (i) General damages for pain, suffering and loss of amenities in the sum of \$65,000.00 together with interest from 21st May, 2016 the date of service of the claim on the Defendants to the date of this Order at the rate of 5% per annum, less the sum of \$15,000.00 awarded to Ms. Mussington as an interim payment by order dated 6th October, 2020.
- (ii) 60% of prescribed costs on Ms. Mussington's global award 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.

[93] Post judgment interest shall be at the statutory rate of 5% per annum.

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

¹⁷ (1997) 56 WIR 183.

Carlos Cameron Michel
High Court Master

By the Court

Registrar