

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCv2020/0416

BETWEEN:

JULIE OSBORNE

Claimant

and

ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendant

Appearances:

Mr. Jarid Hewlett, Counsel for the Claimant

Ms. Joy Dublin and Ms. Alicia Aska, Counsel for the Defendant

2025: July 22nd;
August 13th.

DECISION

- [1] **MICHEL, M.:** This is the Court's decision on an assessment of damages on the Claimant's claim against the Defendant for the tort of negligence.
- [2] The Claimant is employed as an Immigration Officer attached to the Human Resource Unit of the Immigration Department of the Government of Antigua and Barbuda. The Claimant's action was brought against the Defendant by virtue of section 13 of the **Crown Proceedings Act**. On 6th December, 2019 whilst in the course of her employment as an Immigration Officer, the Claimant stumbled over ripped carpet in the Human Resources Unit and fell, suffering personal injuries as a result. The Claimant alleged in her claim that the injury she suffered was on account of the negligence of the Defendant to provide a safe place of work and safe system of work.
- [3] The Claimant alleged in her statement of claim that as a result of the workplace accident, she suffered pain, injury, loss and damage and she pleaded the following as her particulars of injury:-
- (1) Oblique midshaft fracture of 4th metacarpal right hand;
 - (2) Tenderness and swelling over the dorsum of the hand mostly over 4th and 5th metacarpal region;
 - (3) Pain in the right hand with radiation to the ipsilateral fourth finger; and

(4) Bilateral shoulder pain.

[4] The Claimant further pleaded the following as adverse effects and loss of amenity as a result of the accident:-

- (1) Unable to lift items weighing more than two pounds with right dominant hand;
- (2) Cannot peel or grate vegetables;
- (3) Unable to do handwriting for long periods;
- (4) Cannot wring clothes to dry them;
- (5) Unable to make a fist with right hand;
- (6) Loss of dexterity of right hand to do manual tasks; and
- (7) Increased pain and lack of enjoyment during sexual intimacy.

[5] The Claimant therefore claimed against the Defendant, general damages to include future medical expenses for possible surgery and other pecuniary loss to be assessed, and special damages. The Claimant further pleaded that special damages are ongoing and will need to be assessed.

[6] The Defendant filed a defence to the Claimant's claim and the Parties proceeded to mediation. The Parties agreed to an interim payment to be made by the Defendant to the Claimant in the sum of \$2,500.00 and later filed a consent order for judgment to be entered for the Claimant on the issue of liability only and for the matter to proceed to an assessment of damages if the Parties were unable to agree on the quantum of damages. Unfortunately, the Parties were unable to agree the issue of quantum and the task falls on the Court to carry out the assessment of damages. The issue of liability having been settled by the consent judgment, the only matter for the Court to determine is how much in compensatory damages should be awarded to the Claimant based on the evidence adduced by the Claimant in proof of the special and general damages claimed.¹

[7] The Claimant filed a witness statement and supplemental witness statement for the assessment of damages and written submissions in support of the assessment of damages. The Claimant also sought and obtained permission pursuant to Part 32 of the Civil Procedure Rules (Revised Edition) 2023 ("**CPR 2023**") for Dr. Deepraj C. Gaekwad to be an expert witness for the purposes of the assessment of damages and for Dr. Gaekwad to file an expert report.

[8] The expert report of Dr. Gaekwad was filed on 4th December, 2024 and the Defendant subsequently put questions to Dr. Gaekwad about his report on 27th

¹ See Michael Laudat et al v Danny Ambo DOMHCVAP2010/0016 (delivered 15th December 2010, unreported) at para. 30.

March, 2025. These responses are deemed to be part of Dr. Gaekwad's expert report pursuant to CPR 32.8.

- [9] The Defendant did not file any evidence for the assessment of damages and did not file any written submissions ahead of the assessment of damages hearing; however, the Court gave the Parties permission to file written closing submissions following the assessment of damages hearing. The Defendant filed his written closing submissions on 28th July, 2025.
- [10] The assessment of damages therefore proceeded on the Claimant's evidence, the evidence of the court appointed expert and the applicable law.
- [11] I will first consider the Claimant's claim for general damages.

General Damages

- [12] The principles governing the assessment of general damages are well settled. General damages are normally assessed by reference to the well-known guidelines laid down in **Cornilliac v St. Louis**,² which, broadly speaking, compensate for actual injuries sustained, pain and suffering, loss of amenities and loss of pecuniary prospects. Thus, 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.

Nature and Extent of Injuries Suffered and Nature and Gravity of Resulting Physical Disability

- [13] The Claimant was born on 29th November, 1966. She was 53 years old at the time of the accident and was 58 years old at the time of the assessment.
- [14] Whilst at work on 6th December, 2019 the Claimant had left her office space and walked out into the main floor of the Immigration Department Office to use the copier. Whilst walking back to her office space, her right leg got caught in some strings from part of the floor carpet which had been ripped. The Claimant fell forward and, in an effort, to brace her fall she stuck her right hand out to grab onto a chair which was in front of her. Her fingers touched the chair, but it was too far for her to grab onto it and she landed on her right hand.

² (1965) 7 WIR 491.

- [15] Her injuries are not disputed and are set out in the various medical reports that form part of the expert report of Dr. Gaekwad. It is necessary to go through the various reports which comprise Dr. Gaekwad's report to gain a full appreciation of the extent of the Claimant's injuries and her resultant physical disability.
- [16] As result of the workplace fall on 6th December, 2019 the Claimant was diagnosed at the Mount St. John's Medical Centre on the same day with oblique midshaft fracture of 4th metacarpal right hand confirmed by a plain radiographic study of the Claimant's right upper limb, forearm and wrist. She was treated conservatively for same using plaster which was removed after six weeks.
- [17] At a follow up evaluation with Dr. Gaekwad on 21st January, 2020 after the cast immobilization had been removed, the Claimant complained of pain in the right hand with radiation to the ipsilateral fourth finger. She also complained of symptoms of bilateral shoulder pain aggravated by active movement in the terminal ranges. A plain radiographic study conducted on 16th January 2020, six weeks post injury and immobilization, revealed uniting fracture of the fourth metacarpal shaft in acceptable anatomical alignment.
- [18] The Claimant also complained of paraesthesia (abnormal sensation) in the right fourth and fifth fingers and she was advised per oral neuromodulator and six pack exercises of the right hand to achieve the full range of movements and was advised right upper limb overhead elevations.
- [19] In a report dated 4th February, 2022 Dr. Gaekwad noted that the Claimant had presented for clinical evaluation on 22nd November, 2021 complaining of neuralgic pains to the right third and fourth finger distal phalanx dorsum. He stated that there was associated right brachialgia with increased sensitivity to cold temperature. Dr. Gaekwad further stated that the Claimant had reported improvement in textural sensory perception over the period since her last evaluation.
- [20] Dr. Singh noted in this report that clinical examination of the Claimant revealed:-
1. Lumbricals/interossei (intrinsic muscles) weakness of the hand;
 2. Right fifth finger flexion rotational malalignment;
 3. Grip strength of grade four, limiting her ability to perform the activities of daily living;
 4. Paraestheci pain with proximal radiation of the right upper limb was noted;
 5. The active extension of the fingers was full range
- [21] Dr. Gaekwad advised nerve conduction velocity and electromyography study (NCV-EMG) of the right upper limb for the Claimant's residual non-specific

sensory disturbances. The Claimant was recommended per oral neuromodulator and anti-inflammatory medication. Dr. Gaekwad noted that there had been partial compliance by the Claimant regarding the use of per oral neuromodulator with clinical full range of active movements of the right fingers.

[22] A nerve conduction study was performed on the Claimant by Dr. Sean Marquez on 10th March, 2023. The EMG and NCV findings were all within normal limits and the impression revealed a normal study. Dr. Marquez's report noted that there was no electrodiagnostic evidence of any cervical radiculopathy, brachial plexopathy, focal mononeuropathy or diffuse polyneuropathy.

[23] In his report dated 2nd October, 2024 Dr. Gaekwad noted the results of Dr. Marquez's study and the following report of a clinical evaluation of the Claimant on 4th April, 2024:-

1. Paraesthesia predominantly in right fourth and fifth fingers;
2. Partial intermittent restriction of range of motion of right third and second finger;
3. Paraesthesia of right hand and fingers radiating proximally to shoulder and scapulo-thoracic region since August 2023;

[24] Dr. Gaekwad again noted in this report that the Claimant's right hand grip strength is grade four. He stated that the Claimant is unable to write continuously for duration extending over 10 minutes. He also indicated that the stiffness of the Claimant's right hand and fingers has adversely affected her sleep pattern. He further noted that the Claimant's activities of daily living are affected adversely owing to pain at rest.

[25] Dr. Gaekwad also noted that a plain radiographic study of the right hand in orthogonal views revealed rotational malunion of fourth metacarpal with linear shortening. Dr. Gaekwad assessed the Claimant's disability as a result of the injury as 2% of a whole person. He further noted that the percentage of disability will increase with advancing age.

Pain and Suffering Endured

[26] The pain and suffering the Claimant endured after the workplace fall is set out in her witness statements. In her witness statement filed on 28th March, 2025 the Claimant stated that when she got up from the fall, she noticed that her fingers could not come together and her hand started to swell. Soon afterwards the pain in her hand started to get worse. She stated that she went into the kitchen to put some ice on her hand and that when she put her hand in the ice, the pain was so intense she made a loud noise. She stated that the pain got so

intense and the swelling got so bad that she could not take the ice anymore and indicated to the Chief Immigration Office that she intended to go to the Hospital. She stated that when she arrived at the Hospital she was examined by a doctor and was sent for an x-ray of her hand. After the x-ray was completed, she was advised that her hand was broken and that she would need a cast. The Claimant stated that being distraught at this news, she began to cry.

Loss of Amenities Suffered

[27] At paragraph 9 of her witness statement, the Claimant stated that for approximately five months immediately following the accident, she was unable to perform simple tasks such as bathing herself, and she needed her daughters' assistance to do so. She stated that she regained the ability to bathe herself unassisted in or around July 2020 and that at present, she still prefers not to bathe unless someone is home with her in the event that something falls in the shower and she injures herself attempting to retrieve it.

[28] At paragraph 12 of her witness statement, the Claimant stated that at present, she still cannot form a fist with her right hand, which is her dominant hand. She stated that she is also unable to: hold weighted objects for any length of time, peel or grate vegetables, write for long periods, wring clothes to dry them, lift and move pots during cooking, perform other menial tasks; and has increased pain and lack of enjoyment during sexual intimacy. She stated that she continues to have a constant pain, which sometimes feels like a burning sensation/numbness or itching, in her right shoulder, the degree of which varies from day to day. The Claimant further stated that she is still unable to sit in air-conditioned offices for long periods of time, the joints in her hand also feel stiff daily and her hand has a sensitivity to heat as well as cold temperatures.

Loss of Pecuniary Prospects

[29] At paragraph 13 of her witness statement, the Claimant set out her evidence as to the loss of her pecuniary prospects. She stated that her injury has impacted her employment and prospects for promotion. She stated that her job as an Immigration Officer requires her to type, write and hold a stamp for processing persons at the seaport and airport and that as a result of her injuries, she is unable to form a fist with her dominant hand and typing is equally difficult.

[30] The Claimant stated that in 2019, a total of nine persons were promoted within the Immigration Department, and she was not one of them. She stated that in 2022, a total of three persons were promoted within the Immigration Department and she was not one of them. And in 2023, a total of 18 persons were promoted within the Immigration Department and again she was not included. The

Claimant stated that she was firmly of the belief that her injury and the effect it has had on her job performance is directly related to her lack of inclusion in promotions within the Immigration Department.

- [31] The Claimant further stated in her supplemental witness statement filed on 2nd June, 2025 that if she did not get injured, pursue her case in court and was promoted as others in the Department have been, she would at present be at least a Senior Supervisor of five years.

Award of General Damages

- [32] 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**³ 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”.

- [33] Learned Counsel for the Claimant submitted that based on the evidence of the Claimant’s injuries, pain, suffering and loss of amenities, and comparable cases, that an appropriate award for general damages to the Claimant for pain, suffering and loss of amenities is \$55,000.00. The Claimant submitted the following cases for the Court’s consideration in making an award of general damages to the Claimant:-

1. **Austra Franklyn v M.A. Kharafi & Sons WLL Ltd**:⁴ The claimant was a carpenter working on the construction of a cruise ship and ferry birth. He was a national cricketer and had also represented St. Vincent in body building. Whilst working on the berth, the claimant’s hand was injured when it got caught between a steel boat and a pile. An x-ray of the claimant’s hand revealed a fracture of the distal end of his 5th metacarpal with ventral angulation. His hand was placed in a plaster which was removed approximately six weeks later. Two months after the accident, the claimant’s hand was still swollen and he was in pain and unable to bend his fingers. Another x-ray revealed that the fragment was misaligned. To regain full function of his hand, a doctor

³ [1998] 3 All ER 481.

⁴ St. Vincent and the Grenadines Civil Suit no. 276 of 1999 (delivered 5th April 2000, unreported).

recommended open surgical reduction and stabilization. The claimant sought medical treatment overseas and it was found that the fracture had healed but with significant angulation of the fracture. This was corrected through surgery and bone straightening, fixing the fracture with a small plate and screwed and reinforcing with two Kirschner wires. After returning home to St. Vincent, new x-rays of the hand confirmed good alignment of the fracture. The claimant was subsequently referred to Registered Occupational Therapist for mobilization and rehabilitation of the hand.

The claimant's fracture was subsequently found to have healed with good alignment, but he retained stiffness of the joints of the 5th digit and some associated stiffness of the 4th joint as well. Over a year after the accident, the claimant complained of persistent discomfort and pain over the site of the fracture and he complained that his fingers still became swollen at intervals. His grip was good but weakened. His pain was in part attributed to the presence of the metal in his hand and there had been a long delay between the fracture and him undergoing rehabilitation treatment which might have resulted in some loss of flexion at the knuckle. The claimant would have to return overseas to have the plates and screws removed and he would have to be involved in aggressive therapy to improve the range of movement and strength of his grip.

At the time of the assessment, the claimant was unable to work his trade and had expected he would no longer be able to be hired as skilled carpenter because of his injury. The defendant had accepted responsibility to facilitate the claimant's overseas treatment. The court found that the defendant did not honour the obligation it had accepted and that it had been a cause of the length of the claimant's suffering and the pain and disability he was under. The court found it likely that because of the prolongation of the necessary treatment, the claimant would never regain the necessary condition to play cricket at a national level or to compete at national level body building. The court also took into account the claimant being age 32. In 2000, the court awarded claimant general damages of \$60,000.00 comprising \$20,000.00 for pain and suffering and \$40,000.00 for loss of amenities.

2. **Aschelle Hippolyte v Joanne Page:**⁵ The claimant had been a passenger in a vehicle being driven by the defendant when the defendant lost control of the vehicle. The vehicle overturned several times and eventually came to a stop down a slope on the other side of

⁵ SLUHCV2008/0805 (delivered 30th August 2010, unreported).

the road. The court found that the accident was caused by the negligence of the defendant. The claimant was injured in the accident and was taken to the hospital. The medical report from the hospital stated that the claimant sustained (1) a crush injury with severe deformity of her land hand, 20 cm transverse laceration palmer surface of the left hand at the level of the metalerpo – phalangeal joints and 4-6 cm vertical laceration between the middle and ring fingers of the left hand; (2) visible laceration of thenor group of muscles; (3) radiological findings were, segmental comminuted fracture metacarpal of the left ring finger are proximal 3rd metacarpal of the left little finger. The claimant had surgery, wound debridement internal fixation with k wire of the affected metacarpal boned tissue repair she had regular wound dressings (every other day). She made good progress and was discharged six days later.

As a result of the nature of the injury, the claimant had severe deformity of her left hand and needed corrective surgery. In the months following her injury, the claimant underwent several procedures. She was also treated with analgesics and antibiotics and underwent physiotherapy. The claimant was not able to return to work at the time as she also suffered from severe lower back pain. It was assessed that the combined effect of the impaired motion of all the claimant's finger joints of the left hand constituted a whole person impairment in performance of activities of daily living (ADL) of 13%.

The medical expert was of the opinion that the claimant had suffered open fracture/dislocation of the 4th and 5th meta carpo-carpal joint of the left and (2) open fracture of the 4th metacarpal of the left hand and acute lumbosacral strain. At the time of trial, the claimant continued to experience constant pain in the hand and the mobility of the finger joints of the left hand had not improved in spite of an intensive extended program of physiotherapy. The claimant also continued to experience lower back pain. In 2010, the court awarded the Claimant general damages for pain suffering and loss of amenities in the sum of \$90,000.00.

[34] The Defendant submits that an award of \$55,000.00 as sought by the Claimant is not appropriate and that the case of **Austra Franklyn** relied on by the Claimant to arrive at an award is distinguishable.

[35] The Defendant drew the Court's attention to the Judicial Studies Board, Guidelines for the Assessment of General Damages in Personal Injury Cases,⁶

⁶ 9th end., Oxford University Press 2008.

which deals with Orthopaedic Injuries and outlines the levels of award for the various types of injuries. The Defendant submitted that Claimant's injury falls within the classification of "6(h)(n)– Serious injury to ring or middle finger" with suggested awards between the range of £9,750.00 (XCD\$35,304.96) to £10,750 (XCD\$38,925.99). The Defendant submitted that, as the Claimant suffered injury to the 4th metacarpal resulting in stiffness and permanent loss of grip, the injury can be classified as being within the lower end of the scale. Hence compensation for damage should fall midway between the suggested awards.

- [36] The Defendant referred the Court to the case of **Wayne Gloster v John Ashton et al**⁷ for its consideration of an appropriate award of general damages to the Claimant. The claimant in **Wayne Gloster** was riding as a passenger in the back of a truck being driven by the 1st defendant when the truck was involved in a collision resulting in injuries to the claimant. The middle finger of the claimant's right hand was amputated as a result of the injuries he sustained. The claimant complained that because of the amputation the stump had developed neuroma or sensitized nerve ending which causes excruciating pain whenever it comes into contact with another object. Surgery was recommended to alleviate his extreme sensitivity and to improve the function of his hand. The claimant also contended that as a result of his disfigurement he no longer swam and his girlfriend left him and he had not been able to get another girlfriend since. The court rejected the claimant's evidence as to suffering constant pain over the past five years and his loss of amenities. The court referred to cases from the OECS including **Austra Franklyn** and the Judicial Studies Board, Guidelines for the Assessment of General Damages in Personal Injury Cases which suggested an award for general damages for the loss of a middle finger in the region of £8,000.00. The court found the Guidelines useful. Recognizing the differences between the social circumstances in the United Kingdom and Saint Vincent and the Grenadines, it awarded the claimant the sum of \$20,000.00 for pain and suffering and \$10,000.00 for loss of amenities.

Award of General Damages

- [37] As it relates to the Defendant's reliance on the Judicial Studies Board, Guidelines for the Assessment of General Damages in Personal Injury Cases for an appropriate award to the Claimant, and the general approach of the courts in the jurisdiction of the Eastern Caribbean Supreme Court on an assessment of general damages, I am mindful of the pronouncement of Webster JA [Ag.] in

⁷ St. Vincent & the Grenadines High Court Civil Claim no. 36 of 2001 (delivered 29th June 2004, unreported).

Collin Hope Jr v Edmond Lake.⁸ At paragraph 6 of the Court of Appeal's judgment, Webster JA [Ag.] stated:-

"The approach of the courts of the Eastern Caribbean to the assessment of damages and the courts' reliance on the Guidelines is admirably summed up by the Privy Council in the case of *Scott v Attorney General of the Bahamas*, a case cited by Dr. Dorsett, as follows –

"What those guidelines can provide, of course, is an insight into the relationship between, and the comparative levels of compensation appropriate to different types of injury. Subject to that local courts remain best placed to judge how changes in society can be properly catered for. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts' own estimation of what levels of compensation are appropriate for their own jurisdiction. It need hardly be said, therefore, that a slavish adherence to the JSB guidelines, without regard to the requirements of Bahamian society, is not appropriate."⁵

In other words, the Guidelines can be resorted to in appropriate cases but they should not be used in place of or to contradict local decisions that are applicable to the case being decided.

- [38] With the above in mind, I am of the view that the cases provided to the Court can be used for comparison in arriving at an appropriate award to the Claimant.
- [39] I did not find the case of **Wayne Gloster** submitted by the Defendant to be as useful for guidance on an appropriate award of general damages to the Claimant as compared to the cases submitted on behalf of the Claimant. In **Wayne Gloster**, the full nature and extent of the claimant's injuries were not discussed in the Court's decision, however, the end result was the amputation of one of the claimant's finger, which is dissimilar to the injury of the Claimant in the case at bar. There appears to have been no other resulting outcomes of his injury. The Court in **Wayne Gloster** also did not accept the claimant's evidence as to the pain he experienced in the five years since the accident and the court also did not accept his evidence as to his loss of amenities and this was reflected in the ultimate award to the claimant. In the present case, the Claimant undoubtedly has suffered resultant physical disability from the accident and loss of amenities, which is supported by medical evidence.

⁸ ANUHCVP2020/0022 (delivered 23rd February 2022, unreported).

- [40] In my view, the factual circumstances of the present case are more closely aligned with the cases submitted by the Claimant, particularly the case of **Austra Franklyn**; however, the Court does recognize that there are some differences in that case. The injuries received by the claimant in **Austra Franklyn** were likely to have been more severe than the Claimant in the present case as the injuries of the Claimant in **Austra Franklyn** warranted surgery and there is no indication based on the evidence that the Claimant in the present case requires surgery. Secondly, even after surgery, the effects of the claimant's injury in **Austra Franklyn** still persisted and a further procedure was required. The extent of the pain and suffering of the claimant in **Austra Franklyn** was also exacerbated by the inaction of the Defendant. Another notable feature in **Austra Franklyn** was that the claimant was considerably younger than the Claimant in the case at bar. It is noted, however, that the case is of some vintage, the award having been made some 25 years and would not doubt be higher today and this should also be kept in mind in considering an award at the present time.
- [41] As it relates to the case of **Aschelle Hippolyte**, the claimant in that case suffered a serious crush injury to her hand and had to undergo multiple surgical procedures. The claimant also suffered persistent lower back pain. The claimant's disability in **Aschelle Hippolyte** was also assessed as 13% of a whole person, considerably higher than the assessment of 2% disability as a whole person of the Claimant in the case at bar. Thus any award to the Claimant in the present case should be appreciably lower.
- [42] I accept the Claimant's unchallenged evidence as to her injury, the resultant disability and the loss of amenities she has suffered. These have all been supported by the opinion evidence of the expert in these proceedings. Six years on from the accident, she continues to experience paraesthesia predominantly in right fourth and fifth fingers; and partial intermittent restriction of range of motion of right third and second finger. The injury sustained by the Claimant therefore continues to affect her activities of daily living.
- [43] Having consider the Claimant's injuries, the fact that her disability as a whole is 2%, the pain and suffering she ensured, the loss of amenities suffered and having considered the cases from the Eastern Caribbean submitted to the Court, taking into account their similarities and differences and the vintage of the awards, I would award the Claimant the sum of \$15,000.00 for pain and suffering and \$35,000.00 for loss of amenities making a total award of \$50,000.00.

Loss of Earning Potential

- [44] The Claimant seeks an award for loss of earnings or loss of earning potential. Learned Counsel for the Claimant relies on the reasoning in the well-known case of **Smith v Manchester Corp**⁹ for this award.
- [45] Learned Counsel for the Claimant submitted that although the Claimant has managed to remain at her job at the same level she was pre-accident and as such cannot prove loss of earnings, it is clear that the Claimant's injury has diminished her earning potential and as such she is entitled to an award under loss of earning potential.
- [46] Learned Counsel for the Claimant submitted that the Claimant is now 58 years old and the pension age in Antigua and Barbuda is 63 years old. Accordingly, he submitted that the Claimant has approximately five more years of working life. Learned Counsel for the Claimant submitted however that the Claimant has suffered this loss of earning potential since 2019 when the accident occurred. He therefore submitted that the period for which the Claimant ought to be compensated under this head is 2020 to 2030, i.e. 10 years. Learned Counsel for the Claimant's argument, as I understand it, is based on the Claimant's evidence that she was not promoted in the period up until now since the accident despite several other persons in the Immigration Department being promoted over the same period.
- [47] Learned Counsel for the Claimant pointed out the evidence in the Claimant's supplemental witness statement. He submitted that, as stated in her supplemental witness statement, the Claimant's monthly salary is \$4,355.60 (inclusive of her allowance). Had she been promoted to Senior Supervisor, her salary would be \$5,200.00 (inclusive of allowance) leaving a difference of \$844.40. Learned Counsel for the Claimant submitted that if this amount is multiplied by 12, the yearly difference is \$10,132.80 and if this amount is then applied for the 10-year period as outlined, the amount is \$101,328.00. Learned Counsel for the Claimant submitted that this is an appropriate award to make under this head.
- [48] Learned Counsel for the Claimant submitted in the alternative that if the Court is of the view that the time period for calculating an award under this head of damages should only apply to the Claimant's future working life, which he submitted to be five years, as opposed to starting the year immediately following the Claimant's injury, then the yearly sum of \$10,132.80 multiplied by 5 years, would be \$50,664.00.

⁹ [1974] ECA Civ 6.

- [49] It seems to me based on the submissions of learned Counsel for the Claimant that he is inviting the Court to make an award to the Claimant for past loss of earning and loss of future earnings, employing the multiplier-multiplicand method on the basis of a specific amount the Claimant would have earned had she not been injured as opposed to a Smith v Manchester award for loss of earning capacity on the basis of being disadvantaged in the open market as a result of her injuries.
- [50] Learned Counsel for the Defendant submitted that no award should be made to the Claimant for loss of earning potential or properly, loss of earning capacity as the evidence in this case does not support such award.
- [51] The Claimant was extensively cross-examined by learned Counsel for the Defendant on the issue of loss of earning potential. The Claimant admitted under cross-examination that there was no document before the Court that stated why the Claimant was not promoted. The Claimant further stated that she did not recall if there was anything in her evidence that stated that she was not promoted because of the injuries she received from the fall.
- [52] Learned Counsel for the Defendant suggested to the Claimant that promotion is not solely based on performance, however the Claimant did not agree with the statement. She stated that it is not cut and dry. Under further cross-examination, the Claimant stated that she did not recall her employer writing to her about her performance. The Claimant was also unable to answer a question from Counsel for the Defendant as to whether there was anything before the court which would indicate that her employer had issues with her performance. Learned Counsel for the Defendant further suggested to the Claimant that in light of her answers, she, the Claimant, could not come to the Court to say that she missed out on a promotion because of performance. The Claimant responded that it was not as cut and dry as Counsel put it.
- [53] The Claimant confirmed under cross-examination that she is still employed and is still performing the duties assigned to her. She further stated that she was still receiving her salary and had never stopped receiving her salary since the accident.
- [54] In her supplemental witness statement filed on 2nd June, 2025 the Claimant stated that she is an Immigration Officer of approximately 22 years having first joined the immigration Department on 1st July, 2003. She stated that she initially began working in the Immigration Department as a Data Clerk and in 2004 she was reclassified as Grade V Officer as Data Clerks were to be phased out.

Discussion on Loss of Earning Potential

- [55] I have carefully reviewed the Claimant's witness statement and supplementary witness statements and the evidence elicited from the Claimant under-cross examination in relation to her contention that she had not been promoted in the years since the accident. Whilst I accept that the Claimant's injuries may have affected her abilities to perform certain tasks, there is nothing before the Court that demonstrates that her injuries lead to poor or unsatisfactory work performance negating promotion. Further, in my view, there is no sustainable evidence before the Court for the Court to make a finding that the Claimant did not receive a promotion because of her injury thus depriving her of a higher salary. The Claimant did not place any evidence before the Court that she was due a promotion. She has not stated that she applied for a promotion and was rejected. There is no letter before the Court concerning the Claimant's performance, no performance appraisals from before and after the accident, no history of her prior performance and report on her current performance, nor any evidence of her history or pattern of advancement throughout her employment with the Government of Antigua and Barbuda which would demonstrate an upward trajectory in her career which was halted after the accident. Based on the Claimant's supplemental witness statement, it appears that she has been in her present position since 2004.
- [56] The Claimant's own evidence under cross examination to the suggestion of learned counsel for the Defendant that she had nothing to show that she was not promoted because of her performance was that it was not cut and dry. I have no doubt that several matters would be weighed in the balance in deciding whether to promote an employee. The Claimant's sole argument to support her contention that she had not been promoted after her injury is that other persons in her department were promoted during this time. To my mind, the Claimant's evidence is speculative and is not supported by any tangible evidence that the Court can rely on to base an award for loss of potential earnings. Thus, taking the Claimant's evidence at its highest, on the balance of probabilities, I am unable to find that the Claimant lost out on potential earnings because of the accident. I therefore find that the Claimant has not proved this loss.
- [57] Notwithstanding the above finding, considering the principles set out in **Smith v Manchester**, it may still be open to the Court to make an award to the Claimant not for loss of future or potential income, but rather for loss of earning capacity. This would be on the basis that although the Claimant is in regular employment, her disability from her injury is such that it puts her at a disadvantage in the labour market because she may lose her job and not obtain similarly remunerated employment. It refers to a loss of the same ability to earn income that a claimant would have had in the absence of injury.

[58] The principles in **Smith v Manchester** were later discussed in the case of **Moeliker v A Reyrolle and Co Ltd**.¹⁰ The principles set out in the case is that the Court may only make an award for loss of earning capacity if there is a substantial or real risk that the Claimant will lose their present employment at some time before the established end of their working life and if there is such a risk, the Court should assess such risk in making an award considering the facts which will or may affect the Claimant's chances of getting a job at all or an equally well paying job if the risk materializes. These principles were considered and approved by the Court of Appeal in **Martin Alphonso et al v Deodat Ramnath**.¹¹

[59] In **Moeliker v A Reyrolle and Co Ltd** the following guidance was provided to determine the question of the risk of a claimant losing their employment sometime before the end of their working life:-

“Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? I think the question is whether this is a 'substantial' risk or is it a 'speculative' or 'fanciful' risk (see *Davies v Taylor*, per Lord Reid ([1972] 3 All ER 836 at 838, [1974] AC 207 at 212) and Lord Simon of Glaisdale ([1972] 3 All ER 836 at 844, [1974] AC 207 at 220)). Scarman LJ in *Smith v Manchester Corp* referred to a 'real' risk, which I think is the same test. In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with the facts of particular cases. For example, the nature and prospects of the employers' business; the plaintiff's age and qualifications; his length of service; his remaining length of working life; the nature of his disabilities; and any undertaking or statement of intention by his employers as to his future employment. If the court comes to the conclusion that there is no 'substantial' or 'real' risk of the plaintiff's losing his present job in the rest of his working life, no damages will be recoverable under this head.”

[60] As has already been stated, the Claimant is 58 years old and the mandatory age of retirement in Antigua and Barbuda is 65, she therefore has approximately seven years working life remaining. The Claimant has continued to work since she was injured almost six years ago in 2019. There is no evidence before the Court of poor performance on the job. Whilst the medical evidence before the Court addresses certain difficulties the Claimant may have with her grip, and sensitivity to cold or heat, the expert made no conclusion that the Claimant could

¹⁰ [1977] 1 All ER 9.

¹¹ [1997] 56 WIR 183.

not continue to perform her duties at work or that she should retire from working. Further, the Claimant has not given any evidence as to an inability to carry out her assigned tasks.

[61] I also note that the Claimant works in the public service and not the private sector. She is an Immigration Officer of approximately twenty-two years having first joined the Immigration Department on 1st July, 2003. Whilst it is not explicitly stated in the Claimant's evidence as to whether she is on permanent establishment or fixed-term contract, no reference has been made anywhere in the Claimant's evidence or the submissions of the Parties of a fixed term contract, rather continuous service since 2003. In my view having considered the Claimant's history of employment as set out in her supplemental witness statement, in the absence of any evidence to the contrary, it can be inferred that the Claimant is on permanent establishment with the Government of Antigua and Barbuda.

[62] Having reviewed and assessed the evidence before the Court, I am of the considered view it has not been demonstrated on the evidence that there is a substantial or real risk of the Claimant losing her present job during the rest of her working life. I would therefore decline to make a **Smith v Manchester** award to the Claimant for loss of earning capacity.

Special Damages

[63] 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. It is well settled so as to be considered trite that special damages must be strictly pleaded and proved to be recovered.¹²

[64] Based on the Claimant's evidence, she is seeking special damages in the sum of \$2,408.02. In her statement of claim, the Claimant pleaded special damages in the sum of \$120.00 to date and ongoing to be assessed. I pause to note that the claimant's statement of claim was not amended to plead the further pre-trial losses she incurred. As was underscored by Bennett JA [Ag.] in **Carl Webster v Historic Beacon Point Anguilla Ltd. et al**¹³ the requirement to plead special damages is not satisfied by production of documentary evidence in a list of documents or by service of a witness statement setting out evidence proposed to be adduced in support of claims or matters for which no pleading has been made. In any event, CPR 8.7 provides however that: "The claimant may not rely

¹² 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).

¹³ Para. 18 to 19.

on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the Court gives permission, **or the parties agree.**" (Emphasis added).

- [65] Since the accident, the Defendant has facilitated the payment of the Claimant's medical expenses and treatment and an interim payment was made to the Claimant. In the written submission filed on behalf of the Defendant, it was stated that: 'Given that the Defendant has facilitated the payment of the various expenses incurred by the Claimant as a result of her injuries, it is accepted that the Claimant is entitled to special damages in the sum of \$2,408.02.' I consider therefore that the Defendant has agreed to the sum of \$2,408.02 as special damages to be paid to the Claimant and I would therefore order that this sum be paid by the Defendant to the Claimant.

Interest

- [66] The Claimant would ordinarily be entitled to interest on her awards of general and special damages. In making an award of interest, the Court is guided by the judgment of the Court of Appeal in **Terrance Amedee v Marcus Modeste**.¹⁴ The Court, however, is unable to determine the date of the expenses allowed due to the interim payments being advanced to the Claimant from the date of the accident and during the pendency of this claim. It is therefore impossible to determine the date from which pre-judgment interest on her award of special damages should run. I would therefore award no interest pre-judgment on the Claimant's award of special damages.

Costs

- [67] The Claimant is also entitled to prescribed costs in accordance with Part 65 of the Civil Procedure Rules (Revised Edition) 2023.

Disposition

- [68] In light of the foregoing, I would make the following orders:-

1. The Defendant shall pay the Claimant the following:-
 - (i) General damages in the sum of \$50,000.00 for pain, suffering and loss of amenities together with interest from the date of service of the claim to the date of this Order at the rate of 5% per annum.

¹⁴ SLUHCVP2022/0001 (delivered 9th November 2023, unreported).

- (ii) Special damages in the sum of \$2,408,02. No interest is awarded before judgment.
- (iii) Post judgment interest at the statutory rate of 5% per annum.
- (iv) Prescribed costs in accordance with rule 62.5 of the Civil Procedure Rules (Revised Edition) 2023 and Part 65 of the Civil Procedure Rules (Revised Edition) 2023, appendices B and C.

2. The Claimant shall draw, file and serve this Order.

[69] 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