THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2021/0360

BETWEEN:

NAKITA BROWN

Claimant

and

SOCIAL SECURITY BOARD OF CONTROL

Defendant

Appearances:
Ms. Sherrie-Ann Bradshaw, Counsel for the Claimant
Mrs. Nelleen Rogers-Murdoch, 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 in negligence against the Defendant for injuries she sustained from a fall down steps in the Defendant's office building on 19th September, 2018.

[2] The Claimant is employed by the Defendant as a Senior Legal Officer. On or about 19th September, 2018 during the course of her employment with the Defendant, she was attempting to walk down a flight of stairs located in the middle of the Defendant's office building holding onto the side rail whilst doing so, when she slipped and bounced down about 5 to 6 steps. She hit her lower back during the fall and injured her shoulder when she tried to break the fall as she held on to the railing.

[3] The Claimant subsequently commenced these proceedings against the Defendant seeking damages for personal injuries, loss and damages. No acknowledgement of service was filed by the Defendant within the time limited by the Civil Procedure Rules 2000 and at the request of the Claimant, judgment in default of acknowledgement of service was entered for the Claimant against the Defendant for an amount to be decided by the Court.

[4] The issue of the Defendant's liability having been crystalized by the default judgment, the only matter remaining 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]

[5] The Claimant filed an affidavit in support of the assessment of damages and sought and obtained permission to file the expert reports of Dr. Deepraj Gaekwad, Consultant Orthopaedic Surgeon and Mr. Peter Kowlessar, Consultant Neurosurgeon and Neurologist. The Claimant also filed written submissions for the assessment of damages. The Defendant did not put any questions to the experts about their reports and did not file any evidence for the assessment of damages. The Defendant, however, filed written submissions for the assessment. The assessment of damages therefore proceeded on the Claimant's evidence, the evidence of the court-appointed experts and the applicable law.

The Expert Evidence

[6] The Claimant was 29 years old at the time of the accident having been born on 15th October, 1989. Her full clinical history and diagnoses following the accident are outlined in the expert reports filed in these proceedings.

Dr. Deepraj Gaekwad's Expert Report

[7] In his expert report dated 7th March, 2025 Dr. Gaekwad gave a very comprehensive overview of the Claimant's clinical history and his various clinical examinations of the Claimant. Although every detail in the expert report is not set out in this decision, the expert report was thoroughly read and reviewed.

[8] The Claimant presented for examination by Dr. Gaekwad on 12th October, 2018. She had previously been evaluated by a General Practitioner (GP) following the accident with a CT scan done on 20th September, 2018. The CT scan reported cervical spondylosis (C3, 4, 5) and mild straightening of the normal lordotic curvature. The GP recommended specialist orthopaedic evaluation for persistent neck and shoulder pain.

[9] When examined on 12th October, 2018 she had paraspinous tenderness of the carvico-thoraci spine (C2 till C5) with full range of neck movements and no radiation to bilateral upper limbs. No tenderness of the lower back was elicited

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

at the evaluation. The Claimant was treated along conservative lines with neck ROM exercises and pharmacotherapy with analgesia as needed.

[10] At an evaluation on 2nd November, 2018 the Claimant reported residual neck pain with full range of active neck movements. Lower back pain when seated for more than thirty minutes was narrated by the Claimant and an ergonomic chair at her workstation with continued physiotherapy was advised.

[11] At an evaluation in February 2019, the Claimant complained of interscapular radiation of posterior neck pain with no upper limbs radiation. Peroral neuromodulator was prescribed.

[12] The Claimant presented for follow up evaluation on 22nd January, 2020 with the complaints of right upper limb weariness after writing and typing and a persistent sensation of fatigue of the right upper limb-even at rest. Dr. Gaekwad reported that clinically, the active right shoulder range of motion (internal rotation in particular) was restricted along with positive signs of right bicep tendinitis and SLAP tear. Due to the Claimant's worsening neurological symptoms (sensory diminution of the right upper limb up to the C4 segment), radiation of pain in the right scapular region, the Claimant was advised to have an MRI study of the cervical spine to include T2 level and an MRI scan of the right shoulder to rule out internal derangement.

[13] The Claimant presented for follow-up evaluation on 3rd February, 2021 (one year interval) narrating the symptoms of right lower and upper limbs radiation of pain with the subjective sensation of heaviness and fatigue in the upper limbs. The Claimant also reported subjective complaint of sense of fatigue and heaviness in the back. The Claimant was advised physiotherapy (active shoulder phase one and two exercises, neck range of motion and muscles strengthening, back mobility and strengthening exercises). Her diagnosis by Dr. Gaekwad included:-

1. right shoulder internal derangement,
2. cervical intervertebral disc (C4/5) herniation; and
3. right lower limb claudication.

The treatment included per oral neuromodulator, prednisolone, Omeprazole and anti-inflammatory medication.

[14] At a follow up visit on 26th March, 2021 the Claimant provided an update on her physiotherapy outlining her rehabilitation regime. MRI imaging studies dated 1st February, 2021 were reviewed and revealed the following:-

Right shoulder -

- Acute subacromial bursitis
- SLAP two tear
- Biceps tendinitis
- partial tear of the subscapularis tendon

Cervical MRI:

- C4/5 diffuse disc herniation with
- Mass effect on the thecal sac and spinal cord with no nerve root contact

[15] The MRI of the Claimant's lumbar spine was still pending by this visit. At the 26th March, 2021 examination, the Claimant's symptoms of lower limb radiation of pain, right more than the left, localized sacroiliac joint tenderness on the left side with a sense of fatigue in the right lower limb partly resolved and recurrent claudication were narrated by the Claimant.

[16] Notably, at this stage in his expert report, Dr. Gaekwad noted the Claimant experienced dextro-scoliosis of the thoracic spine which was confirmed via a radiographic study of the chest in October 2016 which predates the Claimant's history of trauma sustained on 19th September, 2018. He went on to state that the dextro-scoliosis of the lower thoracic column contributes to the mechanical pain and symptoms with the C4/5 disc herniation leading to the radiating symptoms in the right upper limb with an underlying shoulder internal derangement.

[17] At a visit on 2nd April, 2021 the Claimant complained of an inability to sit for durations exceeding 10 minutes. Dr. Gaekwad assessed the Claimant's permanent impairment as per the Guides to the Evaluation of the Permanent Impairment- Sixth Edition of the American Medical Association as nine percent Whole Person Impairment (9% WPI = 6% C4/5 disc herniation + 3% shoulder labral tear).

[18] The future treatment plan recommended by Dr. Gaekwad included right shoulder arthroscopic surgery and cervical spine decompression surgery in the event of neurological worsening and follow-up physiotherapy clinical evaluations at three monthly intervals.

[19] Dr. Gaekwad stated in his report that the Claimant's occupational and daily living activities are affected by her clinical condition at present and that the percentage of the impairment will increase with advancing age.

[20] Following the above conclusions in his report, Dr. Gaekwad reports on what appears to have been three further consultations with the Claimant in early

2024. He noted that on 31st January, 2024 the Claimant complained of aggravation of pain in the right shoulder region and ipsilateral upper limb more persistent as compared to intermittent aggravations in the past. The Claimant also complained of occasional headaches with subjective numbness of the right fingers with normal appetite and no urinary/bowel symptoms were reported. She narrated being compliant with the home-based regime of neck, shoulder and truncal exercises. Dr. Gaekwad stated that the clinical examination of the Claimant revealed:-

- Right C6 sensory diminution
- Right coracoid process/conjoint tenderness on palpation Right scarf test positive
- No sensory deficit of the right fingers

[21] Dr. Gaekwad further noted that plain radiographic studies of the cervical spine and the right shoulder joint was suggestive of right cervical rib (right > left). She was recommended right arm sling support to relieve the shoulder symptoms with adjuvant peroral anti-inflammatory-analgesic-muscle relaxant and Pantoprazole.

[22] Dr. Gaekwad stated that during a consultation via telephone on 6th February, 2024 the Claimant reported headaches following the administration of prescribed peroral medications. He further stated that prednisolone for five days was prescribed for the aggravated symptoms of the right upper limb.

[23] Dr. Gaekwad further noted that on 21st February, 2024 the Claimant reported right sided base of neck pain- 4/10 with subjective paraesthesia in the right lower limb. Further, subjective diminished sensations and paraesthesia with weakness of the right hand was endorsed by Claimant. The Claimant also reported right shoulder pain 4/10, radiating proximally to ipsilateral aspect of the neck and distally to the right arm was complained of.

[24] Dr. Gaekwad ended his report by noting that a 4th March, 2024 radiologist report of the claimant revealed:-

- C4/5 diffuse disc herniation
- Mass effect on thecal sac and spinal cord
- No lateral recess compromise or nerve root contact
- Partial disc desiccation in lower lumbar spine
- Subacromial bursitis, partial tear of AC ligament
- Partial tear with intrasubstance extension of supraspinatus is additional finding
- SLAP II tear, deltoid tendonitis, biceps tendonitis

Dr. Gaekwad further noted that nerve Conduction Velocity-Electro Myo Graphy studies of the bilateral upper and lower limbs with evaluation by neurophysician are awaited as sensory deficit is clinically evident.

[25] Dr. Gaekwad does not explain what, over 5 years after the accident, may have caused this aggravation of symptoms of the Claimant as these matters had not previously been observed in the Claimant's clinical history and are not a feature of the report of Mr. Kowlessar based on an examination of the Claimant in November 2023, which will be set out below.

Mr. Peter Kowlessar's Expert Report

[26] Mr. Peter Kowlessar examined the Claimant on 8th November, 2023. He also reviewed several medical reports concerning the Claimant since the accident including the Claimant's radiology reports, MRI report and medical reports of Dr. Gaekwad.

[27] In his expert report, Mr. Kowlessar stated the Claimant's clinical features are in keeping with her self-reported complaint of chronic low back pain – cause unspecified. He stated that from the mechanism of injury associated with the event that occurred in September 2018, as described by the Claimant, it is reasonable to state that she suffered muscle-related back pain at that time. He noted that there would have been an axial compressive force to the spinal column with the resultant soft tissue injury to the paraspinal muscles and possibly, spinal joint capsules. Mr. Kowlessar further noted, however, that the nature of such back pain was expected to improve over time in keeping with its natural history. This he stated is provided there was no subsequent episode to cause muscle re-injury and prolongation of time to recovery.

[28] Mr. Kowlessar stated that when he assessed the Claimant in November 2023, five years after the incident, her neurological function of all limbs was normal. Cervical and truncal movements were normal. Despite her self-reported lower limb sensory disturbances, nerve conduction studies of all limbs demonstrated the normal function of the cervical and lumbar nerve roots as well as the major peripheral nerves. In addition, cervical and lumbar MRI scans done in 2021 were acceptable and non-contributory to her ongoing complaint of right shoulder and back pain.

[29] Dr. Gaekwad stated that in his opinion, the Claimant's revealed C4/C5 minor disc bulge is unrelated to the incident that happened in September 2018. This, he stated, may be a partly calcified cervical disc bulge that pre-existed the incident and is age-related. Furthermore, he stated that its mere presence does

not imply the occurrence of paraspinal pain, including posterior neck pain. He further stated that there is no indication that cervical surgery will be beneficial.

[30] Mr. Kowlessar noted that the Claimant was diagnosed with having sustained a right shoulder SLAP (superior labral anteroposterior) type II tear together with inflammatory changes and a partial tendon tear. Though the right shoulder MRI scan was done in February 2021, three years after the incident, Mr. Kowlessar observed that it is reasonable that the mechanism of injury resulted in such shoulder injury. He commented that the management of this is better determined by an orthopaedic surgeon and noted that Dr. Gaekwad, Orthopaedic Surgeon, recommended right shoulder arthroscopic surgery in the future. Mr. Kowlessar further commented that shoulder movement associated with the Claimant's injury would result in right shoulder pain that can extend to the right side of the neck as well as the right arm.

[31] As it relates to the Claimant's back pain, Mr. Kowlessar stated that whilst he appreciates the Claimant's ongoing complaint of back pain which can impact most of the activities that she highlighted, he also notes that it has been almost six years since the event that would have resulted in temporary soft tissue injury involving the paraspinal back muscles. However, the anticipated recovery period related to her back injury would be expected to be weeks – few months, significantly improved with effective physiotherapy for muscle rehabilitation. Therefore, it was Mr. Kowlessar's opinion that the extent and intensity of the Claimant's self-reported back pain is exaggerated. He stated that there is no biological plausibility of these claims existing presently to a significant extent and had arisen from the incident that occurred in Sep 2018. Further, based on her clinical features and investigations related to her neurological and spinal function, there is no impairment permanence. This, Mr. Kowlessar stated is in keeping with the consensus-driven guidelines of the American Medical Association (AMA).

[32] Mr. Kowlessar noted, however, that the Claimant also suffered features of a right shoulder injury that is still evident. He stated that whether or not this is a permanent injury even with the recommended shoulder arthroscopic surgery, is better determined by an orthopaedic surgeon. Dr Gaekwad indicated that the whole person impairment affiliated with a shoulder labral tear is 3%. Mr. Kowlessar's opinion was that for the purpose of compensation, permanent partial disability can be equated to this estimate (3%), however, this does not consider the psychosocial factors arising from her condition.

Observations on Expert Reports

[33] Dr. Gaekwad's expert report provided a comprehensive clinical history of the Claimant. I however found the report to consist of substantial statements of self-reporting of the Claimant, but more limited in the evaluation of the reported symptoms in relation to the accident and her clinically diagnosed injuries. On the other hand, I found Mr. Kowlessar's report to be extremely useful in explaining the Claimant's overall clinical impression. Further, Mr. Kowlessar's report helpfully explained the Claimant's clinically diagnosed injuries and reported symptoms in the context of the workplace accident. Mr. Kowlessar's report also clarified and placed Dr. Gaekwad's report into context for the purpose of these proceedings.

[34] Having carefully considered the two expert reports, I am of the view that on the balance of probabilities, the injuries the Claimant received from the accident were primarily to her shoulder more specifically, a right shoulder SLAP (superior labral anterior posterior) type II tear together with inflammatory changes and a partial tendon tear as reported by the experts. The Claimant also injured her lower back, being a soft tissue injury to her paraspinal muscles and according to Mr. Kowlessar, possibly her spinal joint capsules. This injury, as explained by Mr. Kowlessar would have resulted from axial compressive force to the spinal column from the fall and would have led to muscle-related back pain being experienced by the Claimant.

[35] Having considered both reports, it appears that the claimant's cervical injury - C4/5 diffuse disc herniation is unrelated to the work place accident. Dr. Gaekwad noted in his expert report that the Claimant experienced dextro-scoliosis of the thoracic spine, confirmed via a radiographic study of the chest in October 2016 which predated the Claimant's accident. He noted that the dextro-scoliosis of the lower thoracic column contributes to the mechanical pain and symptoms with the C4/5 disc herniation leading to the radiating symptoms in the right upper limb with an underlying shoulder internal derangement. Further, this is underscored by Mr. Kowlessar's reported opinion that the Claimant's revealed C4/C5 minor disc bulge is unrelated to the incident that happened in September 2018.

[36] Of some concern to me was the noted change in symptoms reported by the Claimant at an examination with Dr. Gaekwad on 31st January, 2024 a telephone consultation on 6th February, 2025 and consultation on 21st February, 2024. It was also noteworthy that this followed an examination by Mr. Kowlessar in November 2023 where these were not reported.

[37] The Claimant reported headaches, which was not previously mentioned in the report of Dr. Gaekwad or in the report of Mr. Kowlessar. Further, reports of right

C6 sensory diminution, Right coracoid process/conjoint tenderness on palpation Right scarf test positive. An MRI scan reportedly conducted on 4th March, 2024 showed, for the first time partial disc desiccation in lower lumbar spine. This would mark quite a departure from the lumbar MRI report dated 13th July, 2021 which noted the following:-

> "There is no evidence of posterior disc herniation.
> The posterior elements are intact and the apophyseal joints are unremarkable.
> The ligamentum flavum and the intra spinous ligaments are unremarkable.
> The spinal cord is normal. The marrow signals are normal on all sequences.
> The MR, findings are consistent with an unrevealing study."
>
> "Impression
> Unrevealing study.
> No disc herniation.
> Intact cord."

[38] The MRI result from the MRI report dated 13th July, 2021 which were presented to Mr. Kowlessar, were also consistent with his clinical impression of the Claimant in November 2023. It is noted that the MRI reports which are mentioned at the end of Dr. Gaekwad's report were not presented to the Court and do not form part of the Claimant's document bundle. As previously mentioned, no explanation has been provided by Dr. Gaekwad to account for these changes, and in my view, it would be difficult to attribute them to the accident without explanation and considering the medical evidence as a whole suggest some later unexplained aggravating event.

General Damages

[39] 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.

[2] (1965) 7 WIR 491.

Nature and Extent of Injuries Suffered

[40] These are outlined in the Claimant's affidavit and reflect what is stated in the medical reports above.

Pain and Suffering Endured and Loss of Amenities Suffered

[41] The Claimant's affidavit does not specifically address the level of pain and suffering she endured after the accident, however, she does give evidence as to pain she experienced in the context of her alleged loss of amenities.

[42] The expert reports set out above do however give an account of the pain related symptoms reported by the Claimant. This has been considered and I need not repeat them here.

[43] Considering the Claimant's affidavit evidence, she stated that before the injury, she was able to walk long distances without any issues. She could go to church or a function and stand or sit without any complaints of discomfort. She could lift a bucket or other objects of water without any help. The Claimant stated that after the injury, walking, standing, sitting and lifting became an issue. She would feel the sensation of heaviness and fatigue in the upper limbs, sense of fatigue and heaviness in the back, weariness after writing and typing and persistent sensation of fatigue of the upper limb- even at rest.

[44] The Claimant stated that at the time of the accident, she had a newborn baby and had difficulties lifting her daughter due to the constant bending.

[45] The Claimant stated that she is right-handed and experienced aggravation of pain in her right shoulder region and upper area and numbness in her right fingers. She stated that where she would previously enjoy an outing with friends and family this became not so enjoyable anymore because her right lower and upper limbs would feel heavy and fatigued bringing the fun to an abrupt end. The Claimant stated that to help ease the pain and discomfort she would have to apply heat therapy and different massage techniques as well as take the medications prescribed by the doctor.

[46] The Claimant also stated that her sex life has been affected due to excruciating pain or her leg going numb and starting to shake during sexual intercourse. The Claimant stated that her shoulder would pain her and that what was once pleasure now brings fear of discomfort and pain. She stated that her social and sexual life has been cut short.

[47] In his medical report, Dr. Gaekwad noted that the Claimant's occupational and daily living activities are affected by her clinical condition at present and that the percentage of the impairment will increase with advancing age. Mr. Kowlessar, whilst not completely discontinuing the Claimant's pain, was of the opinion that the extent and intensity of the Claimant's self-reported back pain is exaggerated. He was firmly of the opinion that there is no biological plausibility of these claims existing presently to a significant extent having arisen from the incident that occurred in September 2018.

Award of General Damages
Comparable Cases

[48] 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".

[49] In her written submissions, learned Counsel for the Claimant submitted that the Claimant should be awarded the sum of $90,000.00 for pain, suffering and loss of amenities. In support of this submission learned Counsel for the Claimant referred the Court to several cases from the Organization of Eastern Caribbean States (OECS), namely:-

1. **Collin Hope Jr. v Edmund Lake**;[4]
2. **Celia Hatched v First Caribbean International Bank et al**;[5]
3. **Gloria Lake v Antigua Comercial Bank**;[6]
4. **Anita Tobitt v Grand Royal Antiguan Beach Resort Limited**;[7]
5. **Claudette Francis v Cecilia Martin**;[8]
6. **Oscar Frederick v LIAT (1974) Limited**;[9]
7. **Leane Forbes v Ulbana Morillo**;[10]

[3] [1998] 3 All ER 481.
[4] ANUHCV2018/0500 (delivered 21st April 2020, unreported).
[5] BVIHCV2006/0227 (delivered 29th November 2007, unreported).
[6] ANUHCV1999/0123 (delivered 28th June 2006, unreported).
[7] ANUHCV2006/0026 (delivered 13th October 2010, unreported).
[8] BVIHCVAP2009/0007 (delivered 20th September 2010, unreported).
[9] ANUHCV2007/0391 (delivered 31st May 2010, unreported).
[10] British Virgin Islands Civil Appeal No. 8 of 2005 (delivered 20th February 2006, unreported).

8. **Daphne Alves v Attorney General of the Virgin Islands**;[11]
9. **Monica Lansiquot v Geest PLC**;[12]
10. **Wadadli Cats Limited v Frances Chapman**;[13]
11. **Lisa Bellott v Albert Raffoul**;[14]
12. **Miriam Myers v Dickenson Bay Hotel Management Ltd DBA Sandals Antigua**;[15]
13. **Carlos Baptiste and Madestine Baptiste v Edwin Ballantyne**.[16]

[50] Learned Counsel for the Defendant on the other hand proposes an award to the Claimant in the range of $4,000.00 to $7,000.000

[51] In addition to referring to and distinguishing the cases submitted by the Claimant, learned Counsel for the Defendant referred the Court to the following cases:-

1. **Fenton Auguste v Francis Neptune**;[17]
2. **Simone Sparman v Jolly Beach Resort & Spa**;[18]
3. **Jameson Mannix and Osaze Mannix v Hamish Anthony**.[19]
4. **Dominique Warner v Jumby Bay Island Company Limited**.[20]

[52] Each case referred to by the Parties has been carefully read and considered. I do not intend to reproduce the details of each case in this decision. However, I make reference the following cases which had been referred to the Court:-

1. **Collin Hope v Edmond Lake**: The Claimant was involved in a motor vehicle accident. As a result of the accident he sustained severe whiplash injury and loss of balance. He was admitted to the orthopaedic services at the Mount St. John's Medical Centre for acute spinal injury and was administered medication to suppress the immune. He was discharged after five days at which time he gradually developed in the functions of his left side of his body and his neck pain gradually got better. He continued to suffer with lower back pain which restricted his movements and disabled him in his functions. He was subsequently diagnosed as having sustained L5/S1 disc bulge. And physical therapy was recommended. He sought a second opinion and an MRI was undertaken which reported a diagnosis that the claimant suffered

[11] BVIHCV2007/0306 (delivered 24th October 2011, unreported).
[12] Saint Lucia Suit no. 222 of 1996 (delivered 18th December 1998, unreported).
[13] Antigua and Barbuda Civil Appeal no. 16 of 2004 heard together with Antigua and Barbuda Civil Appeal No. 19 of 2004 Keithly George et al v Gerald Khoury (delivered 25th April 2005, unreported).
[14] DOMHCV2012/0360 (delivered 30th May 2014, unreported).
[15] ANUHCV2013/0231 (delivered 6th October 2016, unreported).
[16] SVGHCV2018/0072 (delivered 7th February 2020, unreported).
[17] Saint Lucia Suit no. 205 of 1994 (delivered 31st July 1996, unreported).
[18] ANUHCV2012/0292 (delivered 4th December 2018, unreported).
[19] ANUHCV2020/0219 consolidated with ANUHCV2020/0220 (delivered 27th January 2025, unreported).
[20] ANUHCV2019/0711 (delivered 12th December 2023, unreported).

muscle spasm, a cervical sprain due to whiplash injury to the cervical spine and injury to the L3-L-4, L4-L5 and L5-S1 discs without signification herniation. Surgical intervention was not recommended as it was noted that the claimant's symptoms were found to be a result of annual tear which are notorious for taking a long time to resolve. His partial disability was assessed at 15%. It was noted that the claimant's injury was slow to heal and impacted his life. The claimant was awarded the sum of $40,000.00 for general damages for pain, suffering and loss of amenities.

2. **Carlos Baptiste and Madestine Baptiste v Edwin Ballantyne**: The claimants who were husband and wife were injured in a motor vehicle accident caused by the Defendant. Mr. Baptiste suffered an injury to his head and shoulder and lost consciousness. He spent two days in hospital. Following his discharge from the hospital, Mr. Baptiste continued to complain of weakness of the right shoulder and occasional pain. He also complained of occasional neck pain and headaches. The medical expert noted that Mr. Baptiste had some anterior shoulder tenderness, with good range of motion. He had no neurological deficits and there was good range of motion of the cervical spine. He was diagnosed with post-concussion headaches and mild shoulder capsulitis. Physiotherapy was recommended for the shoulder but it was noted that there may be a continuation of chronic shoulder pain. At a later examination it was noted that Mr. Baptiste had developed arthritics of the shoulder which would be chronically debilitating and would potentially worsen with age. Mr. Baptiste complained he had great difficulty in carrying out the simplest of tasks. He stated that he had to rely greatly on family and friends during his recovery period as he could not use his right hand; which is his dominant hand. The court awarded Mr. Baptiste general damages in the sum of $70,000.00.

   The 2nd Claimant, Mrs. Baptiste, was also injured in the accident and experienced pain to her head neck and back. The doctor in his expert report indicated that Mrs. Baptiste complained of chronic neck stiffness and tension. She also complained of chronic right side back pain radiating down the right leg. On examination she had some neck and lower back stiffness. There were no neurological deficits. She was diagnosed with cervical ligament injury and mild sciatica, secondary to trauma. It was recommended that she undergo heat and exercise therapy. It was also noted that she may have chronic back and neck pain as a result of her injury. She was further examined on 19th November, 2018 and complained of occasional neck pain and radiating pain to the left shoulder, which sometimes limited her activity, and required analgesics for relief. There was also a complaint of pain to the left lumbar spine and some mild back stiffness. Upon examination, the

medical expert noted that there was mild lumbar tenderness with good range of motion to the spine. There was also some left cervical muscle tenderness. The doctor recommended long term treatment with physiotherapy. Mrs. Baptiste was awarded the sum of $45,000.00 for pain suffering and loss of amenities.

3. **Lisa Bellot v Albert Raffoul**: The claimant suffered whiplash in a motor vehicle accident together with soft tissue injury of the head, neck, back and shoulder which affected her activities of daily living. An MR diagnosed the claimant with post-traumatic cervical spine disc herniation C6-C7 left side. Physiotherapy was recommended for six weeks with surgical discectomy plus bone grating if there was no improvement. The claimant was awarded the sum of $40,000.00 for pain suffering and loss of amenities in 2014.
4. **Jameson Mannix and Osaze Mannix v Hamish Anthony**: The claimants were a motor vehicle accident caused by the Defendant. As a result of the accident, the 1st Claimant, Jameson Mannix suffered (1) impingement syndrome right shoulder; and (2) SLAP two tear of right rotator cuff. Jameson Mannix was initially assessed as temporarily disabled in the full functions of his right shoulder and was later assessed as ending up with 15% permanent impairment in his right dominant extremity and 9% permanent impairment as a whole man. The medical expert indicated that as Jameson Mannix grew older his percentage of permanent physical impairment would increase on account of developing further post traumatic generative joint disease. He was declared as unfit to be a fisherman to earn a living because of the inability to function in his right upper extremity. He was also diagnosed as being unable to sleep as a result of the pain he was experiencing. The Claimant gave evidence as to the loss of amenities he suffered, which under cross examination it was revealed as exaggerated, although the range of tasks he could carry out was limited following the accident. Jameson Mannix was awarded general damages of $55,000.00.

   On examination of the 2nd Claimant Osaze Mannix, he was found to be to be suffering from severe tenderness on both sides of the scapular muscles, right more than the left with inability to get involved in any recreational or competitive sports which was one of his desired professions in the future. Osaze Mannix was diagnosed as follows: (1) spasm of levator scapulae muscles right side; (2) signs of radiculopathy in lower cervical and upper thoracic spine; and (3) tender myositis of rhomboideus major rhomboideus minor muscles with limitation of scapular movements against resistance. He was later examined and complained of pain on the inner side of his shoulder blade in his upper back as well as severe pain in the lower back with inability to bend

forward. Osaze Mannix was assessed with a "Disc Bulge L4/L5 which is equal to 7%permanent physical impairment as a whole person". The medical expert stated that the percentage of permanent physical impairment would increase as Osaze Mannix grows older on account of developing post traumatic degenerative joint disease. He was able to work following the accident although he continued to suffer pain and his work was more limited than before. Osaze Mannix was awarded $70,000.00 for general damages for pain, suffering and loss of amenities.

[53] Additionally, the Court considered the following cases found from its own research:-

1. **Gloria Edwards v Central Marketing Corporation**:[21] The claimant, a 36-year-old clerk, was injured when she tripped and fell at the defendant's supermarket. She fell on her left wrist and shoulder and experienced severe pain in her lower back. She was assessed as having tenderness of the entire shoulder girdle with weakness and wasting. Her left hand was tender when squeezed and there was increased sudomotor activity evidenced by hyperhidrosis; symptoms consistent with impingement syndrome of the left shoulder complicated by reflex sympathetic dystrophy. She was able to resume her normal work functions, drove as normal, and played with her children. She was however required to obtain domestic assistance. The court awarded the claimant $20,000.00 in general damages for pain suffering and loss of amenities on 13th September 2003.
2. **Elroy Matthews v Shawn Sutherland et al**:[22] The claimant was 39 years old at the time of his injury and was a carpenter. He was working on the construction of a dwelling house when he fell through the ceiling. The claimant sustained injuries to his shoulder and back. Dislocation of the shoulder led to degenerative changes in the affected shoulder joints. His right shoulder was permanently weakened. There was significant injury to the left shoulder with 50% chance of recurrent dislocation. He was assessed as having 7% whole person physical impairment. The claimant was unable to continue to work as a carpenter, and unable to play football. He was awarded general damages of $35,000.00 for pain, suffering and loss of amenities.
3. **Annie Benn v Community First Cooperative Credit Union Ltd**:[23] The claimant slipped and fell when exiting the defendant's premises causing injury to her neck, shoulder and lower back. The claimant had intermittent pain as a result of the injury for in excess of a year and had

[21] SKBHCV2000/0088 (delivered 13th September 2003, unreported).
[22] SVGHCV2012/0121 (delivered 11th April 2015, unreported).
[23] ANUHCV2007/0725 (delivered 20th October 2009, unreported).

treated the injuries through medication and physiotherapy which she asserted gave her relief. The claimant gave evidence that during these painful episodes, she was unable to drive herself and found that she was unable to attend to her normal household chores such as laundry, sweeping and tidying up and gardening. She stated that her physical activities were curtailed during these times. The claimant's further evidence was that she had been advised by medical personnel that she will have to endure pain and discomfort for the rest of her life on an intermittent basis and this will be able to be alleviated through physical therapy and heat treatments and pain killers as well as exercises and massage. The final medical report of the claimant determined that her cervical spine was impaired at 8% and her lumbar spine was impaired at 11% but did not explain the effects of this impairment. The claimant was awarded general damages of $40,000.00 for pain, suffering and loss of amenities.

4. **Jennifer Belina Archibald v Saint Kitts Nevis Anguilla Trading et al**:[24] The claimant exited her parked car in the defendant's parking lot. She walked towards the rear of her vehicle and immediately started sliding "feet forward". She looked down and noticed that she had stepped into a pool of white paint. She tried to break her fall and held on to her vehicle for support. She, however, could not get a firm grip and twisted her back and neck, eventually falling on her buttocks. The Claimant's pain built over time and extended up her back. The claimant was diagnosed with and the medical evidence also suggested that she suffered from intersomatic tear disc posterior annular tear in the L5/S1 region. In addition to that the medical expert indicated that the claimant suffered from sacroiliac dysfunction, bursitis and osteoarthritis. It was also suspected that the claimant suffered sciatic nerve damage. A CT scan indicated that there was evidence of bilateral nerve root canal narrowing and nerve compression. Based on the medical evidence presented, it was determined that the Claimant was not able to return to work. The evidence before the court indicated that the pain the claimant suffered in her back was such that she was unable to undertake normal activities such as sitting, climbing stairs and wearing heels without extreme discomfort. The claimant was awarded the sum of $65,000.00 on 10th March, 2022 for the pain, suffering and loss of amenities she endured.

[54] Whilst it is accepted that the injuries received by the Claimant in the case at bar are not on all fours with the claimants in the cases referred to above, the cases do provide useful guidance on an appropriate award, noting the similarities and

[24] SKBHCV2020/0102 formerly claim no. SKBHCV2018/0168 (delivered 10th March 2022, unreported).

differences in the injuries and the pain and suffering and the resultant loss of amenities.

[55] A lot in this case turns on the medical evidence. As previously noted, Dr. Gaekwad's expert report largely restates the Claimant's self-reporting of injury and pain, but it did not necessarily indicate whether the matters complained of by the Claimant were supported by her clinical history. Similar observations as to the need for medical doctors to give opinion evidence so as to assist the Court in determining clinical outcomes from injuries was emphasized by Moise M in **Baptiste and Baptiste**. An evaluation of the Claimant's clinical history however was much better set out in Mr. Kowlessar's report.

[56] I therefore generally preferred the evidence of Mr. Kowlessar, but in any event, Mr. Kowlessar's assessment was largely supported by the clinical history outlined by Dr. Gaekwad. It is also notable that Mr. Kowlessar deferred to Dr. Gaekwad in relation to the overall assessment and treatment of the Claimant's shoulder injury and I therefore accept Dr. Gaekwad's expert evidence in this regard. I also agree with Mr. Kowlessar's assessment of the claimant's disability as a result of the accident being limited to her shoulder injury. Thus, based on Dr. Gaekwad's assessment, I find that the Claimant's resultant permanent disability from the accident is 3%.

[57] With the above in mind. I have carefully considered the Claimant's injuries as outlined in the expert reports. I accept that the Claimant suffered an injury to her shoulder as described in the report of Dr. Gaekwad. I also accept that the Claimant has an injury to her spine, but I accept the evidence of Mr. Kowlessar, that this injury predated the accident in 2018 and this also seems to be supported by the statements made by Dr. Gaekwad in relation to her 2016 radiographic results. I also accept the evidence of Mr. Kowlessar that the presence of the disc bulge does not imply the occurrence of paraspinal pain, including posterior neck pain being experienced by the Claimant. I also accept his conclusion that cervical surgery will not be beneficial to the Claimant.

[58] In any event, I have already stated that I accepted the evidence that the Claimant's cervical injury was not related to the accident and this must be considered in any award to the Claimant. Further, as it relates to future surgery it is noted that Dr. Gaekwad did not definitively state that the Claimant would need cervical surgery, rather his recommendation as to surgery was conditional, he stated that the Claimant's treatment plan would include spine decompression surgery in the event of neurological worsening.

[59] I also accept that the Claimant would have suffered a soft tissue injury to the back after the accident which would have caused her back pain. I prefer the evidence of Mr. Kowlessar that this was a temporary soft tissue injury involving

the paraspinal back muscles and her back injury ought to have had a recovery time of months with effective physiotherapy for rehabilitation. I accept that the Claimant continues to experience lower back pain however. I also take note of Mr. Kowlessar's opinion evidence that the Claimant's reported pain may be exaggerated.

[60] I prefer the evidence of Mr. Kowlessar in relation to the lower back as the later statements in the report of Dr. Gaekwad of Partial disc desiccation in lower lumbar spine, were completely absent in earlier reports, and an earlier lumbar MRI placed before the Corut was noted as unremarkable and unrevealing.

[61] The Claimant was not cross-examined on the loss of amenities she is said to have suffered, but the extent of the loss of amenities were contradicted by the report of Mr. Kowlessar and this has been taken into consideration.

[62] I consider that the Claimant's injury to her shoulder was serious. She suffered a Type 2 SLAP (Superior Labrum Anterior to Posterior) tear, an injury to the shoulder whereby the labrum and bicep tendon are torn from the shoulder socket. She also suffers from bicep tendinitis and bursitis. As noted by Mr. Kowlessar, shoulder movement associated with the Claimant's injury would result in right shoulder pain that can extend to the right side of the neck as well as the right arm. Up to this assessment, almost 6 years after the accident, the Claimant is still experiencing pain and discomfort from these injuries to her shoulder. The Claimant also experienced a back injury which still persists, although the pain and discomfort is unexplained given its duration as recognized by Mr. Kowlessar in his report.

[63] I have thoroughly reviewed the cases referred to the Court. I note that the Claimant, whilst experiencing some loss of amenities, has been able to continue to work, she has been able to care for her child and carry on her daily living. There is no evidence of retirement from work or the need for domestic care. Having carefully considered the cases referred to above, noting the similarities, and differences, and the vintage of the cases, I am of the considered view that the sum of $50,000.00 for general damages for pain, suffering and loss of amenities is fair compensation to the Claimant.

Future Medical Care

[64] In her written submissions, learned Counsel for the Claimant stated that the Claimant will require further therapy as it is known that the percentage of permanent impairment will increase as she grows older on account of developing further post traumatic degenerative joint disease. Learned Counsel therefore proposed the sum of $40,000.00 for future clinical evaluations which

she submitted would include the occasional doctor visits that the Claimant would have to attend for treatment and physiotherapy for spinal decompression surgery as a lump sum payment. Learned Counsel for the Claimant submitted that both medical reports indicate that the Claimant would have suffered injury and is still suffering. She submitted that in such circumstances, the Claimant would require finance for future medical care.

[65] Learned Counsel for the Defendant on the other hand submitted that the Defendant would not agree to the Claimant's claim for future clinical evaluations. Learned Counsel for the Defendant submitted that the basis of the objection is that there has not been any evidence provided to support that claim. Learned Counsel for the Defendant submitted that whilst it is true that where the Court is cognizant of a loss that has not been proved, they may make nominal damages, but she submitted, this is not such a case. Learned Counsel for the Defendant submitted that in appropriate cases, the Court would be aware that there is a loss, but in the present case, it is speculative and thus not even nominal damages are appropriate.

[66] I have already noted that Mr. Kowlessar's opinion that the Claimant's cervical injury is not related to the accident, and that cervical surgery would not benefit the Claimant. I have further noted previously that Dr. Gaekwad did not state in his report that the Claimant required spinal decompression surgery, rather that she may require it in the event of neurological worsening. Having regard to the foregoing, and to similar circumstances which arose in **Jameson Mannix**,[25] as to the requirement of surgery, I would disallow any award for future cervical/spinal decompression surgery.

[67] It is curious that in her written submissions, learned Counsel for the Claimant does not make mention of the cost of right shoulder arthroscopic surgery for the Claimant. The Court notes however that a treatment plan for the Claimant including right shoulder arthroscopic surgery was mentioned by Dr. Gaekwad in a report as far back as 2nd September, 2021 and there is no evidence of the surgery having taken place. Dr. Gaekwad however has not stated in his expert report this surgery is necessary and how it would improve the Claimant's functioning. Further, in relation to the surgery, the Claimant also stated the following in her affidavit:-

> "…according to medical report of Dr. D.C. Gaekwad MBBS MS (Orthopaedics) Consultant Orthopaedic Surgeon I would require right shoulder arthroscopic surgery…"

[25] At para. 38.

The Claimant, however, gives no evidence as to her willingness and readiness to undergo the surgery and the costs and arrangements made for doing so.

[68] The case of **Peter Robets v Damien Benjamin**[26] is instructive in this regard. In that case, the master carrying out the assessment of damages, referring to the Court of Appeal's decision in **Francis v Martin**,[27] stated:-

> "The Court taking cognizance of the medical evidence also notes that the Claimant has not undergone the procedure neither has he indicated an intention to do so. The authority of Francis v Martin Claim Number BVIHCAP 2009/007 is instructive in such cases in determining whether an award for such damages is prudent. In that case 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."

[69] It has been nearly seven years since the accident and it does not appear that that Claimant has undergone shoulder arthroscopic surgery, she has not stated an intention to undergo the surgery and learned counsel for the Claimant did not refer to this surgery in her submissions for future medical care. Further, the Court has not been provided with any costs of the surgery. In the circumstances, I am not inclined to make an award to the Claimant for this surgery.

[70] Dr. Gaekwad does indicate in his report that the claimant should have follow up physiotherapy and clinical evaluations at three monthly individuals. He noted that the Claimant's occupational and daily living activities are affected by her clinical condition at present and that the percentage of the impairment will increase with advancing age. Mr. Kowlessar noted in his report that the features of a right shoulder injury are still evident in the Claimant. Mr. Kowlessar acknowledged that the Claimant's shoulder injury should best be managed by an Orthopaedic Surgeon (such as Dr. Gaekwad who has recommended future treatment for the Claimant).

[71] In my view, having considered the medical evidence, and taking into account the Claimant's entire clinical history and on-going reports of pain, I am satisfied that she would require further physiotherapy and follow up evaluations.

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[26] ANUHCV2019f0072 (delivered 11th February 2020, unreported).
[27] BVIHCAP2009/007.

[72] The Claimant has not provided a breakdown of the costs of these procedures, however, such a failure does not deprive the court of the ability to make such an award. I accept that there will be a cost associated with follow up physiotherapy and clinical evaluations and an award not out of scale can be made in this regard. This was underscored by the Court of Appeal in **Claudette Francis.** At paragraph 18 of the judgment of the Court of Appeal, Bannister JA [Ag.] stated:-

> "18 But Mr. Farara, QC also says that no evidence has been led as to the likely quantum of future medical expenses. Ideally, of course, the likely quantum of prospective losses should be supported by evidence led at trial. The fact that in this case no such evidence was led in respect of future general medical expenses does not, however, mean that the respondent is not entitled to be compensated for them. The learned judge made a clear finding that the respondent will need continuing medical care. As was pointed out in the Privy Council in Greer v Alstons Engineering Sales Service Ltd, [3] ([2003] UKPC 46) an otherwise good claim for general damages should not be dismissed, even if no evidence on quantum is led and the prospective loss therefore remains unquantified. On the contrary, it is the duty of the court to recognize the claim by an award that is not out of scale. [4] (Ibid, paragraph 9). The learned judge appears to have been attempting something of the sort by using the prospective cost of the arthrodesis procedure as a rough yardstick for prospective medical expenses [5]. [See paragraph [24] of the judgment].
>
> 19 We think that the correct approach is that taken by Barrow J (as he then was) in Ulban Morillo v Leanne Forbes.[6] (BVIHCV2003/0005 (16th March 2005), affirmed in BVI Civil Appeal No 8 of 2005 (unreported – Alleyne JA)). The court must select a figure which falls realistically within the scale of the prospective loss.."

[73] In light of the foregoing, doing the best that I can on the material before me, I consider that an award of $15,000.00 for future medical care for follow up physiotherapy and clinical evaluations to be reasonable.

Special Damages

[74] 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.[28]

[75] Although the Claimant claimed special damages in her statement of claim, the Claimant did not plead or particularise any item of special damage nor did she attach any schedule of special damages to her statement of claim. The Claimant is therefore not entitled to any award of special damages.

Interest

[76] Interest will run on the award of general damages for pain suffering and loss of amenities at the rate of 5% per annum from the date of service of the claim to the date of this Order. No pre-judgment interest is awarded on the award for future medical care. Post judgment interest shall be at the statutory rate of 5% per annum.

Costs

[77] The Claimant is entitled to prescribed costs in accordance with rule CPR 62.5 and Part 65 of CPR 2023, appendices B and C.

Disposition

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

1. The Defendant shall pay the Claimant following:-

    (i) General damages for pain suffering and loss of amenities in the sum of $50,000.00 together with interest thereon from the date of service of the claim to the date of this Order at the rate of 5% per annum.

    (ii) General damages for future medical care in the sum of $15,000.00. No interest is awarded before judgment.

    (iii) Prescribed costs in accordance with rule 62.5 of the Civil Procedure Rules (Revised Editon) 2023 and Part 65 of the Civil Procedure Rules (Revised Editon) 2023, appendices B and C.

[28] 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).

(iv) Post judgment interest at the statutory rate of 5% per annum.

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

[79] I wish to thank learned Counsel for the Parties for their helpful submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar