COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY SIDE
2018/CLE/gen/0027

BETWEEN

HILARENA NIXON

Plaintiff

AND

CLEARVIEW MANAGEMENT LIMITED
(d/b/a SANDALS RESORTS (EMERALD BAY) EXUMA)

Defendant

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Joseph Moxey for the Plaintiff** **Dwight Glinton for the Defendant**
Judgment Date:	**20th January 2023**

JUDGMENT

1. This is the Court's assessment on the quantum of damages after judgment on liability was entered against the Defendant. The Plaintiff after filing its Specially Endorsed Writ of Summons on 1st March 2018, obtained a Judgment in default of a Defence on 10th April 2018 **(the "Judgment in Default of Defence")**. Although a Defence was filed two days later on 12th April 2018 and the Defendant initially sought to set aside the Judgment in Default, it was ordered on 19th November 2020 that judgment be confirmed against the Defendant and that damages be assessed as the Defendant had conceded liability **(the "Judgment Order")**.

2. The Plaintiff was employed with the Sandals Resorts (Emerald Bay) in Exuma. The Bahamas as a Shop Lead Supervisor of the Gift Shop from the 19th August 2009 until her termination on 30th January 2016. Prior to her termination, on 11th March 2015, while on duty she collapsed after offloading two pallets to restock the storage room by herself due to the Defendant being short staffed. Her initial injuries consisted of visual abrasions to her forehead, arm and chin. It was later discovered that she had received injuries to her lumbar spine and associated symptoms in her legs.

3. By the Judgment Order, case management directions were given for the assessment inclusive of witness statements, a bundle of documents and submissions. Following the Judgment Order the following documents were filed by the Plaintiff as the Defendant's only dispute was quantum: -

   - Witness Statement of Hilarena Nixon filed 21st May 2021;
   - Plaintiff's Supplemental Bundle of Documents filed 21st May 2021;
   - Supplemental Witness Statement of Hilarena Nixon filed 24th August 2021;

- List of Documents filed 1st June 2021; and
- Amended Assessment of Damages filed 27th July 2021 **(the "Amended Assessment of Damages).**

4. By the Amended Assessment of Damages the Plaintiff claimed: -

Termination Pay		
Pay in Lieu of Notice	**(1 Month)**	**$1,876.20**
Casual Days	**(2 Weeks & 3 Days)**	**$1,147.38**
Vacation Days	**(11 Weeks)**	**$4,762.67**
Termination Pay	**(6 Yrs 6 Mths)**	**$12,195.30**
General Damages		
Scoliosis of Upper Lumbar		
Grade 1 spondylolithesis 1.2/3		
Concomitant Spinal Stenosis		**$90,000.00**
Special Damages		
Past out of pocket Medical Expenses		**$9,156.11**
Travel, Housing & Car Rental		**$4,843.64**
Future Losses		
Future Surgery and Associated Costs		**$100,000.00**
Future Physical Therapy		**$6,860.05**
Future Doctor's Visits		**$3,000.00**
Future MRI scans		**$3,225.00**
Future Cost of Medication		**$2,000.00**
Future Loss of Earnings		**$129, 842.88**
	Total Damages	**$368,909.23**

5. At the assessment hearing, the parties agreed to the Plaintiff's claim for special damages. Therefore, the Plaintiff is awarded special damages as follows: -

- Past out of pocket medical expenses	$9,156.11
- Travel, Housing & Car Rental	$4,843.64
Total Awarded	**$13,999.75**

TERMINATION PAY

Plaintiff's Submissions

6. The Plaintiff claimed that she was entitled to notice and termination pay by virtue of Section 29(1)(c) of the Employment Act. Section 29 of the Employment Act states: -

> **"29. (1) For the purposes of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be —**
>
> **(a) where the employee has been employed for six months or more but less than twelve months —**
>
> **(i) one week's notice or one week's basic pay in lieu of notice; and**

(ii) one week's basic pay (or a part thereof on a *pro rata* basis) for the said period between six months and twelve months;

(b) where the employee has been employed for twelve months or more —

(i) two weeks' notice or two weeks' basic pay in lieu of notice; and

(ii) two weeks' basic pay (or a part thereof on a *pro rata* basis) for each year up to twentyfour weeks;

(c) where the employee holds a supervisory or managerial position —

(i) one month's notice or one month's basic pay in lieu of notice; and

(ii) one month's basic pay (or a part thereof on a *pro rata* basis) for each year up to forty-eight weeks."

7. She was terminated by the Defendant at the end of February 2016 and was issued a National Insurance Termination of Service/Lay-Off Certificate which was dated 23rd February 2016. The Defendant had offered to pay her one (1) month in lieu of notice and eight weeks' vacation pay excluding termination pay in addition to her employee pension.

8. The Plaintiff submitted that she was entitled to one month pay in lieu of notice, earned casual days, outstanding earned vacation days and termination pay in the amount of $19,981.55.

Defendant's Submissions

9. The Defendant submitted that while the Plaintiff was the manager of a gift shop on its premises, her title did not necessarily mean that she was a manager in accordance with the legal definition set out in **Cunningham v Baha Mar Development Limited [2012] 3 BHD J No 34** where Allen P stated: -

> **".....managerial or supervisor functions, that is to say, having authority on behalf of, and independently of, his employer to hire or lay off or promote or transfer or exercise disciplinary power over persons employed by his employer or to adjust the grievance of such person."**

10. The Plaintiff did not have any subordinates whom she could hire or lay off or promote or transfer or exercise disciplinary power over another employee or deal with any employee related grievance. Therefore, she was entitled to termination pay as a non-managerial employee as follows:-

Pay in lieu of notice: 2 weeks ($432.97 x 2)	**$865.94**
Casual days: 2 weeks and 3 days ($865.94 + $381.43)	**$1,147.38**
Vacation days: 11 weeks ($4,762.67 x 11)	**$4,762.67**
Termination: 6 years and 6 months ($865.94 x 6.5)	**$5,628.61**
Total	**$12,404.60**

DECISION

11. The Defendant disputes the amount of payments the Plaintiff should receive under this heading and not the various payments themselves. The Plaintiff held the title as a Gift Shop Manager when she was terminated. By her termination letter it was stated that this was an important role. However, her letter of engagement did not provide a job description nor was any other document provided which may have defined the same. In the circumstances, no evidence was led as to her managing any staff, or having the

ability to hire, fire or discipline any staff. I therefore accept the award as submitted by the Defendant and award termination pay in the amount of $12,404.60.
I will address the remainder of the headings of damage claimed by the Plaintiff.

GENERAL DAMAGES

Plaintiff's Submissions

12. She had sustained abrasions on her forehead, arm and chin, from the fall and suffers excruciating pain down her lower back and had aggravated a possible pre-existent degenerative disease in her back which was not known to exist until she had received an MRI. She also suffered an injury to her knee. In **Simms v O'Reilly Malone SJ [1989] 1 BHS J. No. 79** stated: -

> **"An award for pain and suffering and loss of amenity is, in my view, a global award. Where there are separate injuries affecting different parts of the body, each injury must be taken into account when assessing the global figure. But it is not a case of assessing each injury separately and arriving at an overall total which is the aggregate of the several assessments."**

13. The Plaintiff was diagnosed in her first MRI as suffering from:-
    i. **".....discogenic disease, spondylosis and there are diffuse posterior disc bulges throughout the cervical spine. The findings are worse and of a moderate degree at C4-C5, C5-C6, and C6-C7.**
    ii. **There is a small central extruded HNP at C2-C3.**
    iii. **There is kyphotic angulation and 3mm of anterolisthesis at C4-C5 and a massive extruded broad-based central right sided HNP. There is a moderate degree of central canal spinal stenosis. Additionally, there is a moderate degree of right recess stenosis and a moderate degree of neural foraminal stenosis bilaterally.**
    iv. **There is a mild degree of central canal spinal stenosis at C5-C6 and a moderate degree of neural foraminal stenosis bilaterally.**
    v. **There is moderate degree of central canal spinal stenosis at C6-C7 and a severe degree of recess and moderate degree of neural foraminal stenosis bilaterally.**
    vi. **There is a mild degree of neural foraminal stenosis on the right at C7-T1."**

14. By her second MRI the findings were:-
    i. **"Suspect transitional partially-sacralized L5 vertebra.**
    ii. **L2-3: Spondylosis with advanced degenerative facet arthrosis resulting in a slight forward slippage and multifactorial moderate narrowing of the central spinal canal.**
    iii. **Multilevel lumbar spondylosis with narrowing of the lumbar disc spaces and spondylotic bulging of the lumbar disc contributing to mild to moderate narrowing of the lumbar neural foramina.**
    iv. **Nonspecific straightening of the normal lumbar lordosis as well as mild dextroconvex upper lumbar scoliosis."**

15. Dr. Allen of Spectrum Health concluded that:-

"The MRI show scoliosis of upper lumbar spine and grade 1 spondylolisthesis L2/3 with concomitant spinal stenosis, also severe disc degeneration of the lower lumbar levels. Considering the strong pain despite oral pain medication with oxycodone, I do recommend surgical decompression."

16. In calculating an award for pain, suffering and loss of amenities it is common practice to refer to the Judicial Studies Board (Guidelines for the Assessment of General Damages in Personal Injury Cases) to ascertain the category in which a plaintiff's injury falls. The Plaintiff's injury to her lower back was her most significant injury as it required surgery. Her injury to her forehead, arm and chin were secondary to the lower back injury.

17. The Court should also take into consideration the pain that the Plaintiff was experiencing since the injury. Damages should account for the various causes of her pain. In **Ferguson v Island Hotel Company Limited [2012] 1 BHS J No 112**, the Plaintiff was awarded $70,000.00 after he slipped and fell and suffered pain and shock, head trauma, injury to his sciatic nerve, injury to his lumbar sacral spine, scars, osteoarthritis and permanent disabilities.

18. The Plaintiff relies on the similarities of this case to hers and seeks $90,000 for pain and suffering.

Defendant's Submissions

19. The Defendant submits that the Plaintiff's injuries do not appear to be sufficiently serious to be categorized as severe because she did not have any chronic conditions. Her injuries instead appeared to be within the Judicial College Guidelines recommendation for moderate (B)(1) back injuries which were described as follows: -

"Cases where any residual disability or less severity that that in(A)(III) above. The bracket contains a wide variety of injuries, £26,050 examples are a case of a compression/crush fracture of the lumbar (B$33,604.50) vertebrae where there is substantial risk of osteoarthritis and constant To pain and discomfort; that of a traumatic spondylolisthesis with continuous £36,390 pain and a probability that spinal fusion will be necessary; A prolapsed (B$46,943.10) intervertebral disc requiring surgery or damage to an intervertebral disc with never root irritation and reduced mobility"

20. While the injuries in the cases the Plaintiff rely on seem similar to that of the Plaintiff's, the damages awarded are too high for her injuries having regard to the Judicial College Guidelines. Instead her injuries were similar to the claimants in Pedley v Timmins where general damages were awarded in the amount of £14,000.00 to a female aged 17 at the date of her accident and aged 21 at the time of her assessment.

21. In **Pedley v Timmmins** the claimant was diagnosed with a Fracture of First lumbar vertebra and subsequent pain and stiffness after being injured when seated in the rear passenger seat of a car that had gone out of control and crashed. Minor injuries included grazing to the forehead, hips and ankles and black eyes. Her major injury was a crash fracture of the first lumbar vertebrae with 85 percent loss of height at L1 and 30 per cent forward angulation of T12 and L1. She had spent 6 weeks in hospital and was discharged in a plaster jacket for a further six weeks. She returned to part time shop work three month after the accident and to full time work after four and a half months with difficulty lifting and bending which required help from her colleagues. She had back

pain when standing or sitting for long periods and had to have odd days off from work. She had a stiff back first thing in the morning and her symptoms worsened in cold or damp weather. She eventually had to leave her shop job and had three subsequent jobs one of which she had to leave due to her injuries and another she had to leave partly due to her injuries. She was unemployed at the time of the hearing but her net weekly earnings at her last job was £80.00. The plaintiff was only fit for work which was mainly sedentary but would provide her with the opportunity to move about when required to ease her symptoms. Her symptoms were permanent and she had to give up her hobbies of horse riding and roller skating and she was no longer able to dance as much as she did prior to the accident. Three years after the accident, her symptoms had worsened such that consideration was given to a spinal fusion operation. Her symptoms however improved. There was a 75% chance that the operation would be required in the future at about £4,800.00 with 6 months off from work thereafter. At the date of assessment the Plaintiff was engaged to be married and wanted to have children shortly afterwards. The extra strain on her back during pregnancy would result in her having to stop work as soon as she found that she was pregnant. She would always require an orthopedic bed.

22. The award of £14,000.00 would be inflated to £35,140.00. With the present exchange rate conversion it would amount to $45,330.60. In the circumstances, $45,330.60 was an appropriate amount of compensation for the Plaintiff's pain and suffering and loss of amenities.

DECISION

23. The Plaintiff seeks general damages for pain and suffering and loss of amenities. Her evidence as to her injuries are that she initially received visual abrasions to her forehead, arm and chin. For seven weeks however, after the accident she suffered constant intense pain. She underwent physiotherapy for 3 months and was referred to an orthopedic surgeon to assist with management and to determine whether surgical intervention would be needed. On 20th May 2015 and 13th December 2016 she had two MRI tests done. She was diagnosed with Scoliosis of Upper Lumbar, Grade 1 spondylolithesis 1.2/3 and Concomitant Spinal Stenosis.

24. On 19th September 2015, Dr. Kathryn Desouza advised that there were certain physical restrictions required if she were to return to work and that if those restrictions could not be met then she should not be allowed to return to work. Dr. Desouza further mandated that the exercises from physiotherapy should be continued and that she would possibly need a lumber epidural steroid to further improve her condition as well as a repeat MRI.

25. In October 2016 she applied to the National Insurance Board for disability after Dr. Chambers had characterized her disability at 47%. The diagnosis was accepted by NIB by letter dated 9th March 2017 for a provisional period of six months. On 23rd November 2017 she was later characterized at 50% disability for life by Dr. Chambers which was accepted by NIB by letters dated 27th June 2018 and 30th July 2018. This determination obviously recognized that the injury to her lower back was a serious one which would have a permanent detrimental effect on her ability to move or stand.

26. In **Johnson v. Mackey (trading as Mackey's Trucking) and another [2012] 1 BHS J. No. 8**, Barnett CJ had to determine what was a suitable award for pain and suffering after the plaintiff had sustained injuries to her right leg, hip and back in a car accident. Her MRI's had suggested that she had L4-L5 and L5-S1 herniated discs with spinal

stenosis, especially toward the right side. She did not improve on physiotherapy and medications and her lumbar pain became increasingly unbearable.

27. In Johnson the plaintiff underwent spinal decompression at L4-L5 and L5-S1 which helped her but she occasionally had mild to moderate back pain and stiffness. It was recommended that she receive about fifteen sessions of physiotherapy once a year for the next few years and to take medications when needed. Barnett CJ considered her injuries to be a moderate back injury within the Judicial Studies Guideline and felt that the request for the sum of $75,000.00 could not be sustained. He instead ordered that the sum of $25,000.00 would be appropriate. There was no determination of disability.

28. In **Gibson v. Public Health Authority *5 BHS J 298*,** the plaintiff a female nurse aged 47 sustained an industrial accident which resulted in neck and back injuries and well as a closed head injury with associated headaches and vertigo.....the doctors there assessed the plaintiff with 35% disability. Gray-Evans J awarded the plaintiff $55,000 for pain and sufferings and loss of amenities.

29. Upon a review of the Judicial College of Guidelines I accept that the Plaintiff's injury falls primarily in the moderate category (1) where the estimated damages would be £36,390.00 in 2019 and when converted would equate to $47,307.00. The assessment however, does not take into consideration a level of permanent disability as suffered by the Plaintiff, which is more fully described in Severe Category III or the other minor injuries sustained by the Plaintiff.

30. The injury appears to be more severe than the injury sustained by Ms. Gibson as she was assessed with 50% disability. In the circumstances, an award of $65,000.00 would be appropriate.

FUTURE MEDICAL EXPENSES

31. The Plaintiff needs surgery for her injuries but has not had it because she lacks the financial resources. She has provided evidence from the Bahamas Orthopedic and Spine Center which states that the required procedure would cost $54,760.00. Her estimates for anesthesia for the surgery are $3,000.00 - $4,000.00 and additional hospital expenses of $22,855.84. The Plaintiff will also require additional physical therapy at a cost of $6,686.40. In **McCoy v Williams and another; Clarke v. Williams and another [2014] 1 BHS J. No. 112**, Winder Actg J (as he then was) set out the consideration for an award for future surgery: -

> **"11 The defendants argue that as Clarke may require surgery in the future, if the physiotherapy failed only a percentage of the cost of future care should be awarded. The defendants proposed a reduction of 50%. The Defendants relied on *Shutt v. Island Construction Co.*** [1997] BHS J. No.104 **and the following extract from** Kemp & Kemp:
>
> > **"Difficulties may arise, however, where the effect of the medical evidence is that there is a *chance* that the claimant will require future medical treatment at some time in the future ... In such cases, it is suggested that the correct approach is first to ascertain (at present day value) the cost to the claimant of such an operation. That cost needs to be discounted twice, first to take account of the chance that the operation will not be required, and secondly**

> to take account of the accelerated receipt. Thus if the medical evidence is to the effect that there is a 75 per cent chance that the claimant will require the operation in 10 years' time, and that the present cost of the operation is £10,000, then the sum to be awarded would be £5,859, namely £7,500 (£10,000 x 75%) x 0.7812, the appropriate discount for an acceleration of 10 years at a discount rate of 2.5 per cent. It is more difficult when the medical evidence gives a range, or uses the expression "within 10 years". In such circumstances, practitioners are advised to ask the medical expert to be more precise so that the necessary evidence is available in order to allow the calculation to be made. Failing that, a more rough and ready method of assessment may be required..."
>
> 12 In *Shutt v. Island Construction Co.* [1997] BHS J. No.104 Sawyer CJ discounted the cost for future hip replacement from $80,000.00 and awarded the sum of $40,000.00 on the premises that *"the sums awarded are being paid now in a lump sum and if properly invested could generate sufficient to meet the medical costs in 10 years' time".*
>
> 13 Clarke argues that physiotherapy has failed. She was prescribed with an initial 15 sessions which she completed and later another 15-18 which she completed without relief. Dr. Munnings confirmed in his 14 March 2011 report that physiotherapy has in fact failed.
>
> 14 In the circumstances of Clarke's case, I would factor a 70% chance of Clarke requiring surgery to her cervical spine at C4-C5 level as proposed by Dr. Ekedede. Dr. Munnings estimates that the cost of the surgery can range up to $50,000. I therefore award the sum of $35,000, being 70% of the $50,000 cost of the surgery to her cervical spine."

32. The Defendant has accepted that the surgery will be required and has agreed the Plaintiff's future medical expenses as follows:-

Surgery -	$54,760.00
Hospital -	$22,400.00
Anesthesia -	$ 4,000.00
Blood Tests etc. -	$ 455.84
Future Physiotherapy -	$ 6,686.40
Total -	$88,302.24

33. Accordingly, the Plaintiff is awarded the sum of $88,302.24 for future medical expenses.

LOSS OF FUTURE EARNINGS

Plaintiff's Submissions

34. The Plaintiff was initially assessed by Dr. Chambers as being 47% disabled. A year later after a second assessment was done, her disability was assessed at 50% for life. The starting point for the assessment of future earnings was the Plaintiff's earnings during the last year of employment with the Defendant. There was no dispute that the Plaintiff's monthly salary was $1,876.20 per month, $432.97 per week or $22,514.40 per annum.

35. The next step is to determine whether there was total disability, or disability to such a degree that she is unable to work. By Dr. Chambers' assessment the Plaintiff had Lumbar and Cervical Radiculpathy which worsened with long standing and walking. The Plaintiff had no chance of gainful employment. While the Plaintiff was under a duty to mitigate her loss, she maintains that her pain was so severe that it hindered her ability to do any work and she received disability payment from the National Insurance Board. She was entitled to the difference between what she could have earned but for the accident up to retirement less the payments received and would continue to receive up to the age of 65 years in the amount of $992.72 per month.

36. At the time the Plaintiff fell she was 55 years of age with an anticipated retirement age of 65. She would have had a remaining period of 10 years of gainful employment. Her pre-injury earnings prior to retirement would have been $22,514.40 x 10 which amounted to $225,144.00. Her post-injury earning by way of disability assistance through the National Insurance Board that commenced on the 16/12/15 and continuing at a rate of $992.72 or $8,934.48 per year multiplied by 9 would amount to $80,410.32.

37. The Plaintiff is unemployed and unable to find employment.

38. The Plaintiff's future loss of earnings after considering her pre-injury earnings and post-injury earnings amounted to $135,799.20. As a result of the injuries to her spine and legs the Plaintiff experiences pain and limited movement. After undergoing spine surgery there is still no guarantee of a total resolution of full recovery. The pain and limitations place the Plaintiff at a serious disadvantage among fully able-bodied applicants on the open labour market. An employer could possibly choose not to hire her given the higher insurance premiums she could be faced with. The amount of $65,000.00 would be appropriate for the 10 year loss.

Defendant's Submissions

39. The Defendant submits that there was no evidence provided by the Plaintiff to support her complete disability. In **Bonham Carter v Hyde Park Hotel [1948] 64 TLR 177** Lord Goddard held: -

> **"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court saying: This I have lost, I ask you to give me these damages. They have to prove it."**

40. In **Russell v Simms and another [2010] 2 BHS J No. 74** the plaintiff had received a medical evaluation in March 2006 and was asked to return in June 2006 but failed to do so until October 2008, some two and a half years later. She claimed loss of earnings for the period between the accident and the court action. The court found that the plaintiff did not provide medical evidence to show that she was unable to work. Barnett CJ held: -

> **"49 I do not find that the medical evidence supports a finding that her injuries prevented her from working as a minister for the entire period since her accident."**

41. The report of Dr. Strachan dated 9th October 2015 stated that no further date would be set for the Plaintiff's recovery and return to work. Dr. Desouza's medical report dated 19th September 2015 indicated that the Plaintiff should not lift or carry anything over 10

pounds. Further she should not bend from the waist to pick up anything and not remain standing for more than 20 minutes. The latter report was issued 6 months after the accident. There was nothing to indicate whether the Plaintiff could perform her job a Gift Shop Manager or any similar occupation without lifting 10 pound objects or whether she had to bend and stand for more than 20 minutes at a time.

42. The letter dated 27th June 2018 from NIB referred to an assessment by Dr. Carlton Chambers of 50% disability for life but it does not state whether there was a written medical report by Dr. Chambers and an explanation of how he arrived at this determination. The medical report dated 30th July 2018 from Dr. Carlton Chambers, one month after the aforesaid letter, described the Plaintiff's injuries then stated that she had been treated with multiple courses of physiotherapy and oral analgesic but it did not state any level of disability.

43. No evidence has been led to show future income. The use of her salary at the time of the accident to calculate her total loss of future earnings should not be accepted by the court. In **Cadet's Car Rental and another v Pinder [2019] UKPC 4**, Lord Lloyd-Jones referred to the Ogden Tables in calculating loss of future earnings. One of the factors required was the value of the claimant's future earnings as a multiplicand. Earnings at the time of the accident would not be appropriate as it would not take into account factors in the claimant's life after the accident which were separate from the Ogden Tables multiplicand.

44. The Plaintiff was not employed at the date of trial or since the accident therefore she was not entitled to the Smith v Manchester award. Even if it were applicable, the Plaintiff did not provide any evidence to support a claim that there was a risk that she would be at a disadvantage in getting another job or an equally paid job in the future. Relying on her injury was insufficient.

45. The Plaintiff had also failed to mitigate her damages including loss of future earnings. In **Johnson v Brown and another [2016] 1 BHS J. No. 137** the court had to consider a claim where the claimant was injured in a road traffic accident and sought damages including loss of earnings. Crane-Scott JA held: -

> **"17 As is well known, the mitigation principle requires the innocent party, following the defendant's breach, to take reasonable steps to avoid or reduce the loss flowing from the breach, failing which he will be unable to hold the defendant responsible for that part of the loss which is attributable to his failure to do so. Although most of the authorities on the duty to mitigate relate to contractual breach, the broad principles are equally applicable to tort, and in particular to actions for personal injury. Furthermore, what is reasonable is a question of fact in each case. See 18th Edition, Winfield & Jolowicz, "Tort" paragraphs 22-17 and 22-34."**

46. From the medical reports it was apparent that the Plaintiff was able to work yet she did not do so for a period of more than 6 years. Dr. Desouza's medical report dated 19th September 2015 stated that the Plaintiff could return to work if it did not involve lifting or carrying heavy objects, bending and standing for lengthy periods of time. Dr. Cyprian Strachan's medical report dated 9th October 2015 recommended that the Plaintiff undergo surgery on her knees and that she should not return to work. His report was not supported by any of the other medical reports from other physicians who examined her.

47. Additionally, the Plaintiff did not provide any evidence to prove that she made efforts to secure employment which did not require that she lift heavy objects or bend or stand for lengthy periods of time even if she was unsuccessful. The Plaintiff did not take any steps to minimize any loss of income.

DECISION

48. The Plaintiff was injured while performing her duties with the Defendant. The Defendant has admitted liability for the fall. The Plaintiff was 55 at the date of the fall and was 61 when her witness statement was filed.

49. I accept based on the evidence led that the fall caused her injuries and disability.

50. She was terminated from her employment by the Defendants. The Plaintiff in cross-examination did state that she tried to apply for employment at a number of places but due to her disability was unable to perform the tasks required. She stated that she was offered a job but did not take it because she was suffering. She did not produce any documentary evidence to support this averment that she had been offered employment and provide any evidence of the nature of the employment.

51. She is presently unemployed. I accept her evidence that she is unable to perform the duties which she previously did because of her injuries.

52. I am not satisfied however that there is no type of job which she can perform. I however also accept that the employment activities on the island of Exuma are not as varied or as available as those as in Nassau which makes it more difficult for a person with a disability to find ready employment.

53. Since the Privy Council's reasoning in **Cadet's Car Rentals Limited**, Bahamian courts have been reluctant to rely on the UK Government Actuary's Department, Actuarial Tables for use in Personal Injury and Fatal Accident Cases ("the Ogden Tables") in order to determine loss of future earnings. I too agree that they are more suited for the economy and lifestyle of residents of the United Kingdom and not The Bahamas. I respectfully adopt the dicta of their Lordships where they stated:-

> **"9. Neither party to the present appeal has suggested that the use of the Ogden Tables for the quantification of future loss of earnings was inappropriate in this case. Accordingly, the Board, in deciding this appeal, will seek guidance from those Tables. The Board notes, however, that the Tables are intended to reflect the particular conditions prevailing in the United Kingdom which are likely to differ considerably from those in The Bahamas. The courts of The Bahamas may, therefore, wish to consider on some future occasion whether it is appropriate to refer to the Ogden Tables for guidance or whether it may be preferable to seek the assistance of actuarial tables designed to reflect the conditions prevailing in The Bahamas. In this regard the Board draws attention to the observations of Lord Kerr in Scott v Attorney General [2017] UKPC 15 (at paras 25-29) concerning the application in The Bahamas of the United Kingdom Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases."**

54. The deviation from these Tables was seen in **Delone Symonette v Charles Turnquest [2020] 1 BHS J. No. 62** where Winder J held that the Ogden Tables would not bear an accurate reflection of future loss of income and made an award on loss of future earnings based on the amount the plaintiff made at the time of the accident and the loss of that amount up to the retirement age of 65 but discounted because the sum was paid upfront in a lump sum.

55. In this case, the Plaintiff was 55 at the time of her accident and earned a salary of $22,514.40 yearly. By the medical evidence, she had a disability of up to 50%. There was nothing to suggest that the Plaintiff could not find work elsewhere. In fact she was offered a job but declined to accept it because of her injuries. The evidence led reflects however, that for almost a year after her accident she underwent therapy and numerous doctors' visits and treatment for her injuries.

56. In **Johnson v Mackey**, Barnett CJ awarded the Plaintiff a lump sum which covered the year off after her accident when she was recuperating and not able to work. He considered that it would not be in the interest of justice to deny the Plaintiff any compensation under this head of damage after she had failed to satisfy the Court that she would not be able to find comparable work. I accept that the Plaintiff is unemployed, she was terminated by her employer and has not worked since. Her efforts at mitigating her loss were insufficient, hence I am of the opinion that any award must also be discounted for failure to mitigate. However, I must bear in mind that the medical evidence has determined that she is 50% disabled for life, and hence this fact would make it difficult, if at all possible, to find similar or any employment, particularly on an island where there is a limited variety of jobs available which do not require standing or sitting for long periods of time.

57. Her disability allowance is compensation which in fact reduces the loss of future earnings. Her disability allowance is $8,934.48 per annum, her annual salary was $22,514.40 at the date of the accident. Accordingly her loss of income would be $13,579.92 per annum.

58. Therefore, I award a lump sum payment of $110,000.00 to reflect the Plaintiff's loss of future earnings suitably discounted to reflect both a failure to properly mitigate and to reflect a lump sum payment which can be invested to compensate her for her loss.

CONCLUSION

59. The following sums are awarded to the Plaintiff are as follows: -

Termination Pay	**$12,404.66**
Special Damages	**$13,999.75**
Future Medical Expenses	**$88,302.24**
Loss of Future Income	**$110,000.00**
General Damages	**$65,000.00**
Total	**$289,706.65**

60. Interest is awarded on special damages at 2% from the date of the accident to the date of judgment.

61. Interest is awarded on the judgment sum at 6.25% per annum from the date hereof to the date of payment.

61. The Defendant shall pay to the Plaintiff the costs of the action to be taxed if not agreed.

Dated this 20th day of January 2023

Hon. Justice G. Diane Stewart