COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/001461

B E T W E E N:

RYAN STRACHAN

Plaintiff

AND

RAYNOR RUSSELL
DONITA RUSSELL

Defendants

Before: Deputy Registrar Mr. Renaldo Toote

Appearances: Richette Percentie with Lashanda Bain for the Plaintiff
Cheryl Whyms for the Defendant

Hearing Dates: 21st May, 11th June, 16th & 23rd July and 9th August 2021

ASSESSMENT OF DAMAGES

Personal injury – damages – road traffic accident – Plaintiff seeking damages for losses and personal injuries.

[1]. This action was commenced on 15 October 2019 by way of generally indorsed writ of summons, whereby the Plaintiff is seeking special and general damages for injuries sustained as a result of a road traffic accident caused by the Defendants.

[2]. The Plaintiff's case as stated in his Statement of Claim filed 19 October 2019 states that on 17th August 2017 while driving a 2010 Nissan Note he was rear ended at the corner of East Street and Lilly of the Valley Corner by a 2006 Nissan Cube driven by the 1st Defendant but owned by the 2nd Defendant ("the index accident").

[3]. Notwithstanding receipt of the claim, the Defendants failed to enter an appearance and judgement in default of appearance was subsequently entered against their interest on 18 December 2019.

[4]. By summons filed 24 January 2020, the Defendants claimed that the interlocutory judgment was irregular and sought leave to have it set aside.

[5]. On 7 June 2020, the parties consented to setting aside the judgment and the Plaintiff later filed its statement of claim on 14 July 2020.

[6]. On 27 July 2020 the Defendants filed its defence; however, by an Order dated 16 February 2021, judgment was granted to the Plaintiff based upon the Defendants' admission of facts.

[7]. On the 3rd May 2021, leave was granted to the Plaintiff to amend its Statement of Claim. The amended Statement of Claim pleads (i) Special damages: $358,583.62; (ii) Loss of Earnings: $69,212.00; and PSLA: to be assessed.

[8]. The assessment occurred over several days to accommodate the expert testimonies on behalf of both parties. Throughout the assessment, the Plaintiff claims that as a result of the accident he developed severe headaches, whiplash, gliosis of the brain, closed head injury with cerebral concussion, post traumatic headaches. Cervical radiculopathy secondary to multilevel herniated nucleus/bulging discs at C4-C5 among other sustained injuries.

[9]. During the assessment, it became apparent that some of the injuries claimed may have been a duplication of each other notwithstanding the varying medical terminology.

[10]. The Plaintiff further claimed that he experienced limited mobility and was unable to stand for prolong periods or walk for long distances without pain due to sustained lumbar injuries.

[11]. At the time of the accident, the Plaintiff was a 40 year old married man with children and employed with Sagoma Construction Company as a project manager. By virtue of the Plaintiff's witness statement, he indicated that he later became unemployed and suffered loss of earnings. There is no evidence before the court to associate his unemployment to the index accident, however I will address this later in more detail.

[12]. The primary dispute arising from the assessment concerns the conflicting expert testimonies regarding the extent of the injuries suffered by the Plaintiff. The Defendant relies on the expert testimony of Dr. David Nigel Barnett, a private Consultant Orthopaedic Surgeon and former Consultant Orthopaedic Surgeon at Princess Margaret Hospital and Doctors Hospital whereas the Plaintiff relied on

the expert opinion of Dr. Clyde Munnings, a Consultant Neurologist at Doctor's Hospital and his examining physician prior to the index accident.

Expert Testimony of Dr. Clyde Munnings:

[13]. According to the medical evidence of Dr. Munnings, the Plaintiff attended his clinic in 2016 prior to the index accident. At the time, Mr. Strachan was diagnosed with polyradiculopathy (pinched nerve) of the thoracolumbar spine with herniated discs bulging from L4 to S1 and T6 to T11. This is consistent with para. 11 of Dr. Barnett's report where Dr. Philip Rahming refers to an MRI on the Plaintiff's lumbar spine in 2014. According to Barnett, the MRI showed ongoing degenerative osteoarthritis at the L4-L5 & the L5-S1 levels.

[14]. Notwithstanding, Mr. Strachan underwent another MRI of the lumbar spine in 2016 which showed progression of the aforementioned L5-S1 herniation. As a result, Mr. Strachan was recommended for a lumbar discectomy surgery which is a type of surgery associated with repairing the disc in the lower back.

[15]. Despite the Plaintiff's surgical apprehension, the lumbar discectomy was performed on 30 June 2017, approximately 4.5 weeks prior to the accident.

[16]. On 2nd August 2017, Dr. Munnings performed a post-surgery examination on the Plaintiff and observed that his symptoms had markedly improved.

[17]. Two weeks post-surgery and during his recovery period, the Plaintiff was rear ended by the 1st Defendant in a road traffic accident. While being evaluated at the emergency room, a CT scan of the cervical spine showed a straightened lordosis. This means that the Plaintiff's lower back has lost some of its natural inward curvature and became unusually straight. According to Munnings, this is consistent with whiplash injury.

[18]. Additionally, a CT scan of the head showed gliosis in the brain or brain scarring. As a result, the Plaintiff was diagnosed with:

a. Closed head injury with cerebral concussion;
b. Post concussive headaches secondary to muscle strain and whiplash injury with radicular findings query herniated disc in the cervical spine;
c. Thoracic strain/sprain;
d. Worsening of his low back syndrome and lumbosacral radicular signs and symptoms query new versus recurrent herniated disc in the lumbar spine.

[19]. According to Dr. Munnings, the Plaintiff persistently complained of back spasms in the region where the lumbar discectomy surgery was performed. As a result of this, on the 24th August 2017, the Plaintiff underwent further MRI scans on his

lumbar, thoracic and cervical spine as well as an MRI of the brain. The results of the brain MRI was not in dispute. The lumbar MRI showed mild levoscoliosis secondary to muscle spasm and considerable epidural fibrosis. It is important to note that epidural fibrosis will naturally occur as a result of scarring after a back surgery. This is consistent with the Plaintiff's 30 June 2017 lumbar discectomy; however, Dr. Munnings opined that the scarring was more considerable than normal which he attributes to the acute impact as a result of the accident.

[20]. The Plaintiff's thoracic MRI showed dextroscoliosis secondary to muscle spasm – curvature to the right side of the spine which is caused by muscle strain or acute injury.

[21]. The MRI of the cervical spine showed mild discogenic disease from C2-C3 to C3-C4. Further there was a mild degree of nueroforaminal stenosis on the right at the C5-C6 and mild discogenic disease, spondylosis and a diffuse posterior bulging disc and a mild degree of nueroforaminal stenosis bilaterally.

[22]. Over the next few months, Dr. Munnings continued to examine the Plaintiff and recommended a surgical consult because of unabated persistent pain syndromes at 10 out of 10 to the left and upper extremities with numbness, tingling and developing weakness on his left side.

[23]. Notwithstanding, the fact that the Plaintiff had pre-existing conditions to the thoracic and lumbar spine and had a recent lumbar hemilaminectomy at his L5-S1, Dr. Munnings opines that Mr. Strachan showed marked improvements in his symptoms which he suggests were exacerbated and worsened as a result of the road traffic accident on the 17 August 2017.

[24]. Throughout the Plaintiff's continued medical visits with Dr. Munnings his pain syndrome persisted at 10 out of 10 despite being prescribed medication for pain management. Dr. Munnings referred the Plaintiff to a University of Miami specialist for a possible lumbar fusion surgery.

[25]. On 15 May 2018, the Plaintiff continued to complain of severe neck pain and stiffness being 10 out of 10 and an MRI scanning of his total spine was ordered and his diagnosis remained consistent with the diagnosis mentioned at para. 19 above.

[26]. On 20 May 2018, another MRI was ordered and the cervical spine showed a worsened herniated disc at C5-C6 with a large broad base, with left lateral osteophyte with an HNP component causing compression on the nerves.

[27]. A herniated nucleus pulposus (HNP) is a condition in which part or all of the soft, gelatinous central portion of an intervertebral disk is forced through a weakened part of the disk, resulting in back pain and nerve root irritation. The Thoracic spine was the same showing bulging discs at T6-T7 and T10-T11. The lumbar spine

showed a lumbar hemilaminectomy at L5-S1 with epidural fibrosis with right thecal and right S1 nerve root compression.

[28]. Acting on Dr. Munnings referral, on 7th August 2018, the Plaintiff underwent an anterior cervical dissection and fusion of the cervical spine, and a lumbar fusion in the lumbar spine by a spinal neurosurgeon in the USA.

[29]. Dr. Munnings recommended that another lumbar surgery was necessary to address the continued unabated lumbar spine. Dr. Munnings testified that on 15 January 2019, the Plaintiff reported that he underwent a right L4/L5 foraminectomy and a right L5/S1 re-exploration and microdisectomy. Post-surgery, he continued physical therapy, however the pains were not improving. There were adjustments to his prescribed medications to aid with the pain management.

[30]. Over the remainder of the year, Dr. Munnings continued to observe the Plaintiff's conditions and opined that the 17 August 2017 accident adversely affected the Plaintiff's recovery from the 30 June 2017 surgery. Dr. Munnings associated his findings with the subsequent MRI scans which showed definite worsening of his cervical spine with a major large prolapsed herniated disc at level C5/C6 causing major spinal nerve compression.

[31]. Munnings further added that the subsequent surgeries were both as a result of the accident and injuries sustained on 17 August 2017which exacerbated his pre-existing injuries. According to Munnings, the Plaintiff followed all of the modalities, medications, supplementations, physical and chiropractic therapies and multiple surgeries. Hence it is unlikely that the Plaintiff can continue in his profession since his current condition did not substantially improve.

Expert Testimony of Dr. David Nigel Barnett:

[32]. According to the 26 September 2020, medical report of Dr. Barnett, a Consultant Orthopaedic surgeon, his findings were based on consultations with Mr. Ryan Strachan to assess his postoperative status; review analysis of multiple documents provided by NIB and Doctors Hospital of his medical history.

[33]. Dr. Barnett's testimony concluded that the index accident was not the main nor was it the substantial cause of the Plaintiff's injuries, pain, loss and damages.

[34]. According to Barnett, the Plaintiff did not suffer a head injury in the accident as there was no evidence of a head injury and that the headaches complained of were as a result of his uncontrolled high-blood pressure, obesity and poorly managed diabetes, hypertension and high cholesterol. It is noteworthy to mention that Dr. Barnett relied on the findings of Dr. Eugene Grey to conclude that the Plaintiff was diagnose with diabetes and high blood pressure; however, Dr. Barnett did not

provide the court with evidence of Dr. Grey's findings to corroborate this prognosis.

According to Dr. Barnett, the Plaintiff's chronological medical history is very telling, so much so, that the Plaintiff sustained several industrial accidents in February 2002 when he suffered a sprain of one of his ankles and another slip and fall on 11 October 2007 in Exuma. According to the medical reports, the left lower extremity was bruised, but the left knee was extremely painful such that the Plaintiff had difficulty walking.

[35]. On 30 January 2008, the Plaintiff underwent knee surgery. Strachan complained that despite months of therapy, there was a lack of progress and consulted Dr. Phillips who indicated that his uncontrolled sugar were factors delaying healing. Between 2008 and 2012, the Plaintiff was examined by several doctors inclusive of Dr. Grey, Bowe and Robert Gibson relative to the orthopaedic complaints to his knee.

[36]. Dr. Barnett indicated that the medical reports disclosed that because of the Plaintiff's non-compliance to follow prescribed management of his sugar, he continued to experience a weakness, headaches, disoriented and painful limbs. In fact, after a CT scan of his head was performed, Dr. Grey diagnosed the Plaintiff as having 'query transient ischemic attack' or a mini stroke.

[37]. This finding was challenged as Dr. Munnings disagreed with Barnett because no conclusive test was conducted to confirm this diagnosis. Under cross examination, Dr. Barnett agreed that the Plaintiff did not go on to do the necessary scans to determine whether a TIA did occur, therefore it remained a "query".

[38]. The Plaintiff's persistent complaints of sharp shooting throbbing pains in the soles of both feet, led Dr. Grey to refer him to Dr. Charles Rahming, a Consultant Neurologist to perform an electromyography and electro-diagnostic investigation on his limbs in May 2013.

[39]. The results indicated:

i. Investigations in the left upper and lower limbs could not be fully determined;
ii. Radiculopathy involving the right C8 & T1 nerve roots more so than the C5 & C6 nerve roots;
iii. Compression of the median nerve (carpal tunnel syndrome) & compression of the ulnar nerve, both at the right wrist;
iv. Compression of the right L5 nerve root in his lower back; and
v. Peripheral neuropathy, which was opined to be as a consequence of his uncontrolled sugar.

[40]. It is noteworthy that in 2014 an MRI of the Plaintiff's lumbar spine showed ongoing degenerative osteoarthritis at the L4-L5 & the L5-S1 levels. Dr. Barnett

concluded that these objective findings along with the 2013 electro-diagnostic findings of radiculopathy in the cervical, thoracic and lumbar regions as mentioned above confirms that Mr. Strachan had longstanding and ongoing degeneration in his entire spine long before the index accident.

[41]. Dr. Barnett maintained that at all material times during his examination of the Plaintiff, his chief complaints were pain in the neck and back. Additionally, Dr. Barnett indicated that at the time of the accident, the Plaintiff's blood pressure was 190/120 when the normal blood pressure is 120/80.

[42]. On the day of the accident, Barnett indicated that a CT scan of the Plaintiff's head showed no new trauma and no acute intracranial bleed, which is inconsistent with someone who suffered blunt force head trauma.

[43]. Another CT scan of the Plaintiff's brain was taken on 24 August 2017 which revealed no inflammatory edema which according to Dr. Barnett further confirms that no head trauma occurred.

[44]. The Defendant submits that the extent of the Plaintiff injuries are pre-existing. Succinctly put, the surgical treatments were unnecessary.

[45]. Whenever matters regarding an assessment of damages arises before a Registrar, the duty of the Registrar during the assessment should only include making a reasonable determination of the damages which flowed from the breach or negligence.

[46]. The Registrar's duty does not include sliding aside the curtain of liability to see what is backstage. As mentioned at paragraph 6, judgement was entered against the Defendant due to an admission of fact. That being the case, the Defendant conceded to the facts as claimed by the Plaintiff. There can no longer be a claim for contributory negligence or the argument of causation at the assessment. The Defendant accepted liability and cannot go behind the judgment to claim a partial indemnity. If this was the intention then the rightful thing to do would have been to challenge the extent of the liability at trial. See **Ruffin Crystal Palace Ltd. v Laniccini Brathwaite** [2013] 1 BHS J. No. 65.

[47]. Nevertheless, I preferred the testimony of Dr. Munnings as compared to that of Dr. Barnett. As noted by Dr. Munnings, the injuries to the C3-C4-C5 spine showed a new trauma which did not appear on any previous MRI scans. I accept the fact that there was medical evidence to establish an exacerbation of injuries, which resulted in the neck disc replacement of the C5-C6 disc in August 2018 and revised procedure on his lower back to the L5-S1 disc in December 2018.

[48]. The Plaintiff was injured during his recovery period from a corrective lumbar surgery. Both expert witnesses confirmed that the recovery period from the 30 June 2017 surgery would have been between 4-6 weeks. The time of the accident

was a sensitive time for the Plaintiff which Dr. Munnings noted was the cause of the exacerbation.

[49]. According to Munnings, this is why the December 2018 revised surgery procedure on the Plaintiff's L5-S1 lower back disc was necessary. Dr. Munnings did not disagree with Dr. Barnett that the original injuries existed prior to the accident, however he [Munnings] satisfied the court that the revised surgery was necessary to repair damages which arose as a result of the index accident.

[50]. Dr. Munnings was able to examine the Plaintiff after this surgery and prior to the index accident and noted that his results showed improvement. Further, Munnings indicated that prior to the accident all of the MRI's showed mild degeneration despite the argument of the Plaintiff's pre-existing injuries and uncontrolled sugar; however post the index accident the MRI imaging showed rapid worsening of degeneration which attributes is consistent with acute trauma.

[51]. Upon further review of both experts' evidence, this court agrees with Dr. Munnings that no MRI scan of the cervical area was conducted prior to the accident; therefore the Defendants were unable to conclusively dispute the injuries claimed at the C5-C6 cervical spine which required the neck disc replacement surgery in 2018.

[52]. As a result of the judgment entered on the admission of facts, the court must assessed damages on the injury claimed at paragraph 8 above inclusive of the postoperative surgeries.

[53]. Therefore, liability as pleaded in the statement of claim is accepted and the issue becomes:

ISSUE:

Having regards to the facts and testimonies what is the reasonable amount of award entitled to the Plaintiff as a result of the injuries sustained.

Assessment of Damages

[54]. **Lord Goddard** in ***British Transport Commission v Gourley*** **[1956] AC 185** held that:

> **"For an award for damages in personal injury matters, the plaintiff is entitled to be placed in the position that he/she was in had the accident not occurred. It is clear to the Court that the plaintiff has indeed suffered injuries but the dispute remains to what degree, in particular whether or not the head injuries were as a result of the accident."**

[55]. Indeed the general principle is that the claimant is entitled to full compensation for sustained losses; however, the claimant must also take all reasonable steps to mitigate against unnecessary losses.

[56]. The Bahamas does not yet have judicial guidelines, as such comparison awards should be arrived at based on analogous awards in similar jurisdictions where the socio-economic conditions are similar. See **Matuszowicz v Parker** [1987] BHS J. No. 80 (1985, No. 827).

General Damages

[57]. The leading West Indian authority on assessment of damages is the case of **Cornilliac v St. Louis** (1965) 7 W.I.R. 491. In that case it was stated that the factors which ought to be borne in mind in assessing general damages are: (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering which had been endured; (iv) the loss of amenities suffered and (v) the extent to which, consequently the injured person's pecuniary prospects have been materially affected.

[58]. In **Cornilliac**, at 494 G-H, **Sir Hugh Wooding, CJ** admonished that it is not the practice to quantify damages separately under each of these heads or to disclose the build-up of the global award. But, it is critical to keep these heads firmly in mind and make a conscious, even if undisclosed, quantification under each of them in order to arrive at an approximate final figure.

[59]. Hence, the practice is to grant a global sum for general damages for pain and suffering and loss of amenities to be considered against the backdrop of the nature and extent of the injuries sustained and the nature and gravity of the resulting physical disability.

[60]. That being the case, the court ought to ensure that above all, awards must be fair. In **H West & Sons Ltd v Shephard** [1964] AC 326, Lord Pearce explained that ***"The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum."***

[61]. Nevertheless, the Court must also be mindful that damages are awarded to an individual and not to an average person of a certain class on an actuarial calculation. Since the defendant must take the plaintiff as he finds him and must compensate him so as to put him in as good a position, as he was prior to the tort, there must be taken into account and assessed the contingencies and chances for better or for worse inherent in the plaintiff at the time of the tort and the contingencies affecting him as an individual. [See **Angelina Turnquest v Stephen Rahming** (unreported) Bahamas Supreme Court 1409 0f 2013).

[62]. In reliance of general damages, the Plaintiff claims the following:

General Damages

a) Pain, Suffering and Loss of Amenities
b) Smith & Manchester Award

c) Future Surgery
d) Loss of Future Earnings
e) Future Home Care

Pain, Suffering and Loss of Amenitites

[63]. From the medical reports, the evidence of the Plaintiff, his wife [Roxanne] and Doctor Munnings, there is no doubt that the plaintiff experienced varying degrees of pain and discomfort associated with the surgery from the neck disc replacement and revised procedure on his lower back. Additionally the Plaintiff underwent a nerve stimulator trial in December 2019 and a permanent nerve stimulator placement in July 2020.

[64]. According to Dr. Munning's medical report, the "worst" time for the plaintiff would likely have been during the period after the accident, at least up to July 2018 when he had spinal surgery.

[65]. Whilst under cross examination, the Plaintiff indicated that immediately after the accident he experienced neck pain and ringing headaches and was subjected to wearing a neck brace.

[66]. It is accepted that in arriving at a reasonable award, the court must have regard to comparable awards within the jurisdiction for comparable injuries so far as possible and where there are multiple injuries affecting different parts of the body, each injury must be taken into account in assessing the global sum.

[67]. As expected, Counsel for the Plaintiff and the Defendants differed on what would be a reasonable amount to award as general damages for pain and suffering and loss of amenity. The Defendant suggests an award in the region of $10,000 whilst the Plaintiff is seeking a range of $300,000.

[68]. The Plaintiff relies on the Judicial Studies Boards (JSB) Guidelines for Assessment of Damages in Personal Injury Cases and cited a number of cases, both English and local.

[69]. Having regard to the authorities and the awards for comparative injuries in those cases while taking into consideration similarities in the injuries sustained by the Plaintiff in this case with those in the cases cited and other factors, including different ages and varying degrees of loss of amenities whilst allowing for inflation and increased cost of living, an award of **$100,000.00** would be reasonable.

[70]. In **Delone Symonette v Charles Turnquest** [2020] 1 BHS J. No. 62, **Winder, J.** (as he then was) awarded $148,000 PSLA general damages to a 36 year old marine engineer who was hospitalized for 4 weeks and underwent 3 surgeries after suffering fractures to the right femur, right ulna, and the left tibula.

[71]. In the case of **Sheila L. Knowles v. Lady Maria DuPuch** Supreme Court Action No. 392 of 1992, **Nathan J.** awarded the sum of $100,000 as general damages to a 51-year old woman who suffered bilateral tears of the rotator cuff, underwent two (2) surgeries, but still continued to experience "pain and discomfort of a totally disabling kind" some seven years after the accident.

[72]. In **Olga Forbes v Marion Smith** [2007/CLE/gen/1388], the plaintiff suffered the following injuries namely (i) cervical strain; (ii) lumbar strain; (iii) soft tissue Injury to the right Mandible (jaw) and fracture in the mesio-buccal root of the lower right second molar tooth; (iv) Injury to the right eye; (v) right carpal tunnel syndrome requiring surgery; (vi) shoulder impingement syndrome with hypertrophy bursa, acromial spur, partial thickness rotator cuff tendon tear of supraspinatus portion and small anterior labral tear; (vii) moderate post- traumatic stress disorder. She was awarded $65,000.00 for pain, suffering and loss of amenities.

[73]. It is well settled that in most cases involving personal injuries, the amount of the award for general damages usually turns on the type and seriousness of the injury, as well as the loss of amenities which the plaintiff has suffered, with each case being decided on its own merits.

[74]. In reviewing this case, I am reminded of the dicta of **Sawyer, P.** in **Automotive & Industrial Distributors Ltd v Omerod** [2003] BHS J. No. 103 where she opined:

> **Loss of amenities, which is considered sometimes as a separate head of damages and sometimes is subsumed under that head of damage called "pain and suffering" takes into account the "curtailment of the plaintiff's enjoyment of life not by the positive unpleasantness of pain and suffering but, in a more negative way, by the to pursue the activities a plaintiff may have pursued before" – see e.g. McGregor on Damages 16th edition paragraph 1706. In Manley v. rugby Portland Cement Co, (1951) C.A. no. 286 at Kemp, and Kemp, the Quantum of Damages, Vol. 1 2nd ed. 1961) p.624, Birkett, L.J. said:**
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> > **"There is a head of damage which is sometimes called loss of amenities; the man made blind by the accident will no longer be able to see the familiar things he has seen all his life; the man who has had both legs removed will never again go upon his walking excursions – things of that kind – loss of amenities."**

[75]. Therefore, having regard to all the relevant factors, including the plaintiff's age, his testimony with regard to his injuries, pain, treatment, his inability to walk long distance, his chances for continued employment, physician reports, the strain on his family life, submissions and authorities cited by both sides (all of which I have considered), and having regard to the fact that the plaintiff had to undergo four (4) surgical procedures, I consider the sum of **$100,000.00** reasonable compensation for pain and suffering and loss of amenities. The total sum breakdown is as follows:

i. Neck disc replacement of the C5-C6 disc ($25,000.00 –PSLA);
ii. Revised corrective procedure on his lower back to the L5-S1 disc as a result of the accident ($25,000.00 – PSLA);

iii. Nerve stimulator trial in December 2019 ($25,000.00 – PSLA); and
iv. Permanent nerve stimulator placement in July 2020 ($25,000.00 – PSLA);

Smith v Manchester

[76]. The Plaintiff seeks a *Smith v Manchester* award. This award is derived from the case of **Smith v Manchester Corporation (1974) 1 WLR 132** in which the plaintiff developed a frozen shoulder resulting from an accident at work due to her employer's negligence. The Plaintiff continued to be employed by the company so she had no loss of earnings. However, the Court of Appeal increased her damages award to include £1,000 for future loss of earning capacity. The court opined that it had done so with the view that if the Plaintiff should she become unemployed, she would find it more difficult to obtain employment than an able-bodied person.

[77]. I am of the view that this is not a case in which a *Smith v Manchester* award would be appropriate. The 'Smith v. Manchester award' is properly awarded in very narrow circumstances and generally, only where the claimant is in employment at the date of the trial. Strachan was unemployed at the date of trial which alone precludes the court from making such an order. (See **Cadet's Car Rental v Pinder** SCCivAPP No. 33 of 2015).

Future medical expenses

[78]. The Plaintiff invited this court to consider the sum of $187,000 for costs of future surgery which equates to the cost to replace the electrical nerve simulator device which was implanted in his lower back in 2020 in order to assist with his chronic pain management.

[79]. By his closing submissions, Counsel for the Plaintiff indicated that the device is a man-made device with only a 10 year lifespan, therefore the need to replace the same is necessary.

[80]. In reviewing all of the witnesses' testimonies, I noted that no evidence was given to corroborate the need to replace the implant nerve simulator or the life span of the device. Dr. Munnings, did refer to the implant surgery in his witness statement (evidence in chief) and indicated that the same resulted from the exacerbation of the index accident.

[81]. The Defendants have invited this court to reject this claim given that no medical evidence has been given to support the claim for the costs of future surgery. I do not wholly agree with this statement. The cost of the nerve simulator was specifically pleaded and the 2020 receipts were exhibited in the Bundle of documents evidence the cost of $187,000.00.

[82]. Future medical expenses ought to be treated with some degree of certainty regarding the likelihood of further medical care. Not all personal injury victims will receive this compensation therefore those claiming this head of damages ought to plead it and provide evidence in support of this claim. The need to replace the nerve simulator was never put before Dr. Munnings or Dr. Barnett in order to support or refute the claim.

[83]. Despite this, the Plaintiff underwent multiple surgeries since the index accident. Dr. Barnett attributed this to his pre-existing condition, however Dr. Munnings testified that index accident exacerbated those pre-existing injuries to the extent that the Plaintiff now suffers chronic spinal disorder that is permanent, unrelenting with the prospect of further surgeries.

[84]. The learned authors of **Kemp and Kemp on Damages** had this to say with respect to potential future surgeries:

> "**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..."**

[85]. In **Shutt v. Island Construction Co.** [1997] BHS J. No.104 **Sawyer, C.J.** 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".

[86]. Dr. Munnings testified that based on the Plaintiff's current prognosis, he is likely to require surgery in the future. Having regard to the multiple surgeries since the index accident, I would factor a 50% chance of Strachan requiring additional surgery to his cervical spine. The Plaintiff estimates that the cost of the surgery can range up to $187,000. Applying the principle in **Shutt** (*ibid*), I therefore award the sum of **$93,500** being 50% of the cost of the surgery.

Loss of Future Earnings

[87]. As it relates to this sub-heading, the Plaintiff seeks the sum of $900,000 as compensation for wages between the time of the accident and the date of trial and potential losses from the date of trial onward.

[88]. The Plaintiff testified that he earned $62,920 (which is exhibited in the Bundle of Documents Tab 46) and became unemployed in 2020. He was employed as Project Manager at Sagoma Construction Company.

[89]. It must be noted that the Defendants failed to cross examine the Plaintiff as to the validity of his unemployment and salary, nor did they lead any submission as to the Plaintiff's failure to mitigate. Perhaps it may be that the Defendants accepted the Plaintiff's claim or accepted his inability to work.

[90]. In determining whether to make an award, I have reviewed a number of authorities in particular **Thompson et al v Strachan and another** [2017] 2 BHS J. No. 171; **Michelle Russell v Ethel Simms et al** (Unreported) Bahamas Judgement 440 of 2008; and **Chandler v Kaiser et al** [2007] 4 BHS J. No. 22.

[91]. In **Michelle Russell v (1) Ethylyn Simms and (2) Darren Smith** [2008/CLE/gen/00440] **Sir Michael Barnett, CJ** at [43] stated as follows:

> **"It is settled law that special damages must be pleaded and proven. The Court of Appeal in Lubin v Major [No. 6 of 1990] said:**
>
> > **"From the above reasoning, it is clear that what the learned Registrar is saying, correctly in our view is that a person who alleges special damage must prove the same. It is not in general sufficient for him merely to plead special damage and thereafter recite in oath the same facts, or give evidence in an affidavit without any supporting credible evidence aliunde (sic), and sit back expecting the tribunal of fact to accept his evidence as true in its entirety, merely because the aforesaid evidence is not controverted, even though the particular damage in the sense of a loss having been incurred appears reasonably improbable and or the money value attributed to the said loss or damage appears unlikely and or unreasonable viewed in the context of the susceptibility of human beings in general to overestimate and exaggerate loss, damage, and suffering without any intention whatsoever of being deliberately dishonest...."**

[92]. Both the Plaintiff and Defendant has put the court in a difficult position. The Plaintiff did not lead sufficient evidence as to degree of loss and future prospect of employment. There was no evidence to suggest that the Plaintiff is disabled. Dr. Munnings did recommend sedentary duties but did not suggest for how long. On the other hand, the Defendant during cross examination failed to solicit the reason for the Plaintiff's unemployment. Is there a direct correlation of his unemployment and the accident? Was the Plaintiff terminated or did he resign on his own volition for reasons not associated with the accident?

[93]. Nevertheless, it seems clear that the Plaintiff is unable to continue in his chosen line of employment as a Construction Project Manager. This is evidenced in the

Plaintiff's evidence-in-chief (witness statement) which went unchallenged. Strachan indicated that he lost significant avenues of revenue as a result of his injuries which forced him to take out loans. Strachan further added that since his unemployment, he has been "unable to find a suitable job" due to the injuries" and have lost earnings of about $64,444.30 (as at the date of trial).

[94]. Having regard to his injuries, I accept that there are many risks and dangers associated with a construction site. Further, I accept that he has sustained and will continue to suffer some loss of income.

[95]. In calculating loss of future earnings, the court is urged to consider past earnings and medical evidence which would suggest the prospective period of loss.

[96]. **Winder, J**. in **Symonette v Turnquest** [2020] 1 BHS J. No. 62 cautioned against applying the wholesale application of the Ogden Table as suggested by the Privy Council in **Cadet Car Rental et al v Pinder** [2020] 1 BHS J. No. 62. **Winder, J.** determined that "the Ogden tables would not bear an accurate reflection of future loss of income" since the index tables are based in risks and contingencies related to the UK and not The Bahamas.

[97]. Having considered the evidence, the Plaintiff remained employed from the date of the accident until 2020. At the time of the trial, the Plaintiff was aged 44 and unemployed. It is fair to say that his income has been reduced. The likelihood of the Plaintiff being employed in a similar capacity is doubtful, however his evidence suggests that he may pursue computer programming work.

[98]. I am satisfied that a nominal sum should be awarded his future loss of income. At the time of the trial, the plaintiff was 44 years of age. In my view, a lump sum of **$100,000** is reasonable taking into account his prospect of employment and projected annual income losses. If properly invested, the award ought to reasonably account for his loss of income between trial and up to his retirement age of 65.

Special Damages

[99]. As expressed by the Court of Appeal in the case of **George Lubin v Miriam Major** Appeal No. 6 of 1990, in regard to a person who alleges special damages:

> "**It is not in general sufficient for him merely to plead special damage and thereafter recite on oath the same facts, or give evidence in an affidavit without any supporting credible evidence aliunde, and sit back expecting the tribunal of fact to accept his evidence as true in its entirety, merely because the aforesaid evidence is not controverted...**"

[100]. Unquestionably, it is for the Plaintiffs to prove their damages. Mr. Strachan claims the following as special damages:

Special Damages

a.	Doctor's Hospital	$9,930.01
b.	Dr. Clyde Munnings Medical Legal Report:	$2,800.00
c.	Pharmacy Receipts	$67.94
d.	Home care/postoperative care	$1,644.64
e.	Medical Expenses & Subgrogation	$358,583.62
f.	Past Loss of Earnings	$69,212.00
	Total	$442,238.21

Subrogation

[101]. The Plaintiff claim associated medical expenses of $358,583.62 inclusive of surgeries, travel, transportation and accommodations. By way of subrogation, the Plaintiff submitted the cost of $326,604.00 on behalf of Family Guardian Insurance.

[102]. The Plaintiff relies on the case of **Livingstone Minnis v Commonwealth Bank Ltd.** et al [2017] 2 BHS J. No. 50 as its authority to recover the aforementioned costs. However, I am of the view that the Plaintiff's position was erroneously applied.

[103]. In **Livingstone Minnis v Commonwealth Bank Ltd.** Evans, J. at para. 123 clearly sets out the contractual effect of subrogation and referred to Lord Hoffman in the case of **Banque Financiere de la Citeé v Parc (Battersea) Ltd.** [1998] UKHL 7 wherein he opined that "subrogation" may be a "contractual arrangement for the transfer of rights against third parties" but that the "term is also used to describe an equitable remedy to reverse or prevent unjust enrichment". He described the former as being part of the law of contract and the latter as part of the law of restitution. **Evans, J.** continued:

> **124. In the case of the law of contract, Lord Hoffman said that the doctrine of subrogation rests upon the common intention of the parties, as in the case of insurance claims, and gives effect to the principle of indemnity embodied in the contract. A typical case of such subrogation, he noted, is when an insurance company pays its insured client for injuries and losses caused by another, then sues that other party which the injured person contends caused the damages to him to recover the sum paid."**

[104]. Apparently, this is not the case. The plaintiff is of the view that the right to claim subrogation is transferrable to him. This misconception common and became transparent in the case of **Symonette v Turnquest** [2020] 1 BHS J. No. 62 where **Winder, J.** highlighted the distinction between medical insurance and accident insurance.

[105]. In **Symonette** (*ibid*) the Plaintiff contends that Colina Insurance Company may have paid as much as $50,146.35 of the medical bills and as such subrogation should take place in relation to the plaintiffs. The Defendant however, argued that

much of the medical expenses were not paid out of pocket by the plaintiff but by Colina Insurance, the carrier for the group health insurance. They aver that medical insurance and accident insurance are not the same creatures, in that there is no right of subrogation under an medical insurance plan and they rely on *inter alia* a statement in **McGregor on Damages (18th ed.)** as instructive, which states the following:

> **"Where a claimant's medical expense have been paid for him under a private medical insurance scheme to which he subscribes, ... the question of whether he is entitled nevertheless to claim the expenses as part of his damages is a question which does not arise because the insurances under the schemes, unlike the accident policies considered when dealing with loss of earning capacity, are regarded as indemnity insurances which entitle the insured themselves to recover their outlays directly from the tortfeasor through the medium of subrogation. Thus the injured party has no standing to claim medical expenses; he has been made whole by his insurers who in their turn step into his shoes and make the claim for the moneys expended by them." (Underline mines)**

[106]. In response **Winder, J.** concluded:

> **Whilst it is clear from the evidence provided that medical expenses were in fact incurred and were necessary, I accept the submission of the Defendant in this regard. This is not accident insurance as provided for in Parry v Cleaver. In any event, I am comforted by the fact that these are not funds which the Plaintiff has actually expended himself and that the insurer was able to pursue this loss through subrogation if it wished.**

[107]. The merits of this case are similar to that in **Symonette**; therefore, the Plaintiff must yield the same fruits and his claim of subrogation in the amount of $326,604.00 is hereby denied.

Medical Expenses

[108]. On the other hand, the Plaintiff is entitled to recover reasonable out of pockets expenses. What I deem as reasonable are expenses that arose but for the index accident. Therefore, I dismissed the reimbursement associated with food items. I reviewed all of the receipts submitted and cross referenced the same against the insurance ledger and totalled the following as proven:

OUT OF POCKET EXPENSES						
Airline Travel	Hotel	Car Rental	Rehab	Medical Co-pay	Prescription	**Total**
$1,056.06	$15,972.12	$4,071.20	$1,945.84	$6,049.53	$67.94	**$29,162.69**

[109]. At tab 69 of the Plaintiff Bundle of Documents, the Plaintiff sought to recover costs outlined from Bank Statements however I rejected the same as it is not sufficient to through general statements at the court without more and expect it stick. The bank statements were the history of the transactions dated from August 2017 to January 2019 without any explanation as to what ought to be considered.

[110]. These receipts were exhibited and were not challenged by the Defendants or objected to in their closing submissions. Having reviewed the receipts, I am satisfied that the claim represents out of pocket expenses and I will therefore allow the sum of $29,162.69 as well as the cost associated with Dr. Munnings Medical legal report at $2,800 to be recovered, totalling **$31,962.69**.

Home Care

[111]. Strachan's evidence is that he is unable to lead a normal life and his mobility has drastically changed as a result of the accident. He's unable to do any heavy lifting or unnecessary bending. As a result, his wife has had to physically and financially assist him.

[112]. The evidence of Strachan's wife Roxanne corroborated this fact, wherein she indicated that immediately after the accident she had to bathe, feed and clothe him. Roxanne indicated there were moments when she had to assist her husband to the bathroom.

[113]. The Plaintiff seeks the sum of $1,644.64 for home care assistance and post-operative surgery care. Counsel for the Defendants submits that Strachan has not provided any proof to support this claim.

[114]. I accept Strachan's evidence that he did require and provided financially for home care support during his convalescence. Strachan indicated that he exhausted his entire savings on medical expenses resulting from the injuries. It is a fact that Strachan underwent several injuries since the accident and that at the time of the index accident he was still recovering from a prior surgery. I do not consider the sum claimed by Strachan to be unreasonable, therefore, I will award the sum of **$1,644.64**.

Past Loss of Earnings

[115]. The general principles on which damages for pecuniary losses – such as loss of past income and loss of future income or the loss of earning capacity – are the same in The Bahamas as in England although the sums awarded may be different.

[116]. Loss of income is an assessment that requires forensic proof. It is a specific allegation that ought to be strictly proven. Counsel for the Defendants aver that there is no credible evidence of any specific loss to the Respondent despite the fact that he was not cross examined by the Defendant's Counsel on the issue of income.

[117]. By a letter dated 25 November 2019 and filed 15 March 2021 exhibited in the Plaintiff's Affidavit for interim relief from Monique Minnis, Chief Financial Officer of Sagoma Construction Intl. the Plaintiff began employment at Sagoma in 2014 as an Assistant Project Manager earning $62,920.00 annually.

[118]. Furthermore, the Plaintiff's unemployment was around May 2020 which was at the peak of the covid-19 pandemic forcing most business to close its doors particularly the construction industry. This begs the question as to whether or not the accident resulted in his loss of income?

[119]. The index accident occurred in 2017, however the Plaintiff remained employed with Sagoma until 2020 despite undergoing multiple surgeries. There is no evidence led to indicate that had it not been for his inability to perform at work or any other correlating evidence to associate his disability with his unemployment. In my judgment, his testimony alone falls short of what is required to prove entitlement to an award under this head. A Defendant is only liable for such part of the plaintiff's loss as is properly caused by the Defendant's breach of duty.

[120]. Since the Plaintiff remained employed 3 years after the accident, I will not order an award for this head of damage.

Total Award

[121]. In conclusion, the total award ordered to the Plaintiff is as follows:

General Damages

a)	Pain, Suffering and Loss of Amenities	$100,000
b)	Smith & Manchester Award	Nil
c)	Future Surgery	$93,500
d)	Loss of Future Earnings	$100,000

Special Damages

g.	Dr. Clyde Munnings Medical Legal Report:	$2,800.00
h.	Home care/postoperative care	$1,644.64
i.	Medical Expenses	$29,162.69
j.	Subgrogation	Nil
k.	Past Loss of Earnings	Nil
	Total	**$327,107.33**

[122]. Judgment is awarded to the Plaintiff in the sum of $327,107.33. The sum shall bear interest at the rate of 2.5% per annum from the date of the Statement of Claim to the date of judgment. Interest to accrue thereafter at the statutory rate.

Cost

[123]. I instructed Counsel to provide submissions as to cost for fixed determination. Liability was determined through an interlocutory application and the Plaintiff relied on 3 witness inclusive of himself, his wife and medical expert. The Defendant called 1 witness, Dr. Barnett. The writ of summons was filed in 2019 whereas several

interlocutory applications was made and the assessment occurred in 2021 which lasted for 5 days.

[124]. The Plaintiff provided a Bill of Costs in the amount of $232,995.50 along with 3 days court appearances for Dr. Munnings at $10,000.00 per day. The Counsel for the Plaintiff seeks a standard fee of $375 per hour or a per diem rate of $4,000.00. Taking into consideration disbursements, the time spent and research involved in this matter, I will fix legal cost to the Plaintiff in the amount of **$70,000.00**. I have reviewed the invoices for Dr. Munnings' court appearances and accept that the witness was cross examined for 2 days, and will award the additional sum of **$20,000.00** as proven.

-- End --

Dated 22nd August A.D. 2023

[*Original signed and sealed*]
Renaldo Toote
Deputy Registrar