COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/00494

BETWEEN

SAMANTHA COLEBROOKE

Plaintiff

AND

DOCTORS HOSPITAL (BAHAMAS) LIMITED

Defendant

Before: **Deputy Registrar Toote**

Appearances: **Sidney Campbell with Cyril Ebong for the Plaintiff**
Adrian Hunt for the Defendant

Hearing dates: **11 August 2021 and 13 August 2021**

ASSESSMENT OF DAMAGES

Toote, Deputy Registrar

1. This is an assessment of damages for personal injuries and loss sustained by the Plaintiff as a result of an industrial accident which occurred in the course of the performance of her duties as an emergency medical technician (EMT) while employed by the Defendant.

2. At the assessment, the Plaintiff was the sole witness on her behalf, while the Defendant solely relied on Dr. David N. Barnett, an orthopedic surgeon. Dr. Barnett examined the Plaintiffs case on behalf of the National Insurance Board and examined the Plaintiff on 16 February 2021 at the request of the Defendant.

3. The Plaintiff relied on documents contained in a bundle of documents filed prior to the assessment. The bundle itself was not agreed nor were the documents in the bundle formally admitted into evidence through a witness. Some of the documents contained in the bundle were exhibited to and considered in the Defendant's expert evidence. Those documents must necessarily be taken to have been agreed. However, subject to paragraph 5 below, the other documents in the Plaintiff's bundle were not in evidence.

4. The Plaintiff also relied on documents attached or exhibited to her closing submissions. Attaching or exhibiting documents to closing submissions is not a conventional or proper way of tendering documentary evidence. There is a real risk of prejudice attendant to the practice as an opposing party cannot properly respond to the documentary evidence. Subject to paragraph 5 below, the documents attached or exhibited to the Plaintiff's closing submissions are not in evidence and have not been considered.

5. The Plaintiff filed an "Affidavit in Support of Application to Re-Amend Statement of Claim" on 15 October 2021 sworn by Cleo Neely (the "Re-Amendment Affidavit") exhibiting a receipt issued to the Plaintiff from Dr. Chambers for $336.00 for Dr. Chambers' medico-legal report and a termination letter dated 11 January 2019 issued by the Defendant to the Plaintiff. While the Re-Amendment Affidavit was not sworn for the purposes of the assessment, in the circumstances, I have taken the documents it exhibited into consideration.

Background

6. The Plaintiff, who was born on 8 February 1980, was formerly employed as an EMT in the Defendant's Emergency Transport Department. The Plaintiff was employed in that capacity from 19 August 2013 to 11 January 2019 when she was terminated from her employment.

7. The Plaintiff sustained an injury to her lower back on 27 August 2018 when she was required to lift a 230lb patient of the Defendant's onto a 60lb manual stretcher and into an ambulance with another female technician as part of her duties as an EMT (the "Index Accident"). The Plaintiff had bent down to lift the patient and stretcher when she felt a pull in her lower back.

8. The Plaintiff commenced this action by a specially indorsed writ of summons which was filed on 9 April 2019, amended on 27 July 2020 and re-amended without leave on 18 October 2021. A memorandum of appearance was filed on 9 May 2019. A defence to the claim was filed on 11 October 2019.

9. By a Consent Order made by the Honourable Mr. Justice Thompson dated 6 July 2020 and filed on 17 July 2020, judgment on liability was entered against the Defendant with damages to be assessed and costs were awarded to the Plaintiff to be taxed if not agreed.

10. The Plaintiff's statement of claim pleads that the following injuries and loss and damage were sustained and/or suffered by her as a result of the Index Accident:

PARTICULARS OF INJURIES

Pain, shock and suffering

The Plaintiff suffered pain in the back with noted spasm of the lumbar and para spinal muscles. The Plaintiff further suffered defect in the lumbar and para spinal muscles. The Plaintiff underwent an operation to repair her left lumbar triangle hernia.

PARTICULARS OF LOSS AND DAMAGE

Co-pay		**$535.00**
Per detail bill/from Doctors Hospital dated 18th May 2018		
Loss of income: From date of termination 11th January 2019 to October 30th, 2019 and continuing		**$18,797.10**
Maid service: April 2018 to October 30th, 2019	**$7,900.00**	
Loss of earning capacity: (to be assessed)		
Loss of future earning: (to be assessed)		
Loss of job opportunity: (to be assessed)		
Receipt dated 29 August 2019 for medical report from Dr. Carlton Chambers		**$336.00**

AND THE PLAINTIFF CLAIMS:-

1. **Damages;**
2. **Interest pursuant to the Civil Procedure (Award of Interest) Act 1992;**
3. **General damages for pain and suffering and loss of amenity;**
4. **Costs;**
5. **Such further or other relief as the Court deems just.**

11. The Plaintiff initially treated her injury at home with painkillers and returned to work despite feeling pain in her lower back which persisted through pain medication. She did not stop working until 4 May 2018.

12. On 6 May 2018, the Plaintiff woke up with severe pain on her left side and called the Emergency Department of the Defendant's hospital. She spoke with Dr. Ross O. Downes and told him about the pain she was experiencing and that she had a painful lump on her left lower back. He advised her to attend the Emergency Department in person so that he could examine her.

13. The Plaintiff duly consulted Dr. Downes in the Emergency Department of the Defendant's hospital where she was diagnosed as having a *Petit's* hernia/left interior lumbar triangle hernia (the herniation of omental fat through the posterior abdominal muscles) after an ultrasound

was conducted. This diagnosis was confirmed by an MRI scan conducted at the Defendant's hospital on 7 May 2018. The MRI scan disclosed a 52x67mm fibroid in the Plaintiff's uterus.

14. In a medical report addressed to Dulwch Law Chambers dated 6 March 2019 (the "Downes Report"), Dr. Downes confirmed his diagnosis of the Plaintiff. He also said that the Plaintiff had presented with complaints of pain in the back with noted spasm of the lumbar and para-spinal muscles. He was unable to confirm whether the *Petit's* hernia resulted as a consequence of the Plaintiff's profession, but he expressed the opinion that the symptoms would be aggravated by the activities essential to her profession.

15. The Plaintiff said that she experienced constant pain in the days leading up to surgery.

16. On 10 May 2018, the Plaintiff underwent a herniorrhaphy to repair the *Petit*'s hernia and a hernioplasty to reinforce the weakened region of tissue to prevent the hernia from reoccurring. The two procedures were carried out at the Defendant's hospital by Dr. Downes under general anesthesia. The Plaintiff was discharged without restriction at 4:22 pm.

17. The Plaintiff said that she experienced "the most pain she had ever experienced" following the herniorrhaphy and hernioplasty and required hospitalization for two days. She further said that she continued to experience severe pain in her back area during her recovery period and that she was unable to do anything for herself; she required assistance going to the bathroom and doing basic functions.

18. The Plaintiff said that, 2 weeks after her surgery, she attended the Defendant's Human Resources Department (one infers for some form of redress) but this "proved fruitless". She had to use her insurance to cover her medical expenses and was given 6 weeks' sick leave.

19. While it is not pleaded in her statement of claim, the Plaintiff said that she discovered she was 1 month pregnant after the Index Accident and was advised by her physician that due to the severity of her injury and the mesh inserted as part of the hernioplasty, it would be best not to go through with the pregnancy. As a result, while on sick leave she reluctantly underwent a dilation and curettage procedure and had her fallopian tubes tied.

20. On 14 June 2018, the Plaintiff met with Ronnet Scarlet, a physiotherapist at the Defendant's hospital, some 6 weeks after the Index Accident. A review was conducted on 18 June 2018 by Kelley Cartwright, another physiotherapist at the Defendant's hospital.

21. Therapist Scarlet's notes of the session with the Plaintiff on 14 June 2018, recorded among other things, that the Plaintiff reported her pain as being 4/10 on the Pain Numeric Rating Scale ("Distressing"), which was aggravated by prolonged sitting, standing and lifting, the Plaintiff had a normal gait, the Plaintiff had no sensory deficits, the Plaintiff had good balance while standing and the straight leg raising and stork test were negative.

22. Therapist Cartwright's notes of the session with the Plaintiff on 18 June 2018 recorded, among other things, that the Plaintiff reported she had trouble sleeping, she was experiencing pain at the level of 2-3/10 on the Pain Numeric Rating Scale ("Discomforting"/"Tolerable") in her left thoracic and lumbar regions while at rest, which was exacerbated by, among other

things, standing and sitting, and she had little to no control over her pelvic floor muscles when urinating.

23. Dr. Downes referred the Plaintiff to physiotherapy at KTH physiotherapy for her lower back pain. The Plaintiff had an initial evaluation there on 6 July 2018 where she complained of a deep aching pain in her anterior thigh and lower back (at the level of 5/10 on the Pain Numeric Rating Scale ("Very distressing") which at its worst was 6/10 ("Intense") and at its best 0/10 ("no pain")) and reported numbness while using the toilet and symptoms of urinary incontinence. She was assessed and her prognosis was that she would achieve pain-free functioning at work, home and leisure in 8 weeks.

24. The Plaintiff undertook a course of 25 therapy sessions with KTH physiotherapy which ended on 19 October 2018 when she was discharged from therapy with a home program which included a pelvic floor training kit. The Plaintiff said that (i) during this time, she would often go to the Defendant's Human Resources department and they would tell her there were no light duties in her department and she would be "sent home" and (ii) she was "sent home" in August 2018, despite being scheduled to return to work, and in September 2018.

25. By the end of her course of physiotherapy with KTH physiotherapy, the Plaintiff had achieved all of the milestones that were set at the commencement of therapy. The range of motion in all planes of her lumbar spine were within functional limits and muscle strength in her trunk and lumbar spine regions were all determined to be strong. According to the Downes' report, the Plaintiff was "cleared for active duty" upon her discharge. Dr. Downes had in fact assessed that the Plaintiff could return to modified (light) duties on 1 October 2018.

26. The Plaintiff's physiotherapist at KTH physiotherapy, Dr. Kereen Sherwood-Wallace, opined in her discharge report that the Plaintiff had done "*very well*" with physiotherapy and noted that the Plaintiff had expressed confidence in performing all activities of daily living and felt ready to return to work. The Plaintiff's evidence was, however, that she had "little improvement" by the end of therapy and lingering pain.

27. The Plaintiff underwent a functional capacity evaluation (FCE) at the Defendant's Rehabilitation Center on 1 November 2018 to determine her capacity for her job as an EMT. The FCE was conducted by Zenobia Neely, an occupational therapist employed by the Defendant, and involved 4.5 hours of testing.

28. Therapist Neely concluded that the Plaintiff had "LIGHT to MEDIUM work capacity for target job" as the Plaintiff had limited bilateral hand grip strength and decreased endurance/tolerance for lifting and carrying tasks. Therapist Neely concluded that the Plaintiff could return to work as an EMT in a modified capacity with restrictions on the tasks she could carry out involving carrying, lifting, pulling or pushing.

29. In the events that transpired, the Plaintiff's employment with the Defendant ended on 11 January 2019. The Plaintiff's evidence was that, while on sick leave, she received a call from the Defendant to inform her that her services were no longer required and she was given 2 weeks' notice pay and severance pay.

30. According to the Plaintiff, the National Insurance Board referred the Plaintiff to Dr. Carlton Chambers, an orthopedic surgeon, for pain management. On 6 June 2019, the Plaintiff consulted Dr. Chambers, as she said she had been experiencing persistent pain in the left side of her lower back since her physiotherapy. That pain radiated to her left leg and was accompanied by numbness. Dr. Chambers diagnosed her as having left L4-L5 disc herniation and radiculopathy and requested an MRI scan.

31. The MRI scan Dr. Chambers requested was conducted on 18 June 2019. The MRI scan revealed that the Plaintiff had a moderate-sized left lateral herniated nucleus pulposus at L4-L5 which extended into the left recess and left neural foramen with compromise of the left L4 nerve root. The scan also revealed mild degenerative disc disease, mild spondylosis and a mild degree of pre-existent joint osteoarthropathy bilaterally at L4-L5.

32. Dr. Chambers explained the findings of the MRI scan to the Plaintiff on 1 August 2019 and referred her to physiotherapy and, if that did not work, he suggested surgery. Parenthetically, at the visit with Dr. Chambers on 1 August 2019, the Plaintiff complained of urinary incontinence.

33. Dr. Chambers subsequently prepared an undated medico-legal report confirming his diagnosis (left lateral L4-L5 herniated nucleus pulposus with left L4 nerve root compression). In the report, he recorded that the Plaintiff continued to have pain and numbness and reported urinary incontinence and opined that the Plaintiff had a partial impairment of 18% based on the American Association Guides to the Evaluation of Permanent Impairment (6th edn). Dr. Chambers noted the Plaintiff was currently being treated with physiotherapy but opined that her condition was unlikely to improve without surgical intervention.

34. The Plaintiff applied for and obtained industrial benefits from the National Insurance Board.

35. In *circa* 2020, Dr. Barnett was selected by the National Insurance Board as the referee to perform the Plaintiff's disability/impairment assessment.

36. In his report dated 4 February 2020, Dr. Barnett expressed the following clinical opinions:

> *"1. Is the claimant suffering from a loss of faculty?* *YES*
> *2. Has this loss of faculty resulted from the accident on* *YES*
> *27 April 2018 which is described in these papers?*
> *3. (a) Describe below, in terms as nearly as possible similar to those used in the second schedule to the Industrial Benefits Regulations, the injury caused by the accident; and indicate, from your general examination of the claimant, relevant conditions (if any) which affect the degree of his disablement resulting from the accident.*
> *(i) <u>Description of injury</u>*
> *Mrs. Butterifeld-Colebrooke was assisting with lifting a patient unto a trolley, on a sloped surface (a hill) on the 27th April 2018, when she felt what she described as a strain in her lower left back.*
> *She self-treated herself for just over one week, until her pain became unbearable on the 6th May 2018. She then consulted Dr. Downes at Doctors Hospital, who assessed her including with an ultrasound of her painful lower back, that day & with an MRI scan on the 8th May 2018.*
> *They showed a left lumbar triangle hernia, therefore, she had exploratory surgery on the 10th May 2018, when a 2 cm defect near the external oblique muscle was found to contain a portion of omental fat.*
> *The hernial defect around the external oblique muscle was identified & repaired.*

Post-operatively, she commenced a course of physical therapy, mainly to enhance the strength & flexibility of her core, so as to enable her to return to work, as she admitted she did no exercises prior to the incident, beyond moving around at work. Dr. Downes determined that she had recovered to return to modified (light) duties on the 1st October 2018, but, it was determined that if se could not perform her contractual duties she would be terminated, an action that was done by letter on the 11th January 2019.

Since then, Mrs. Butterfield-Colebrooke lower back pain ahs worsened in association with radiating numbness & pain down her left lower extremity to the lateral ankle; in association with SLR of 60°, on the left.

Arcoxia, Neurontin & CoCodamol pain-killers & the muscle relaxant, Flexeril, have not been very helpful. She therefore had an MRI scan of her L/S spinal region on the 18th June 2019, which showed pre-existent facet joint osteo-arthropathy bilaterally, throughout the lumbo-sacral spine, in association with disc degeneration. However, super-imposed on the above, there was an L4-L5 a moderate-sized left lateral disc herniation extending into the left recess and left neural foramen with compromise of the left L4 nerve root. The above therefore was necessarily associated with left recess and left neutral foraminal stenosis.

In addition, on review of her Past Medical History, Mrs. Butterfield-Colebrooke has had fractures of her left L1 & L3 vertebral transverse processes in 2014, which highly likely predisposed her to having the lumbar herniation. Also, she was involved in a RTA in 2016, when she was found to have pre-existent degeneration in her C-spine. The latter finding was predictive of lumbo-sacral degeneration.

(ii) Relevant conditions:

I opine that her clinical features, which are the 1° factors in determining whether a patient with spinal problems is a surgical candidate were corroborated by the radiological, the 2° factor. Hence, she is highly likely to benefit from surgery, via the minimally invasive technique of L4-L5 laminectomy/discectomy.

Mrs. Butterfield-Colebrook mentioned that she had episodes of urinary incontinence/soiling when she sneezed or coughed.

However, during the course of her physical therapy, with the performance of Kegel exercises, the soiling abated & she is now continent, suggesting it was more from pelvic floor weakness, than a nerve compression deficit. In addition, she has a large fibroid in her womb, causing compression of her bladder, another factor contributing to her stress incontinence. No assisted therapy has been done since the 19th October 2018.

Mrs. Butterfield-Colebrooke however is obese, with a markedly protuberant abdomen & is unfit, as she said that she does not exercise. A state in existent at the time of the incident. She weighed 205 lbs on a 5'6" frame, making her ~50lbs overweight, although, she said that her weight was appropriate for her height.

The hernia repair was performed with enhancement by Dr. Downes, as both a repair (herniorrhaphy) and mesh reinforcement (hernioplasty) were done.

Mrs. Butterfield-Colebrooke had a Functional Capacity Evaluation done on the 1st November 2018, which concluded that she could return to work on modified duties at that time.

However, the American Academy of Orthopedic Surgeons Guidelines are that these evaluations are too subjectively patient-dependent, hence, their usefulness have not been fully validated by randomized control studies, hence, the findings need to be carefully scrutinized. Mrs. Colebrooke is performing her personal chores, but is assisted with her domestic & household chores by her family. However, she was able to drive herself to the Clinic today & which she said she does daily.

Mrs. Colebrooke has an acute on chronic L/S spinal lesion, that would benefit from her loosing a significant amount of weight, as any surgery in her milieu of unfitness is bound to have a poor outcome.

RECOMMEND: Mrs. Butterfield-Colebrooke needs to be referred to a neurosurgeon to be assessed & surgically treated for her L/S acute on chronic lesion, followed by an aggressive exercise program in order to enhance her general fitness, the strength and flexibility of her core muscles, and decreasing her body weight to one appropriate for her height

(b) At what percentage is the degree of his disablement to be assessed? *TEN (10%)**

4. Is the assessed loss of faculty likely to last for life, or for a term less than life? *LESS THAN LIFE*

. …

**(The total impairment is assessed as 19%, Class 3, Table 17-4, pg 570, of the Guides, which is rounded to 20%. However, as her injury on analysis was the final step in the natural & ongoing history of the development of a disc herniation in a degenerate spine, I opine that 10% was apportioned from the accident.*
[However, it should be noted only the spinal lesion was considered for rating, as 2 lesions in the same anatomical region cannot be rated, so as to avoid 'double-dipping'.
Therefore, the higher problem is rated, i.e. the spinal problem]."

37. The Plaintiff now works on a part-time basis for Emergency Medical Services under the Public Hospital Authority. She works on light duties two days a week and is paid $12.00 per hour. She has held this position since September 2020. Prior to obtaining the position, she had only been able to obtain a temporary one-month long position with Patronus Medical (located in Baker's Bay, Abaco) in March 2020 notwithstanding she began looking for work in May 2019.

The medical evidence

38. The sole sworn medical evidence before the Court was an affidavit sworn by Dr. Barnett filed on 7 May 2021 (the "Barnett Affidavit"). The Barnett Affidavit exhibited a medical report prepared by Dr. Barnett for the purposes of these proceedings dated 28 March 2021 (the "Barnett Report").

39. Dr. Barnett's evidence was received as expert evidence without objection. While the existence of a conflict of interest was suggested by Counsel on behalf of the Plaintiff because Dr. Barnett previously examined the Plaintiff and submitted a report to the National Insurance Board which did not accord completely with his evidence, the Plaintiff took no steps to disqualify Dr. Barnett or otherwise prevent him from giving evidence.

40. In the Barnett Report, Dr. Barnett opined that:

i) **the Index Accident was not an isolated event, but was precipitated by a number of events which, acting together, led to the diagnosis of a left-sided lumbar (*Petit's*) hernia (paragraphs 25.a.i-25.a.ii). The Plaintiff experienced trauma prior to September 2014 which led to transverse process legions which likely predisposed her to the *Petit's* hernia and she had degenerative wear and tear in her lower back by December 2016 (paragraphs 10.b.i-10.b.iii; 20.c.iii; 25.c.i and 25.d.ii). The Index Accident was the "last step" or "final factor" that transitioned the Plaintiff from having an asymptomatic and developing *Petit's* hernia into a symptomatic state (paragraphs 26.b.i and 29.a.ii).**

ii) **as the Plaintiff's *Petit's* hernia was appropriately treated, the permanent impairment that resulted from its occurrence is less than 1%. (paragraph 4.b.iii; paragraph 30.a.ii).**

iii) **the Plaintiff developed her left L4-L5 spinal disc herniation sometime between March and June 2019 (paragraph 26.d). It is biomechanically impossible to produce a disc herniation in a healthy spinal disc as a result of one simple axial load, such as lifting (paragraph 21.e.iii)). The Index Accident was only a contributor, but not the final factor, in the development of the Plaintiff's left L4-L5 spinal disc herniation (paragraph 29.b.i). The Plaintiff's previous history of lower back pain, being in a car accident on 11 December 2016, bilateral facet joint degeneration, lack of fitness, obesity, her activities lifting patients and her activities lifting her overweight child were all factors which contributed to the occurrence of the disc herniation and not just the singular lift of the Index Accident (paragraphs 11.a.-11.c.ii; paragraphs 21.e.i-21.e.vii).**

The spinal disc herniation was "brewing" and was "pushed along the path towards becoming symptomatic" by the Index Accident (paragraph 26.c.ii). There is no evidence the Plaintiff sustained "major spinal trauma" as a result of the Index Accident (paragraph 27.b).

iv) the pre-existent and ongoing cumulative factors (the Plaintiff's weight, habits and pre-existing degeneration/damage) have a stronger relationship as to why the Plaintiff developed disc herniation, with the Index Accident contributing the lesser percentage (paragraph 29.b.ii).

v) the apportionment of the injury that arose from the Index Accident should not have exceeded 8%. The impairment deficits from the *Petit's* hernia were minimal and therefore not ratable but the Plaintiff's spinal herniation deficits were mainly related to the multiple pre-existing factors which existed at the time of the Index Accident and continued after its occurrence (paragraph 27.c).

vi) the Plaintiff did not have urinary incontinence from a neural cause, as if there was some compression or affliction of the relevant nerve supply to the bladder and urethra, her incontinence should have been spontaneous and constant and not at the time of peeing. The first factor causing her incontinence was her weakened muscles, including the pelvic floor muscles, and the second was the large fibroid in her womb (paragraphs 5.d.ii-5.d.iv).

vii) the Plaintiff needs to be assessed by a neurosurgeon for spinal surgery. Once she has the surgery, which will require 3 to 6 months of rehabilitation, she should be able to return to the modified duties she is doing at present and she is highly likely to be able to do more, though a full assessment would be required to ascertain her capabilities at that time. Even with the surgical procedure, the Plaintiff's spine will continue to degenerate, an inevitability of living, although her spine does not have to become symptomatic if she makes long term lifestyle changes (paragraphs 30, 31 and 32).

41. In paragraph 4 of the Barnett Affidavit, Dr. Barnett said:

> ***"In my report I state that the Plaintiff has a pre-existing chronic degenerative spine, the symptoms of which were asymptomatic at the time of the Accident complained of this Action ("the Index Accident"). I further opine that this degenerative state is the primary cause of the Plaintiff's present and ongoing lower back spinal problems, and the Index Accident only made a minor contribution to the same. It is my opinion that the Index Accident resulted in the Plaintiff's asymptomatic condition becoming symptomatic, accelerating the onset of symptoms same by less than two years."***

42. In cross-examination, Dr. Barnett accepted it was not correct to say one episode of lifting could not cause disc herniation without knowing the weight of the object being lifted and who is doing the lifting. Dr. Barnett also accepted that the Plaintiff's prolonged lifting of patients as part of her job could have accelerated the development of her herniation. Dr. Barnett considered that impairment assessment degree (for benefit purposes) and apportionment of causation are equivalent because 'when you are asked to assess the degree of impairment of a patient as a result of an accident you are assessing the causation of what arose from the specific accident'.

43. In re-examination, Dr. Barnett clarified that a normal disc will not bulge or herniate with one episode of lifting. If that occurs, the disc was diseased and the lift was the last step that shifted it from asymptomatic to symptomatic. Dr. Barnett also confirmed that you cannot determine whether someone can have disc herniation from one episode of lifting in the abstract.

Assessment

44. The general principle when assessing damages in a personal injury action is that, subject to their duty to mitigate, a plaintiff is entitled to full compensation for all past and future pecuniary and non-pecuniary losses suffered or incurred as a result of the accident. In **Livingstone v Rawyards Coal Company** (1880) 5 App. Cas. 25, ***Lord Blackburn*** said at page 30:

> ***"I do not think there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."***

45. There is a presumption in the circumstances of this case that some damage has been sustained by the Plaintiff as a result of the Defendant's negligence. However, the burden of proof is on the Plaintiff in relation to each loss she has claimed to establish causation and quantum on the balance of probabilities.

46. Damages in personal injury actions are conventionally divided into general and special damages. In **British Transport Commission v Gourley** [1956] AC 185, ***Lord Goddard*** said at page 206:

> ***"In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future. …"***

General Damages

47. In **Cornilliac v St. Louis** (1965) 7 WIR 491, a classic leading West Indian authority on the assessment of damages, the Court of Appeal of Trinidad and Tobago held that the factors which ought to be considered by a court when assessing general damages for personal injuries 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.

48. In **Cornilliac**, at 494 G-H, ***Sir Hugh Wooding, CJ*** warned that it is not the practice to quantify damages separately under each of the heads identified above or to disclose the build-up of the global award. The practice is simply to grant a global sum. However, it is critical to keep the heads firmly in mind and to make a conscious, even if undisclosed, quantification under each of them in order to arrive at an approximate final figure.

49. The authorities disapprove of the use of the percentage impairment or percentage degree of disablement prepared by doctors for use in worker's compensation claims when assessing damages for personal injuries: **Peter Seepersad v Theophilus Persad** [2000] TTCA 4; **Peter Seepersad v Theophilus Persad** [2005] UKPC 19.

50. An award of general damages should be fair to both the plaintiff and the defendant. In **Scott v Attorney General** [2017] 3 LRC 704, ***Lord Kerr***, delivering the advice of the Judicial Committee of the Privy Council, said at paragraph 17:

> ***"[17] General damages must be compensatory. They must be fair in the sense of being fair for the claimant to receive and fair for the defendant to be required to pay—Armsworth v South Eastern Railway Co (1847) 11 Jur 758 at 760. But an award of general damages should not aspire to be 'perfect compensation' (however that might be conceived)—Rowley v London and North Western Rail Co (1873) LR 8 Exch 221. It has been suggested that full, as opposed to perfect, compensation should be awarded—Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 per Lord Blackburn …"***

51. When assessing damages, the Court must be mindful that damages are awarded to an individual and not to an average person of a certain class on an actuarial calculation. 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 also 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: **Thompson v Strachan** [2017] 1 BHS J. No. 108.

Pain, suffering and loss of amenity

52. Damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They are assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed by the plaintiff including that derived from the plaintiff's necessary medical care, operations and treatment: **Lashonda Poitier v The Medi Centre Ltd and another** [2019] 1 BHS J. No. 58.

53. The Bahamas does not yet have judicial guidelines for the award of damages in personal injury matters. As such it is legitimate to consider not only local decisions but also decisions in jurisdictions where the socio-economic conditions are similar (such as Bermuda, Cayman Islands and the British Virgin Islands) and England: **Matuszowicz v Parker** (1987) 50 WIR 24.

54. Where a plaintiff has suffered multiple injuries which add up to one composite effect on the plaintiff, it is necessary to fix a particular figure for pain, suffering and loss and amenity which is reasonable for each injury and to then stand back and look at what would be the global aggregate figure on that approach and ask if it that would be reasonable compensation for the totality of the injuries suffered by the plaintiff or overcompensation: **Pratt v Sands** [2012] 1 BHS J No. 12; **Delone Symonette v Charles Turnquest** [2020] 1 BHS J No. 62.

55. The parties have joined issue on whether the Defendant is responsible in law for the Plaintiff's left L4-L5 spinal disc herniation in light of the Index Accident's limited "causal potency" on Dr. Barnett's analysis. The Defendant did not object to the ambiguity in or scope of the

Plaintiff's particulars of injuries and, therefore, I treat the Plaintiff's pleaded particulars of injury as encompassing her left L4-L5 spinal disc herniation.

56. The Plaintiff submitted that the Defendant is responsible in law for both the Plaintiff's *Petit's* hernia and the Plaintiff's current disc herniation, as both the Index Accident and the Plaintiff's pre-existing back condition were necessary for the herniations to have occurred. The Plaintiff submitted that the Index Accident was a necessary contributing cause and the presence of non-tortious contributing causes does not excuse the Defendant from liability. The Plaintiff relied on **Athey v Leonati** [1996] 3 SCR 458, **Brewster v Davis** [1993] 42 WIR 59 and **Eleanor Diane Grossgill v The Ministry of Health** CLE/gen/01909 of 2014 in support of those submissions.

57. The Defendant submitted that the Index Accident resulted in a minor back injury to the Plaintiff which led to a short-term acceleration in the onset of a pre-existing degenerative condition in the Plaintiff. The Defendant submitted that the Plaintiff's submission that the Defendant is fully liable for the Plaintiff's current condition regardless of any pre-existing condition is patently wrong in law and contrary to authority. The Defendant relied upon the decision of ***Winder J*** (Ag) (as he then was) in **McCoy v Williams** [2014] BHS J. No. 122 in support of those submissions.

58. In **Athey v Leonati** [1996] 3 SCR 458, the appellant was injured in two motor vehicle accidents which occurred in February and April 1991. In the fall of 1991, the Plaintiff developed a disc herniation while exercising which was ultimately treated by surgery and physiotherapy. The issue arose whether the disc herniation was caused by the injuries sustained by the plaintiff in the accidents or whether it was attributable to the appellant's pre-existing back problems; mere stretching alone was insufficient to cause disc herniation in the absence of some latent disposition or previous injuries. The Supreme Court of Canada rejected the proposition that it is possible to apportion loss according to the degree of causation where a loss is created by tortious and non-tortious causes. The court held that the trial judge's conclusion that the appellant's pre-existing injuries contributed 25% to the disc herniation, which was more than *de minimis*, was sufficient to render the defendant fully liable.

59. In **Brewster v Davis** [1993] 42 WIR 59, the plaintiff was involved in a car accident. In the aftermath of the accident, she was admitted to hospital and diagnosed with systemic lupus erythematosus (SLE). While in hospital, she experienced total renal failure due to severe SLE. The medical evidence before the court was that SLE was not caused by stress but could be exacerbated by it. The plaintiff had SLE at the date of the accident. ***Sir Denys Williams CJ*** sitting in the High Court of Barbaods, found the defendant liable applying the "egg-shell skull" rule, holding that the defendant's negligence caused the plaintiff to experience stress which materially contributed to her developing acute renal failure given her already inflamed kidneys due to SLE.

60. In **Eleanor Diane Grossgill v The Ministry of Health** CLE/gen/01909 of 2014, the plaintiff, a nurse, suffered a back injury when she fell off a chair at her workplace as a result of which she suffered an L5-S1 and L4-L5 disc herniation with nerve root compression and spondylosis. The defendant argued that the plaintiff's injury was not that severe and that the plaintiff had a degenerative spine which caused her symptoms. ***Winder J*** accepted that the

plaintiff was impacted by degenerative changes in her spine but did not accept it caused her symptoms on the evidence. He treated the plaintiff's back injury as an injury falling at the "higher end" of "moderate (b)(i)" of the *Judicial College Guidelines for The Assessment of General Damages in Personal Injury Cases* and awarded $40,4755 for pain, suffering and loss of amenity.

61. In **McCoy v Williams** [2014] BHS J. No. 122, the plaintiffs were involved in a road traffic accident with the first defendant's motor vehicle. The first plaintiff complained of damage to his cervical spine. However, the first plaintiff had an extensive history of prior injury and damage to his back. He required surgery prior to the accident in 2007 but he did not pursue it. The evidence was that the first plaintiff required the same surgery to resolve any new injuries he sustained as a result of the road traffic accident with the defendants. There was no evidence that that accident either accelerated the need for surgery or made it more prominent or urgent, or that the pre-existing degeneration in the first plaintiff's spine was impacted by the accident. ***Winder J (Ag)*** referred to **Cutler v Vauxhall Motors Ltd** [1970] 2 All ER 56 and **Salih v Enfield Health Authority** [1991] 3 All ER 400 and held the defendants could not be held responsible for the surgery the first plaintiff required. ***Winder J (Ag)*** found, however, that new injuries were sustained by the first plaintiff as a result of the accident but that they were minor. He awarded the first plaintiff $11,000 for those injuries.

62. In **Cutler v Vauxhall Motors Ltd** [1970] 2 All ER 56, the plaintiff grazed his ankle in an accident at work which set off a pre-existing varicose condition in his legs. The plaintiff developed an ulcer which required an operation on the varicose condition itself. The medical evidence was that, in all probability, the plaintiff's condition would have called for the same operation in a few years' time had the accident not occurred. The plaintiff lost £173 in wages due to time off work as a result of the operation. The trial judge awarded the plaintiff £10 as damages for the graze and its attendant discomfort and inconvenience, but nothing in respect of the operation, on the ground that any damage suffered thereby was "cancelled out as a mere anticipation of the inevitable". The trial judge's award was upheld by the English Court of Appeal on the basis that, otherwise, the result would be that the defendants would be recouping the plaintiff for a loss he would have had to bear had there been no accident at all.

63. In **Salih v Enfield Health Authority** [1991] 3 All ER 400, the plaintiffs, the parents of a child born suffering from congenital rubella syndrome, brought an action for damages against the defendant health authority alleging that the birth of the child resulted from the failure of the health authority to diagnose and warn the mother of the danger that the child she was carrying might be affected by rubella syndrome, with the result that she was unable to have the pregnancy terminated. The trial judge awarded the plaintiffs damages which included an award of £1,050 a year, capitalised at £8,400, for the basic cost of maintaining the child. The English Court of Appeal disallowed that amount on the basis the loss would have been incurred by the plaintiffs in any event given the evidence was it was likely the plaintiffs would have had another child had the health authority not been negligent.

64. Having considered Dr. Barnett's evidence as a whole, which I accept, and the authorities cited, it is my considered view that the Index Accident made a more than *de minimis* (and therefore, a "material") contribution towards both the Plaintiff's *Petit's* hernia and the Plaintiff's left L4-L5 spinal disc herniation with L4 nerve root compression and their associated symptoms (though I do find the Plaintiff exaggerated her symptoms, which were moderate, in her witness

statement). The Plaintiff's incontinence was not caused by the Index Accident and there is no medical evidence linking the Plaintiff's alleged miscarriage to the Index Accident.

65. Allowance must be made for the fact that, on Dr. Barnett's uncontested evidence, the Plaintiff's current lower back spinal problems would have manifested in less than 2 years in any event due to the Plaintiff's pre-existing chronic degenerative spine. This was not explored in any great depth in questioning. Nevertheless, I understand Dr. Barnett to have meant that, due to the Plaintiff's pre-existing chronic degenerative spine, the Plaintiff would have been in the same position in less than 2 years from the Index Accident had the Index Accident not happened. For the purposes of this assessment, due to Dr. Barnett's lack of precision in specifying the precise period of acceleration, I adopt 2 years as the period of acceleration.

66. The learned authors of ***Munkman & Exall on Damages for Personal Injuries and Death*** explain how the acceleration of a condition or symptoms should be dealt with in an assessment of damages at paragraph 3.58:

> ***"It is not uncommon to have cases where the effect of the injury is to accelerate the onset of a pre-existing medical condition, sometimes by making a non-symptomatic condition symptomatic. The courts have long recognised this as factor in the award of damages: see Kenth v Heimdale [2001] EWCA Civ 1283, [2001] All ER (D) 27 (Jul). The award of damages for pain and suffering is, therefore, confined to that period of acceleration. Similarly, it is likely to be illogical to award damages for loss of earnings, or disability in the labour market, for a period beyond the period of acceleration: see Morgan v Millett [2001] EWCA Civ 1641, [2001] All ER (D) 254 (Oct)."***

67. The Plaintiff submitted that an award of $158,655 for pain, suffering and loss of amenity would be appropriate compensation for the Plaintiff's *Petit's* hernia, left L4-L5 spinal disc herniation with L4 root compression, numbness, and urinary incontinence.

68. The Defendant submitted that an award of $12,500 would be appropriate compensation for the injury that can be linked to the Index Accident, which is, in substance, a minor back injury. Both parties referred to the ***Judicial College Guidelines for The Assessment of General Damages in Personal Injury Cases***.

69. The Plaintiff referred to **Blanche Gibson v Public Hospital Authority** CLE/gen/0090 of 2004 and **Forbes v Murphy** CLE/gen/00043 of 1999 in support of the figure suggested by her for pain, suffering and loss of amenity. The Defendant referred to **McCoy v Williams** [2014] BHS J. No. 122 in support of the figure suggested by it for pain, suffering and loss of amenity.

70. Having considered the parties' submissions and the authorities laid over by them, and having regard to all relevant factors, including the plaintiff's age, health, loss of amenity and prognosis (to the extent there is evidence of the same), I consider the sum of **$18,000** reasonable compensation to the Plaintiff for pain and suffering and loss of amenity.

Future loss of earnings

71. No award for future loss of earnings can be made on the facts, as the symptoms currently impeding the Plaintiff in the labour market were merely accelerated by the Index Accident and

the period that those symptoms were accelerated is shorter than the period between the Index Accident and trial.

Loss of earning capacity/job opportunity

72. This is not a case in which a **Smith v Manchester** award is appropriate. As the Plaintiff's *Petit's* hernia was adequately addressed via surgery and the Index Accident only accelerated the onset of the Plaintiff's degenerative condition, any future handicap in the job market the Plaintiff might experience is not attributable to the Index Accident.

Future medical treatment, surgery and therapy

73. No award for future medical treatment, surgery and therapy can be made having regard to the finding that the Index Accident merely accelerated the Plaintiff's degenerative condition. The medical treatment, surgery and therapy would more likely than not have been required had the Index Accident not occurred. Furthermore, there is no estimate of the cost of future medical treatment, surgery and therapy properly before the Court.

Special damages

74. As appears from the extract from ***Lord Goddard***'s speech in **British Transport Commission v Gourley** [1956] AC 185 quoted at paragraph 46 above, special damages must be pleaded and proved.

75. With respect to the requirement that special damages must be pleaded, in ***Newton v. VRL (Nassau) Ltd. (d/b/a Super Club Breezes Bahamas)*** [2014] 1 BHS J. No. 149, ***Bain J*** explained at paragraph 40 that:

> ***"40 It is trite law that special damages must be specifically pleaded. The Supreme Court Order 18 Rule 12 provides: "Special Damage- The Plaintiff will not be allowed at the trial to give evidence of any special damages which is not claimed explicitly, either in his pleadings or particulars (Hayward v Pullinger and Partners, Ltd. (1950) 1 All E.R. 581; Anglo- Cyprian Trade Agencies, Ltd. v. Paphos Wine Industries, Ltd. (1951) 1 All E.R. 873). Special damage in the sense of a monetary loss which the Plaintiff has sustained up to date of trial must be pleaded and particularized; otherwise it cannot be recovered."***

76. With respect to the requirement that special damages must be proved, in **Lubin v Major** [1992] BHS J. No. 22, ***Henry J*** explained at paragraph 13:

> ***"…a person who alleges special damage must prove the same. It is not in general sufficient for him merely to plead special carnage 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, 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."***

77. The requirement that special damages must be proved is not inflexible. The certainty and precision insisted upon varies depending on the circumstances of the case. In **Ratcliffe v Evans** [1892] 2 QB 524, ***Bowen LJ*** said at pages 532 to 533:

> ***"In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."***

Prescription and medical expenses/co-pay

78. No award can be made for the Plaintiff's co-pay of her medical expenses as there is no evidence properly before the Court supporting the amount claimed by the Plaintiff.

Medical report

79. It is appropriate to award $336.00 to the Plaintiff for the cost of Dr. Chambers' medico-legal report as it was reasonable to procure that report and a receipt has been produced supporting the amount claimed.

Loss of earnings

80. The Plaintiff submitted that she should be awarded $47,428 to reflect her loss of earnings from 11 January 2019 to August 2020 (85 weeks at $430 per week) and 1 September 2020 to 11 August 2020 (49 weeks at $222 week; $222 being the difference between what she now earns versus what she earned before the Index Accident).

81. The Defendant submitted that the Plaintiff has not established loss of income from the Index Accident and that the amount sought by the Plaintiff for loss of income, in the absence of any proof that the same flowed from the Index Accident, is recoverable as compensation in separate pending proceedings brought by the Plaintiff for wrongful and unfair dismissal.

82. The Defendant chose to lead no evidence as to the reason for the Plaintiff's termination and the termination letter dated 11 January 2019 provides no reason for the Plaintiff's termination. The Plaintiff's uncontroverted evidence was that she was terminated by the Defendant while on sick leave and the natural inference is that it was because of the Index Accident.

83. It is appropriate to compensate the Plaintiff for loss of earnings from 11 January 2019 to 27 April 2020 (the end of the 2-year period of acceleration of her symptoms) as she would not, on the balance of probabilities, have lost her employment with the Defendant but for the Index Accident. I must, however, allow for the fact that the Plaintiff found a temporary job with Patronus Medical in March 2020. As there is no evidence of her salary at that job, I assume she suffered no loss of earnings during her month of employment with Patronus Medical. I accordingly award $28,810 (67 weeks at $430 per week) for past loss of income.

Maid services

84. The Plaintiff is a mother of several children (aged nearly 2, 9, 14 or 15 and 19 at the time of the Index Accident) who was responsible for housework prior to the Index Accident. After the Index Accident, she engaged the services of a maid to perform household chores, and, in particular, most of the washing and heavy detailing.

85. The Plaintiff claimed that she paid the maid $50.00 per day, two days a week, for a period from shortly after the Index Accident to 30 October 2019. The Plaintiff said her young children could not help her with housework because they had to attend school; her older child was "in and out"; and her partner had to work.

86. There is no doubt that a plaintiff sustaining personal injuries as a result of the negligence of a defendant is entitled to be compensated for domestic services reasonably required by such injuries: see **Forbes v Murphy** CLE/gen/00043 of 1999; **Chandler v Kaiser** [2007] 4 BHS J. No. 22.

87. The Defendant submitted that the Plaintiff has not proven this item of loss as she had not adduced any corroborating evidence. The Plaintiff filed a witness statement from the maid, Lealox Williams, on 6 August 2021, however Williams did not attend the assessment to give evidence and I was not invited or allowed to treat her witness statement as hearsay principally on the fact that Counsel for the Plaintiff withdrew the witness statement. Therefore, I accept the submission made by Counsel for the Defendant and decline to make any award in relation to maid services.

Total award

88. The total award ordered to the Plaintiff is as follows:

General Damages

a) Pain, Suffering and Loss of Amenities **$18,000**

b) Smith & Manchester Award **Nil**

c) Future Surgery, Medical Treatment etc. **Nil**

d) Loss of Future Earnings **Nil**

Special Damages

a) Co-pay **Nil**

b) Dr. Chambers' medico-legal report **$336** (which crystallized on 29 August 2019)

c) Loss of earnings **$28,810** (which crystallized on 27 April 2020)

d) Housekeeping **Nil**

Total: $47,146.00

89. Judgment is awarded to the Plaintiff in the sum of **$47,146.00.** The damages awarded for pain, suffering and loss of amenity shall bear interest at the rate of 2% per annum from the date of service of the statement of claim to the date of judgment. Special damages shall bear interest at the rate of 2% per annum from the date that they crystallized to the date of judgment. Interest is to accrue on the judgment sum from the date of judgment at the statutory rate of 6.25%.

Cost

90. I instructed Counsel to provide submissions as to cost for fixed determination. Liability was determined by consent before Justice Thompson and as mentioned the Plaintiff gave evidence on her own behalf. 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 2 days.

91. The Plaintiff provided a Bill of Costs file 20 September 2021 in the amount of $47,206.00 inclusive of disbursements. No submissions were made on behalf of the Defendant acknowledging costs. Counsel for the Plaintiff seeks a standard fee of $500 per hour or a per diem rate of $5,000.00. Taking into consideration disbursements, the time spent and research involved in this matter, I will fix legal cost (inclusive of disbursements) to the Plaintiff in the amount of **$30,000.00**.

-- End --

Dated 7th September A.D. 2023

[Original signed and sealed]
Renaldo Toote
Deputy Registrar