COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2004/CLE/gen/00492

B E T W E E N

ELVA LINDSAY

Plaintiff

AND

GOODMANS BAY DEVELOPMENT COMPANY LTD.

Defendant

Before: Deputy Registrar Mr. Renaldo Toote

Appearances: Cyril Ebong with Sidney Campbell for the Plaintiff
Wynsome Carey with Darzhon Rolle for the Defendant

Hearing dates: 8 March 2022 and 3 May 2022

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 a slip and fall accident which occurred at the Defendant's building complex, known as Goodman's Bay Corporate Center. The issue of liability took place before *Winder J* (as he then was) on 15 October 2020 and judgment was given in favour of the Plaintiff on 7 December 2020.

[2]. At the assessment, the sole witness for the Plaintiff was the Plaintiff herself. Her amended witness statement filed on 25 February 2022 stood as her evidence-in-chief and she was cross-examined and re-examined in accordance with the usual practice. A writ of subpoena ad testificandum dated 6 December 2021 was issued and served to compel the attendance of Dr. Clyde Munnings ("Dr. Munnings") to give evidence on behalf of the Plaintiff, but Dr. Munnings did not obey the subpoena. The Defendant called no witnesses.

[3]. Both parties relied on the contents of an agreed bundle of documents filed on 14 September 2020 (the "Agreed Bundle") which was prepared in accordance with **Practice Direction No. 2 (1974-1978)**. Prior to the commencement of the assessment, the Defendant served a notice of objection on the Plaintiff filed on 30 November 2021 (the "Notice of Objection") objecting to the medical reports prepared by Dr. Munnings in the Agreed Bundle being admitted as evidence of their contents and requiring them to be proved.

Background

[4]. For the purposes of the summary of the background which follows, I have had regard to the contents of the Agreed Bundle (other than the documents in the Agreed Bundle objected to by the Defendant) and the testimony of the Plaintiff.

[5]. The Plaintiff, who was born on 26 January 1951, was employed by Canadian Imperial Bank of Commerce in 2001 as a receptionist. Canadian Imperial Bank of Commerce were then tenants of the Defendant and maintained an office at its premises.

[6]. On 29 June 2001, the Plaintiff was accompanying her supervisor, Carolyn Longley, out of the back door of the Defendant's premises when she slipped on the wet tiled floor and fell heavily, twisting her ankle and hitting her head on the tiled floor (the "Index Accident"). She blacked out for a split second and when she got up, she felt a "big lump" on her head. At the time, the Plaintiff was 50 years old and weighed 245 pounds.

[7]. Following unsuccessful attempts at settlement, the Plaintiff commenced this action by a generally indorsed writ of summons filed on 20 April 2004. The Plaintiff filed an amended statement of claim on 20 November 2015 formulating a claim in negligence alleging occupier's liability. A defence was filed by the Defendant on 16 November 2017 denying liability for negligence.

[8]. On 15 October 2020, the trial on the issue of liability took place before *Winder J* (as he then was). The Plaintiff was the only witness in her case. At the close of the Plaintiff's case, the Defendant elected not to call any witnesses and to instead make a submission of no case to answer. That submission failed. Resultantly, judgment for damages to be assessed was given

in favour of the Plaintiff on 7 December 2020 and the matter proceeded to the assessment of damages herein.

[9]. The Plaintiff's amended statement of claim pleaded that the following injuries and loss and damage were sustained and/or are being sustained by her as a result of the Index Accident:

PARTICULARS OF INJURIES

9. As a result of the accident, the Plaintiff sustained the following injuries:

- **i. Closed head injury**
- **ii. Cerebral concussion**
- **iii. Post concussive syndrome**
- **iv. A cervical strain/sprain**
- **v. Cephalgia and cervical radiculopathy**
- **vi. Lower back pain syndrome**
- **vii. Herniated disc at C5, C6 and C6 and C7 after MRI scan**
- **viii. Lumbrosacral degenerative disc disease L5 at S1 with a bulging disc at that level**
- **ix. Accompanying symptom resulting from fall include relenting headaches, dizziness, spasms, shoulder pain, low back pain, lightheadedness, memory loss, poor concentration and poor attention.**

PARTICULARS OF LOSS AND DAMAGES

10. By reason of the matter aforesaid, the Plaintiff has sustained serious personal injuries, loss and damages,

a. The Plaintiff was fifty (50) years of age at the time of the accident, having been born on January 26, 1951. The Plaintiff was walking on the tiled floor in the premises owned by the Defendant situated at Goodman's Bay Corporate Centre when she slipped and fell heavily on a wet surface therein.

b. Following the accident the Plaintiff received medical attention at Doctors Hospital where she was X-rayed, given MRI treatments, given medication, advised to follow-up on Orthopedic Treatment and was evaluated. The Plaintiff further, underwent medical advice and treatments.

c. As a result of the injuries sustained the Plaintiff was required to undergo treatments which resulted in a substantial amount of time off from work

d. Between the time off from the accident and the forced resignation of the Plaintiff by her employer the Plaintiff had accumulated 233 days off from work as sick days which resulted in her employer asking her to resign otherwise they would have to dismiss her from her job

e. The Plaintiff continues to suffer pain, loss of amenities and loss of earning;

f. Due to the Plaintiff's injuries and her age she is unable to secure new employment to the extent that she was previously employed. Thereby she would not be able to earn a normal salary in the future.

g. The Plaintiff has suffered financial loss as a result of the accident, namely, the cost of medical consultation, treatment, physiotherapy and medication.

h. The Plaintiff claims interest on her special damages from the date of loss of employment to payment or judgment.

i. The Plaintiff intends to rely on the evidence and medical report of Dr. Clyde A. Munnings Consultant Neurologist at Doctor's Hospital and other medical reports.

j. The Plaintiff further claims interest pursuant to the Civil Procedure (Award of Interest) Act, 1992 from the date of judgment until liquidation thereto.

SPECIAL DAMAGES

Medical Expenses	**$4,748.00**
Loss of Earning	**$105,000.00**
Airline Tickets to and from USA	**$998.00**
Living accommodation while in USA	**$858.00**
Ongoing Expenses	
Medical follow up	**$4,800.00**
Physical therapy	**$24,000.00**

GENERAL DAMAGES

Pain and Suffering
Loss of Amenities
Future Medical Expense

AND THE PLAINTIFF CLAIMS

Special Damages	**$140,404.00**
General Damages	
Interest Pursuant to the Civil Procedure (Award of interest) Act 1992	
Cost	
Further or other relief as the Court deems necessary	

[10]. While it is not pleaded in her amended statement of claim, the Plaintiff claimed that she suffered a cerebral hemorrhage as a consequence of the Index Accident and developed hypertension and diabetes as a result of the Index Accident.

[11]. The Plaintiff maintained she was healthy, pain-free and not on medication before the Index Accident and said that she was immediately symptomatic after the Index Accident. There was notable inconsistencies in her evidence as to whether she suffered from diabetes, hypertension, and early onset Alzheimer's prior to the Index Accident. There was also a minor discrepancy between her pleaded case and her evidence as to precisely when she began experiencing symptoms, but this was not material. On her evidence, she began experiencing headaches the following day, and a "terrible burning sensation", which led her to attend Doctor's Hospital in New Providence on 30 June 2001.

[12]. According to the Plaintiff, after "a battery of tests, x-rays and MRIs" at Doctor's Hospital, Dr. Iferenta, her attending emergency physician, determined she had a cerebral hemorrhage, though she (the Plaintiff) declined the recommended surgery, and she was kept at Doctors Hospital "for a very long time" on "large doses of medication" while receiving treatment.

Neither Dr. Iferenta's report nor any invoices or receipts regarding her stay at Doctor's Hospital were produced in evidence.

[13]. The Plaintiff's evidence was that, following her discharge from Doctors Hospital, she travelled to the United States for medical treatment and, on her return to Nassau, she saw Dr. Munnings, a consultant neurologist at Doctor's Hospital, "for a long time" for headaches. In questioning by the Court, the Plaintiff said that she visited Dr. Munnings because of her cerebral hemorrhage and he agreed with Dr. Iferenta that she did indeed have a cerebral hemorrhage.

[14]. The Plaintiff said that she was put on "numerous medications" (to adopt her words) following the Index Accident including medications to prevent seizures. The Plaintiff did not particularize the medications that she was placed on in her own testimony save that in questioning by her own counsel, the Plaintiff said that she was prescribed neurotropic medications including meperidine, gabapentin, butalbital and Skelaxin.

[15]. According to the Plaintiff, after the Index Accident, she was "in and out of hospital" and "lost a lot of time from work" engaging in therapy, attending doctors and trying to address memory loss that she suffered as a result of the Index Accident. The Plaintiff provided limited particulars regarding this in her evidence. Notably, she did not verify the pleaded allegation that she accumulated 233 days off from work at Canadian Imperial Bank of Commerce as sick days.

[16]. By letter dated 25 November 2003, the National Insurance Board communicated its final assessment of the Plaintiff's claim for Disablement Benefit to the Plaintiff, advising that Dr. Eugene Gray had assessed her level of disablement at 20% for life and accordingly, that a one-time "Disablement Grant" in the amount of $2,000 would be paid to her. There is, no medical report from Dr. Gray before the Court and it is not said what Dr. Gray relied upon to make his assessment.

[17]. According to a letter from the Plaintiff's attorneys dated 14 April 2016 contained in the Agreed Bundle, Dr. Munnings assessed the Plaintiff as being 30-35% disabled in early 2004.

[18]. The Plaintiff suffered a stroke on 7 May 2004 and a second stroke in July 2005, both of which she viewed as being a consequence of the Index Accident. On her evidence, Dr. Munnings told her that a stroke could be expected. The strokes required further hospitalization. The Plaintiff said that her first stroke, combined with the other injuries she suffered as a result of the Index Accident, rendered her unable to continue working with Canadian Imperial Bank of Commerce and she resigned from her employment there on 30 December 2004. The Plaintiff relocated to the state of Georgia in the United States sometime around 2005. According to a letter from the Plaintiff's attorneys dated 16 December 2005, Dr. Munnings assessed the Plaintiff as being 100% disabled after the Plaintiff's second stroke.

[19]. On 6 February 2006, the Plaintiff attended the University of Miami School of Medicine at the request of the Defendant to see Dr. Rodrigo O. Kuljis ("Dr. Kuljis"), the Esther Lichtenstein Professor of Neurology and Psychiatry at the University of Miami, for a neurological

evaluation. Dr. Kuljis examined the Plaintiff and prepared a report giving his impressions and a treatment plan ("the Kuljis Report").

[20]. Prior to the Plaintiff being examined by Dr. Kuljis, she provided the Defendant's attorneys with a signed letter of authorization drafted by them dated 8 November 2005 which permitted them to obtain information from the Plaintiff's attending physicians regarding the medical treatment she received after the Index Accident.

[21]. After Dr. Kuljis examined the Plaintiff, he referred her to Dr. Carlton S. Gass, Ph.D ("Dr. Gass"), a colleague of his in the Clinical and Neuropsychology Department, for a neuropsychological examination. The Plaintiff was examined by Dr. Gass on 14 August 2006 and he prepared a report summarizing his findings dated 15 August 2006 (the "Gass Report").

[22]. The Plaintiff's evidence was that she continues to feel the effects of the Index Accident to the present day and she is experiencing arthritis and memory loss, which was something Dr. Munnings warned her would occur. There was no recent medical evidence provided to corroborate the Plaintiff's condition, the last medical reports dating from 2016.

[23]. The Plaintiff's medical expenses since the Index Accident have in large part been met by the National Insurance Board and her husband's private medical insurance, but there are uncovered expenses the Plaintiff has claimed reimbursement for from the Defendant.

The medical evidence

[24]. It is trite law that the Plaintiff bears the burden of proving the nature and extent of the injuries she suffered as a result of the Index Accident. No medical expert testified as to those injuries, the treatment she received or her prognosis. This omission necessarily operates to the detriment of the Plaintiff. In personal injury cases, the opinion of a medical expert who owes a duty to the Court and whose evidence can be thoroughly tested by cross-examination is frequently invaluable as an aid to the Court in its assessment of damages.

[25]. There are, nonetheless, a number of medical reports before the Court. To the extent that the medical reports are to be considered, they must be evaluated as hearsay evidence. Where hearsay is admitted, the Court is required to take special care in assessing the weight to be given to it and must have regard to all the circumstances that may affect its reliability, though, in principle, there is nothing to exclude a fact from being proven exclusively by hearsay evidence: **Bacon v Brown** [2015] 3 BHS J. No. 38. **Section 62(3)** of the **Evidence Act** lists considerations that may be relevant when assessing the weight to be given to hearsay evidence, including the contemporaneity of the statement and the incentive of the maker of the statement to conceal or misrepresent the facts.

Dr. Munnings' reports

[26]. I turn to the medical reports and begin with those prepared by Dr. Munnings. The Defendant objected to Dr. Munnings' reports being used or referred to by witnesses in the course of the assessment on the basis that the reports are hearsay and are inadmissible. **Section 38** of the **Evidence Act** provides that, where a fact is proved by evidence that a statement as to the fact was made by any person or that a statement as to the fact is contained or recorded in any

book, document or other record, the fact is said to be proved by hearsay evidence. **Section 39** of the **Evidence Act** renders hearsay evidence presumptively inadmissible unless it falls within the statutory exceptions contained in that section or elsewhere within the Act.

[27]. While the Defendant acknowledged that Dr. Munnings' reports were included in the Agreed Bundle, the Defendant asserted the reports were agreed to be included on the premise that a medical expert would be called by the Plaintiff to substantiate their veracity, and, when this did not appear to be the case, objection was immediately taken by the Defendant. The Defendant contended Dr. Munnings' reports are inadmissible as evidence of their contents and cannot be treated as evidence of the facts stated in them. No objection was taken by the Defendant to the Plaintiff relying on the other medical reports contained in the Agreed Bundle to which the same objections might have been made.

[28]. The Defendant submitted that the Court of Appeal decision in **Colina Imperial Insurance Co. v Enos Gardiner** SCCivApp & Cais No. 117 of 2015 ("**Enos Gardiner**") provides a "useful and conclusive" discussion on the issue of documents contained in an agreed bundle. That language is redolent of ***Winder J***'s (as he then was) discussion of **Enos Gardiner** in **Tamika Bootle v Colina Imperial Insurance Ltd.** 2009/CLE/gen/01378, where he considered and summarized the facts and holdings in **Enos Gardiner** at paragraphs 10 and 11 in the following terms:

> ***"10. The recent Court of Appeal decision in Colina Imperial Insurance Co. v Enos Gardiner SCCivV App & CAIS No. 117 of 2015 provides a useful and conclusive discussion on this issue of documents contained in an agreed bundle. The circumstances are indeed similar to the instant case. On 25 July 2011, Mrs. Monique Gardiner applied for a life insurance policy with the appellant insurer with a face value of $150,000. She completed the company's proposal form and subsequently attended before the appellant's paramedical examiner and answered, all in the negative, specific questions designed to elicit information pertaining to her medical history. The appellant issued the policy on 8 December 2011, however, Mrs. Gardiner died on 18 November, 2012, approximately eleven (11) months afterwards. Her husband, now Mr. Gardiner, was the named beneficiary under the policy. He submitted a claim under the policy for payment of the sum assured. As the policyholder's death occurred within the two-year contestability period stipulated in the policy, the appellant commenced its investigations. Mrs. Gardiner's medical records were obtained from the Department of Public Health. At first instance the trial judge found that her medical record compiled in the Department of Public health was hearsay and inadmissible.***
>
> ***11. On appeal the Court of Appeal held, per Crane-Scott JA, that:***
> ***(1) The inclusion of a document in an agreed trial bundle in accordance with Supreme Court Practice Direction No. 2 means that it is admitted in evidence before the judge by agreement, without the party wishing to rely on it having to call a witness to formally produce it or to authenticate it. While the document is undeniably in evidence by consent, its relevance and significance to the issues-in-dispute will usually only become evident when witnesses who are called to testify at the trial are referred to the document and give secondary evidence about its contents. Sections 41 and 43(3) respectively of the Evidence Act, permit secondary evidence of a document to be given, inter alia, through oral accounts of the contents of a document given by a witness who has seen the document.***
>
> ***(2) The fact that a specific document relied on by one party is contained in an agreed trial bundle, however, does not, prevent the other party from making a formal objection at the start of trial to its contents being used or referred to witnesses in the course of the trial. However, advance notice of any objection should be given to the party wishing to rely on such a document***

so that the party relying on it will be alerted in advance of the trial of the necessity to call the maker of the document to authenticate it and give direct evidence as to its contents.

(3) However, if (as occurred in the court below) no such objection is taken before the commencement of the trial, and a specific document in the agreed bundle is used and oral testimony is given (without objection) by witnesses who have seen it, the contents of the document are undeniably proved by secondary evidence as provided in sections 41 and 43(e) of the Act.

(4) In the circumstances of this particular trial in which the contents of the DPH Summary and the other documents in the agreed bundle were utilized and referred to (without objection) during the testimony of the various witnesses, it was not only unreasonable but unfair and plainly wrong for the learned judge to uphold the objections to the document."

[29]. The Defendant submitted that, if the Plaintiff were to be allowed to rely on the medical reports of Dr. Munnings without him being called as a witness, it would be significantly prejudicial to the Defendant as the Defendant has not been and is not able to challenge Dr. Munnings' evidence by cross-examination in the ordinary way. The Defendant submitted this was particularly important given there are inconsistencies in the various medical reports. The Defendant referred to **Smith v Exuma Waste Management Company Ltd.** [2015] 3 BHS J No. 44. In that case, ***Fraser J*** (as she then was) said:

"5 There is no witness statement by the Doctor but Counsel says that the medical evidence is critical. If so, why is evidence not properly before this court. Why has the doctor not been called? This evidence is hearsay and there has been no hearsay notice taken out before the trial. In order for hearsay evidence to be validly admitted without calling the witness, Counsel would have to show that the doctor is dead or unfit to attend. There has been no submission that the Doctor is dead, unfit by reason of body or mind to attend Court. Counsel for the Plaintiff has made any number of excuses as to why she has not been able to produce this evidence before the Court. All of which I found to be most unacceptable. The admission of this evidence could only cause prejudice to the parties defending the case. They have not been given an opportunity to respond properly to any matters arising in the report and the Court has no means of seeing if the evidence is credible through cross examination. Both the Defendants and the Third Party have contested the admissibility of this evidence. Counsel for the Plaintiff indicated that she would subpoena the Doctor and that has not happened.

6 I cannot allow this evidence. I reserve my ruling in the substantive matter which will not include any reference to the medical evidence of Doctor Gibson."

[30]. The Plaintiff submitted that Dr. Munnings' medical reports are admissible pursuant to **section 60(1)** and **60(3)** of the **Evidence Act** as a "record" or "records" compiled by a person ostensibly acting under a duty. **Section 60** of the **Evidence Act** provides:

"60. (1) Without prejudice to section 61, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty; and applies also where the person compiling the record is himself the person by whom the information is supplied.

(2) Where in any civil proceedings a party desiring to give a statement in evidence by virtue of this section has called or intends to call as a witness in the proceedings the person who originally supplied the information from which the record containing the statement was compiled, the statement — (a) shall not be given in evidence by virtue of this section on behalf of that party without the leave of the court; and (b) without prejudice to paragraph (a) shall not without the leave of the court be given in evidence by virtue of this section on behalf of that party before the conclusion of the examination-in-chief of the person who originally supplied the said information.

(3) Any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any trade, business, profession or other occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him."

[31]. The Plaintiff did not elaborate on how the conditions of **section 60** of the **Evidence Act** are met in relation to Dr. Munnings' reports but instead simply relied on **Enos Gardiner** as authority supporting the admissibility of the reports, *insofar* as the Court of Appeal in that case held that the "DPH Summary" was admissible pursuant to **section 60** of the **Evidence Act**. ***Crane-Scott JA*** said at paragraphs 82 and 86:

"82. Section 60 of the Evidence Act, however, clearly facilitates the admission in evidence in civil proceedings of statements of fact contained in a document compiled by a person acting under a duty in circumstances where: firstly, the content of the document is, or forms part of a record compiled from information supplied by another person who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information; and secondly, where the information contained in the record is supplied to the compiler of the record by such person either directly or through one or more intermediaries each acting under a duty.

…

86. The Summary is dated June 30, 2013 and is ostensibly signed by Dr. Pearl McMillan, in her capacity as the Director of Public Health. We are satisfied that notwithstanding the rule against hearsay in section 39(1), the DPH Summary was admissible in accordance with section 60 as a 'record' compiled by a person ostensibly acting under a duty, from information supplied by the attending doctor(s) at the Flamingo Clinic who would have had personal knowledge of Mrs. Gardiner's medical condition at the time of her visits in 2007 and 2009."

[32]. The "DPH Summary" was described earlier in the Court of Appeal's judgment at paragraphs 13 to 16 thusly:

"13. The medical records provided to Colina by the Department of Public Health were contained in the 'Plaintiff's Agreed Bundle' for use at the trial. The records included, inter alia, a Medical Summary of Patient Visits Report ('DPH Summary') ostensibly prepared by the Director of the Department of Public Health, a Dr. Pearl McMillan on June 30, 2013; and a certified copy of a DPH Radiology and Ultrasound Form dated 5th July 2007 which both indicated that a Monique Bridgewater had undergone a routine chest radiograph (CXR) following a clinical diagnosis of 'uncontrolled hypertension and obesity'.

14. The DPH Summary revealed that a Monique T. Bridgewater had visited the Ministry of Health's Flamingo Gardens Clinic on 5th July 2007 and 1st August 2009 respectively.

15. As regards her 5th July 2007 visit, the contents of the DPH Summary reported that based on the Ministry's records, the patient had visited the Flamingo Gardens Clinic for a blood pressure check and had complained of frequent headaches. The information in the Summary also revealed that she was a 'known hypertensive for two years' and that she was 'not on any medication'. Additionally, according to the Summary, at the time of her visit, she was found to have had an elevated blood pressure of 160/120. The DPH Summary also stated that the

> ***attending doctor had assessed the patient as having 'uncontrolled hypertension' and had prescribed medication (Natralix SR and Adalat OROS 30mg) and diet and exercise. She was also referred for a CXR, an ECG, a CBC and Chemistry.***
>
> ***16. According to the DPH Summary, approximately two years later, on 1st August 2009, the patient visited the Flamingo Clinic again complaining once more of headaches. On that occasion she was again found to have had an elevated blood pressure of 150/90 and had weighed-in at 254 pounds. She was prescribed Tonopan by the attending physician and advised to pursue diet and exercise."***

[33]. The Plaintiff alternatively submitted that the Defendant is estopped from denying the use of Dr. Munnings' reports, inasmuch as a common assumption existed between the parties that the Defendant could obtain and use the Plaintiff's medical records including Dr. Munnings' reports in connection with this claim.

[34]. In 2005, the Plaintiff provided the Defendant's attorneys with a medical authorization to permit them to obtain medical information relating to the Plaintiff directly from the Plaintiff's medical providers. The Plaintiff submitted (adopting the arguments recorded at paragraphs 69 and 70 of the Court of Appeal's decision in **Enos Gardiner**) that this gives rise to an estoppel, as it would be unjust if the Plaintiff were denied the ability to utilize the records evidencing the nature and extent of her injuries. No authority was provided for the proposition that merely providing a medical authorization lent itself to the creation of an estoppel by convention in the strict sense, however.

[35]. For my part, unassisted by submissions on the specific construction that I should place on **section 60**, I incline to the view that Dr. Munnings' report dated 11 July 2001 is in principle admissible under the section because it is a "record" within the meaning of the section, but his other reports are not. Dr. Munnings' report dated 11 July 2001 purports to be a "summary of essential findings" and summarizes the Plaintiff's relevant medical history, diagnosis and treatment as at the date of the letter. The other reports prepared by Dr. Munnings in the Agreed Bundle lie a greater distance from the "DPH Summary" in **Enos Gardiner** because they contain commentary or expressions of opinion from Dr. Munnings. That detracts from their character as "records".

[36]. Supplementing my findings with respect to **section 60** of the **Evidence Act**, **section 58** of the **Evidence Act** renders hearsay evidence not falling within **section 39** of the **Evidence Act** admissible in civil proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible, subject to the provisions of **section 58** itself and rules of court. **Order 38, rule 28** of the **Rules of the Supreme Court, 1978** confers a discretion on the Court to admit hearsay evidence notwithstanding that there has been a failure to serve a hearsay notice or to call a witness at trial in response to a counter-notice: **note 38/29/1** in the **Supreme Court Practice 1997**. This discretion falls to be exercised in the context that the admission of hearsay evidence is an exception from the norm that the best evidence is oral evidence at trial.

[37]. In my judgment, on the very unusual facts of this case, it is in the interests of justice that I exercise my discretion to admit Dr. Munnings' report dated 11 July 2001 (if I am wrong that it is a "record" for the purposes of **section 60** of the **Evidence Act**) and Dr. Munnings' report 21 January 2004. The evidence is important to the Plaintiff's case and the Plaintiff attempted

to compel Dr. Munnings' attendance to give evidence but he disobeyed the process of the Court. No genuine question about the authenticity of the reports arises. The contents of both reports were referred to by Dr. Kuljis in the Kuljis Report, a document relied upon by the Defendant, and the Defendant made submissions addressing or referring to Dr. Munnings' reports in its written opening submissions dated 19 November 2021 at paragraphs 20, 23 and 26. With respect to prejudice to the Defendant, allowance will be made for the lack of cross-examination in determining weight and the Defendant has had ample opportunity to meet the contents of Dr. Munnings' reports by its own evidence if it adjudged the Kuljis Report and Gass Report inadequate for that purpose. The Plaintiff's original statement of claim filed in December 2004 made clear that the Plaintiff would be relying on Dr. Munnings' reports. In all the circumstances, ***Smith v Exuma Waste Management Company Ltd. [2015] 3 BHS J No. 44*** is distinguishable.

[38]. In his report dated 11 July 2001, Dr. Munnings recorded that, on examining the Plaintiff, he found cervical tenderness and spasms, short term memory, concentration and attention decrease and LE weakness. He diagnosed her as having a "closed head injury/trauma", cerebral concussion, post concussive syndrome, hypertension and a lumbosacral sprain and prescribed her Voxx, an anti-inflammatory for pain, Singular for asthma, Vitamin B-6 and sirdalud, a muscle relaxant.

[39]. In his report dated 21 January 2004, Dr. Munnings stated that:

(i) **the Plaintiff reported twisting her left ankle. She also reported hitting her head and having loss of consciousness and amnesia. She had swelling of the right forehead, she developed headaches on the right side, right ear pain, right finger numbness, right facial numbness, drowsiness, excessive sleepiness, pain and stiffness, and reported headaches in the posteroparietal area, always feeling "spaced out", dizziness, vertigo, nausea without vomiting, chest pains, shortness of breath, palpitations and bilateral hand tingling right greater than left.**

(ii) **the Plaintiff was initially treated with Vioxx 25 mg twice a day.**

(iii) **the Plaintiff experienced photophobia with headaches and bilateral hand tremors.**

(iv) **the Plaintiff was initially diagnosed with closed head injury, cerebral concussion, post concussive syndrome, post concussive migraines, a cervical strain/sprain, cephalgia and cervical radiculopathy, myelopathy. She was also diagnosed with a low back syndrome.**

(v) **the Plaintiff was started on Vitamin B6, calcium, magnesium and the Vioxx was continued.**

(vi) **the Plaintiff's symptoms persisted and progressed to a point on 15 July 2001 that she had to be admitted to Doctors Hospital. A MRI scan showed a herniated disc at C5, C6 and C6, C7, with mild compression on the spinal cord and bilateral neuroforaminal encroachment. A MRI of the lumbosacral spine showed degenerative disc disease at L5, S1, with a bulging disc at that level. Medications at the time were changed to include Toradol 10mg three times a day, Robaxin 1500 mg three times a day and Decadron and Dormicum 7.5mg.**

(vii) **the Plaintiff was referred for physical therapy.**

(viii) **between 2001 and 2004, the Plaintiff had unrelenting headaches, memory loss, poor attention and concentration, neck pains and spasms, bilateral shoulder pains, bilateral arm pains and tremors, mid-back pain, low back pain, headaches, dizziness and vertigo. The Plaintiff had none of these symptoms prior to the Index Accident and her concussion. The Plaintiff had been followed in the Neurology Clinic on numerous occasions for medication adjustment and temporary hospitalizations. She had multiple days off from work due to illnesses as a result of her injuries.**

(ix) **on 30 July 2001, an EMG and nerve conduction study showed nerve damage to the median nerve and also a C8,T1 radiculopathy, which is nerve damage in the neck.**

(x) **the next Neurology clinic visit was on 9 August 2001. The Plaintiff was admitted to the Emergency Room at Doctor's Hospital on 30 October 2001 and underwent an MRI scan of the brain, which showed a small area of low abnormal signal within the right periventricular and**

supraventricular region, most consistent with an old hemorrhage. The old hemorrhage likely came from the head injury.

(xi) **the Plaintiff was next seen in the Neurology Clinic on 6 November 2001. Additional visits included 14 November 2001, 12 December 2001, 6 January 2002, 22 January 2002, 5 February 2002 and 12 February 2002.**

(xii) **the Plaintiff was again seen in the Neurology Clinic on 26 February 2002, 19 March 2002 and 21 May 2002. These visits had to do with symptoms as a result of her fall. These symptoms included persisting and unrelenting headaches, dizziness, vertigo, nausea, palpitations, chest pain, neck pain, spasms, bilateral shoulder pain, low back pain, lightheadedness, memory loss, poor concentration and poor attention.**

(xiii) **on 21 March 2002, the Plaintiff had to be evaluated by Gastroenterology and was found to have bleeding internal hemorrhoids.**

(xiv) **the Plaintiff was next seen on 30 July 2002, 13 August 2002, 3 September 2002, 12 November 2002, 7 January 2003, 4 February 2003, 11 March 2003, 29 April 2003, 8 July 2003, 2 September 2003, 14 October 2003, 4 November 2003, 2 December 2003 and 29 December 2003.**

(xv) **at her most recent visit on 5 January 2004, the Plaintiff continued to complain of severe headaches, neck pain, dizziness, lightheadedness, vertigo, tinnitus, bilateral shoulder pain and spasms, mid-back pain, low back pain and spasms radiating to both legs, hand tremors, poor memory, poor concentration and poor attention.**

(xvi) **the Plaintiff's medications at the time of the letter were Sirdilude 4 mg, Topamax 50mg, Tylex 750 mg, Nneurontin 400mg, Arcoxia 120mg, Vitamin B6, Vitamin B12, Vitamin E, Calcium, Magnesium and Arcallion.**

(xvii) **the Plaintiff's condition was chronic. 18 months after a head injury, if the symptoms have not cleared completely, they will be chronic for a lifetime.**

(xviii) **the Plaintiff will need continued neurologic follow up in the pattern established, most likely on a monthly basis, indefinitely. The cost of medication is anywhere from $300-$400 per month. She may need physical therapy from time to time, once to twice a year, eight to sixteen sessions per year, which is generally $100-$150 per session.**

(xix) **the Plaintiff should be rated at 30-35% disabled. As arthritis sets into an injured neck and lower spine, her painful symptoms are only expected to worsen.**

Dr. Brown's report

[40]. As mentioned above, on 30 August 2001, the Plaintiff was examined by Dr. Brown of Open MRI of America.

[41]. The Brown Report recorded the following impressions based on the results of an MRI of the Plaintiff's brain:

(i) **there was an approximately 2 cm area of signal abnormality within the right parietal lobe which may have represented avascular malformation with the differential diagnosis including inflammatory and less likely neoplastic etiology.**

(ii) **there was mild signal abnormality within the deep periventricular white matter with the differential diagnosis including entities such as deep white matter ischemic change, inflammatory process, demyelinating disease and vasculitis.**

(iii) **there was an approximately 3 cm region within the extra-axial spaces of the anterior right parietal/frontal lobe which may have represented an old or subacute subdural hematoma versus volume averaging.**

(iv) **the cavernous portion of the left internal carotid artery was not as well defined as the right internal carotid artery. That finding was of uncertain etiology.**

Dr. Vaicys' report

[42]. As mentioned above, on 11 September 2001, the Plaintiff was examined by Dr. Vaicys of Memorial Healthcare System.

[43]. The Vaicys Report noted a steak of old hemorrhage or an old thrombosed venous angioma in the right peri or supraventricular region. It stated *inter alia*:

> *"…echo images suggest streaky area of old hemorrhage or old thrombosed venous angioma. There is no evidence of fast flow either arterial or venous within the lesion. No vascular malformations are seen elsewhere. Dural venous sinuses appear patent. No aneurysm is visible. The left oen segment is extremely thin. The main anterior cerebral artery appears to be supplied by the anterior cerebral artery with other branches arising from the right side. I am not certain whether this is acquired or congenital although this could easily be congenital."*

Dr. Kuljis' report

[44]. As mentioned above, on 6 February 2006, the Plaintiff was examined by Dr. Kuljis of the University of Miami School of Medicine.

[45]. The Kuljis Report recorded the reason for the Plaintiff's consultation with Dr. Kuljis as follows:

> *"Head trauma- legal referral…since 2001. She came in unaccompanied reporting '…people I have a claim against referred me to you…this is for their benefit…cerebral hemorrhage from 2001, I am still experiencing headaches…backaches, still experiencing the back pains, I think I went to the emergency room last month…I've had two strokes since the fall…May 7 2004 and July 2005…' However she could not describe the symptoms from the later, other than 'I've been blessed…first one was [weakness] off the right [pointing to the right thigh], and the second with numbness or pain, I don't remember, on the left'. She also reports, on request '…blurred vision, problems with legs…heel spurs…that's all I can think of…but memory loss is getting worse…that's a big thing…my kids tell me…mommy, you're repeating yourself…' As for the headaches, she reports that they start suboccipitally and descend into the lower neck, '…it's a burning sensation if I'm stressed, if I'm tired it's just like a pressure…but it's a constant headaches, it's just there…being there constantly all the time…when I feel it I know it's time to take it easy…sometimes I wake up in the morning it's just there, and sometimes it's better…' but fails to describe it beyond that. She was unable to state precisely what medications have helped, except '…the Neurontin works for a short time…Motrin is OK For fifteen minutes, half and hour.' The headache is worsened by, '…rushing around…loud noise…' She was unable to communicate symptoms associated with the pain in the head, other than '…blurry eyesight.' Denies nausea and vomiting."*

[46]. The Kuljis Report summarized the medical records reviewed by Dr. Kuljis as follows:

> "*Medical records available included a note from CAMI Neurologic Associates dated 11 July 2001 which indicates she was felt to have closed head injury/head trauma, cerebral concussion, post concussive syndrome, hypertension and lumbosacral sprain. Brain MRI 08/30/2001 revealed a signal abnormality in the parietal lobe felt to represent an, '…avascular malformation…deep white matter ischemic change…old or subacute subdural hematoma vs. volume averaging'. Another MRI 09/11/2011 revealed '…a streak of old hemorrhage or perhaps an old thrombosed venous angioma," in the "…right peri or supraventricular region.' A note from Clyde A. Munnings dated 01/21/2004 describes headaches after a fall on 06/09/2001, with loss of consciousness and amnesia, dizziness, vertigo, nausea without vomiting and bilateral hand tingling. Dr.*

> *Munnings further describes a …herniated disc at C5,C6 and C6, C7 with mild compression of the spinal cord…degenerative disc disease at C5, C6 and C6, C7, with mild compression of the spinal cord…degenerative disc disease at L5, S1, with a bulging disc at that level …EMG and nerve conduction studies showed nerve damage to the median nerve and also to C8, T1 radiculopathy…on 08/09/2001…MRI scan of the brain…showed a small area of a law abnormal signal within the right periventricular and supraventricular region…most consistent with old hemorrhage…January 05, 2004…she continues to complain of severe headaches, neck pain, dizziness, lightheadedness, vertigo, tinnitus, bilateral shoulder pain and spasms, mid-back pain, low back pain, and spasms radiating to both legs, hand tremors, poor concentration and poor attention."*

[47]. The Kuljis Report summarized Dr. Kuljis' clinical impressions after examining the Plaintiff as follows:

> *"(1)Post concussion syndrome, probable (Based on history of head trauma and brief loss of consciousness from her supervisor, who reportedly witnessed it), rule out inconclusive imaging report of possible small subdural hematoma.*
> *(2)Headaches, mixed, chronic, daily, predominantly muscle tension with probable added analgesic rebound component.*
> *(3)Rule out added cognitive impact of superimposed mild depression.*
> *(4)Cerebral infracts, small deep, bihemispheric, rule out (Based on suspicion of vascular lesions in MRI reports).*
> *(5)Adverse cognitive impact of chronic use of multiple neurotropic medications, including meperidine, gabapentin, butalbital and Skelaxin.*
> *(6)History of multiple levels of degenerative changes in the spine.*
> *(7)Memory loss, multifactorial, associated with above conditions, rule out adverse cognitive effects of diabetes mellitus, long-standing poorly controlled hypertension and early manifestations of Alzheimer's disease."*

Dr. Gass' report

[48]. As mentioned above, on 14 August 2006, the Plaintiff was examined by Dr. Gass on the referral of Dr. Kuljis for a neuropsychological examination.

[49]. The Gass Report recorded under the rubric "Relevant background and medical history":

> *"Ms. Lindsay is a 55 year-old married Bahamian woman who reported as follows (words in quotes were reported by her and transcribed from auditotape with her informed consent). She suffers intermittent headaches on a daily basis that have partially improved, frequent problems with forgetfulness, low back pain that limits her ability to do housework, periodic spells of forgetfulness, low back pain that limits her ability to do housework, periodic spells of generalized weakness and dizziness, some mild tinnitus of an unknown origin, and occasional difficulties with imbalance in walking. These problems allegedly began following a slip-and-fall accident in her place of employment. Ms. Lindsay does not have complete recall of the incident ('I must have blacked out for a second'). However, her supervisor who was present reported that Ms. Lindasy fell, hitting the right frontal portion of her forehead, and that she possibly sustained a momentary loss of consciousness. 'When I fell, I don't remember…they told me I must have blacked out for a second. I remember that I was with my supervisor, and she said to me when I fell, she helped me up and she said "You hit your head." But I didn't realize I hit my head, and I did this (gestures) I touched my head, and I had a bump, I said "I sure did". And she said "Do you want to find a doctor?", and I said, "No I'll be okay."" Ms. Lindasy went to a doctor the next day because of a bad headache. 'I had a burning in the back of my head, and I kept telling them that my head felt like it was bleeding…'*
>
> *She further reported that a subsequent medical exam shortly after the incident revealed that the head trauma triggered a 'cerebral hemorrhage'. When she returned to the USA and had another brain scan, she was told*

that the bleed had 'already dried up' and, because of the specific posterior location, surgery was contraindicated. 'I Had bad headaches everyday for a number of years, three years, but now it's gotten to the point that I know it's there, but it's not as bad.'

Several years after this incident, she experienced two strokes, one in 2004 the caused left-side numbness in her face and arm, a headache, and a burning sensation in the back of her head. Subsequent to reporting these symptoms, she added that the stroke also caused a 'heaviness' and paralysis in her right leg that precipitated physical therapeutic measures. She was unable to move her leg and had problems walking for a couple of days. 'A couple of months, I think, I had to do therapy because it was just heavy, I had to drag it.' She was hospitalized for two weeks. The second stroke occurred in 2005, causing sensations of tingling and numbness in the right facial area and a headache. She experienced the tingling and numbness 'off and on' for 'a couple of days'. She added that these symptoms also involved her right arm.

Her strokes were accompanied by severe chest pain.

Additional medical history (by self-report) is significant for hypertension and non-insulin-dependent diabetes (since 1991).

…

Her major occupational work has been secretarial. She stopped working (resigned) in 2004 after her frequent sick-related absenteeism created problems with her boss. She recently relocated to Georgia with her husband. Since her occupational work in 2004, her daily activities include a focus on interests such as cooking, hosting parties, entertaining friends, fishing with her husband, and travel."

[50]. The Gass Report recorded the following findings on motivational and symptom validity testing:

"*Ms. Lindsay gave a solid effort on neuropsychological testing, as evidenced by her positive performance on the Test of Memory Malingering (TOMM) as well as clinical observation. However, strong evidence of exaggeration or feigning of memory problems emerged in her positive self-report of highly unusual memory complaints on the Structured Inventory for Malingered Symptomatology (SIMS). She endorsed complaints that occur with extreme rarity in severely brain-injured patients. Her score (6) markedly exceeded the cut off of 3 that effectively distinguishes malingerers from clinical patients."*

[51]. Dr. Gass' clinical impressions were summarized in the Gass Report thusly:

"*The results of this neuropsychological examination suggest very mild impairment of Ms. Lindsay's mental abilities most likely due to underlying brain dysfunction. Her performance pattern shows strong evidence of a lesion in the right cerebral hemisphere adversely affecting her visuospatial and constructional skills, as well as her left hand motor speed and strength, and finally, proprioception in her left hand. By far the most likely cause is cerebrovascular, and, in specific, dates back to the stroke she experienced in 2004.*

Coincidentally, this was the same time period at which she deemed herself unable to continue working. In regard to her 1991 slip and fall, it is highly unusual for mild and closed head trauma to produce the focal and unilateral pattern of neuropsychological test findings that she produced.

Her memory abilities and capacity for new verbal and visual learning appear to be intact, in sharp contrast with her subjective self-report. Her retentive memory fell within normal limits, and actually exceeded the normal rate of retention efficiency (100% and 88% of auditory-verbal and visual memory, respectively, after 30 minutes)."

Dr. Jackson's reports

[52]. On 31 March 2016 and 20 September 2016, the Plaintiff visited Dr. Calvin Jackson ("Dr. Jackson"), her primary care provider in Augusta, Georgia, in the former instance to discuss the results of an MRI and in the latter instance for a routine follow up.

[53]. Dr. Jacksons' Client Summary for the Plaintiff's visit on 31 March 2016 recorded that the visit was aimed at addressing the Plaintiff's uncontrolled type 2 diabetes, knee crepitus, right knee effusion, hypertension and knee osteoarthritis. Dr. Jackson listed that the Plaintiff was taking an array of medication, including painkillers. Dr. Jackson scheduled a follow up in 3 months, gave the Plaintiff advice on living with diabetes and how to access health information online and recommended that the Plaintiff adopt a healthy diet, take a blood glucose test, lose weight and engage in aerobic exercise.

[54]. Dr. Jacksons' Client Summary for the Plaintiff's visit on 20 September 2016 recorded that the purpose of the visit was for a routine follow up and for complaints of headache and backpain. The visit was aimed at addressing the Plaintiff's uncontrolled type 2 diabetes, hypertension, obesity, headache and complaints of low back pain. Dr. Jackson again listed that the Plaintiff was taking an array of medicine, including painkillers. Dr. Jackson scheduled a follow up in 3 months, discussed a healthy diet, gave the Plaintiff advice on living, recommended a blood glucose test and that the Plaintiff lose weight and engage in aerobic exercise.

Assessment

[55]. 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."***

[56]. 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 as lability has been determined and liability in negligence is not established without proof of some damage. However, the burden of proof is on the plaintiff to establish causation on the balance of probabilities in relation to each injury or other loss or damage she has claimed.

[57]. 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

[58]. 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.

[59]. 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. Despite the general practice, sometimes, courts will disclose the amounts awarded under one or several heads: **Charlene Rahming v Bahamas Ferries Limited** 2016/CLE/gen/0112 (13 April 2018).

[60]. 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 paragraphs 17 and 18:

> ***[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 …***
> ***[18.] As Dickson J, in the Supreme Court of Canada, observed in Andrews v Grand & Toy Alberta Ltd (1977) 83 DLR (3d) 452, 475-476, applying this principle in practice may not be easy:***
>
> > ***"The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution."***

[61]. 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

[62]. The Plaintiff claimed damages for "Pain and Suffering" and "Loss of Amenities". 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. In terms of loss of amenity, it is authoritatively settled that it is in respect of the objective loss of amenity that damages will be determined. Hence, loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine of life are all proper considerations to be taken into account: **Lashonda Poitier v The Medi Centre Ltd and another** [2019] 1 BHS J. No. 58.

[63]. 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. Awards for pain, suffering and loss of amenity should be consistent with similar awards made in comparable cases.

[64]. 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.

[65]. In its written closing submissions, the Defendant disputed that the Plaintiff discharged the burden of proving that the Index Accident caused any of the injuries complained of by her.

[66]. The Plaintiff submitted that the Brown Report, Kuljis Report and Gass Report all showed that the Plaintiff suffered serious head trauma with moderate brain damage and the Kuljis Report referred to a herniated disc at C5-C6 and C6-C7 with mild compression of the spinal cord, degenerative disc disease at L5, S1 with a bulging disc at that level, nerve damage to the median nerve and a C8,T1 radiculopathy, all of which the Plaintiff did not suffer from before the Index Accident. The Plaintiff also submitted that her evidence regarding Dr. Iferenta's finding of a cerebral hemorrhage was supported by Dr. Brown's impressions.

[67]. The Plaintiff relied on the cases of **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 on the issue of causation.

[68]. In **Athey v Leonati** [1996] 3 SCR 458, the plaintiff was injured in two motor vehicle accidents which occurred in February 1991 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 plaintiff'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 accidents contributed 25% to the disc herniation was sufficient to render the defendant fully liable.

[69]. 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 Barbados found the defendant liable applying the "egg-shell skull" rule (the rule that a tortfeasor takes their victim as they find them), holding that the defendant's negligence caused the plaintiff to experience stress and that stress materially contributed to her developing acute renal failure given her already inflamed kidneys due to SLE.

[70]. In **Eleanor Diane Grossgill v The Ministry of Health** CLE/gen/01909 of 2014, the plaintiff, a nurse, fell off a chair at her workplace and 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, noting he did not find the plaintiff suffered previously from any of the effects of the degenerative changes to her spine. 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 her $40,4755 for pain, suffering and loss of amenity.

[71]. Relying on **Athey v Leonati**, the Plaintiff submitted that the Defendant cannot escape liability by relying on "pre-existing conditions" because:

(i) the injuries the Plaintiff was diagnosed with began following the Index Accident and the adverse cognitive impact of the chronic use of multiple neurotropic medications noted by Dr. Kuljis was caused by medicine the Plaintiff was prescribed to treat the brain injuries resulting from the head trauma she suffered in the Index Accident.

(ii) it was necessary in the case of the neck and back injuries the Plaintiff sustained for the Plaintiff to have had both the Index Accident and pre-existing degenerative disc disease for her cervical radiculopathy and low back syndrome to occur, since those conditions would not have occurred "but for" the Index Accident. The Defendant is fully liable because the Index Accident is still a necessary contributing cause.

(iii) there was no evidence the Plaintiff suffered previously from any of the effects of degenerative changes in her spine. The Plaintiff's injuries would not have occurred at the time they occurred without the Index Accident. The Defendant is fully liable because the Index Accident is a necessary contributing cause.

[72]. Relying on **Clerk & Lindsell on Torts** (19th edn) at paragraph 2-07, **Halsbury's Laws of England (Vol 12(1))** and **Simmons v British Steel plc** [2004] UKHL 20 per ***Lord Rodger*** at paragraph 67, the Defendant submitted that the Plaintiff misunderstood the basic elements of legal causation because it is insufficient to merely show that damage followed an accident; it is necessary to show, on the balance of probabilities, that the damage was caused by the accident (applying the "but for" test) and caused in a way that was not too remote.

[73]. The Defendant referred to extracts from **Butterworths Personal Injury Service** and paragraph 8 of ***Lord Bingham***'s speech in **Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22** to emphasize that it is a fundamental requirement in personal injury actions for the plaintiff to prove causation of the damage claimed by them.

[74]. The Defendant submitted that, in order for the Index Accident to have caused the serious injuries alleged and pleaded by the Plaintiff, the impact of the slip and fall she suffered would have had to have been severe and traumatic, but the evidence in this case does not demonstrate that. The Plaintiff was contradicted in cross-examination, no expert medical evidence was adduced by her and, based on the inconsistencies between the injuries claimed by the Plaintiff and the Kuljis Report, the Gass Report and Dr. Jackson's reports, it is not possible to formulate what injuries the Plaintiff sustained as a result of the Index Accident. The Defendant submitted that the Plaintiff failed to adduce evidence that conclusively or definitively proves that the injuries claimed by her in her amended statement of claim are a direct result of the Index Accident.

[75]. The Defendant submitted that the Plaintiff's evidence was that she attended Doctor's Hospital for a long time after the Index Accident, where she underwent a "battery" of tests inclusive of X-rays and MRIs, and it was determined by Dr. Iferenta that she had a cerebral hemorrhage which required surgery, but:

(i) there was no medical evidence corroborating the Plaintiff's visit to the hospital nor did Dr. Iferenta provide a report nor did the Plaintiff adduce an invoice for the services provided. The Defendant submitted that one would expect a hospital stay of a long period to produce a large bill which a plaintiff would wish to seek compensation for as special damages.

(ii) the Plaintiff wrote a memorandum to the Human Resource Manager of Canadian Imperial Bank of Commerce three days after the Index Accident and it is "hard to fathom" how the Plaintiff could have possibly written it at Doctor's Hospital while on "large doses of medication".

(iii) the Plaintiff did not claim she suffered a cerebral hemorrhage as a result of the Index Accident in her amended statement of claim. Furthermore, the Plaintiff failed to decisively prove the same, as Dr. Vaicys commented in the Vaicys Report that the area of old hemorrhage could have been congenital as opposed to stemming from the Index Accident.

[76]. The Defendant submitted that no evidence was placed before the Court that the Plaintiff was placed on numerous medications after the Index Accident.

[77]. The Defendant further submitted that the Plaintiff is simply concocting particular ailments for the purpose of securing a payout from the Defendant. The Defendant relied on Dr. Gass' clinical impressions set out at paragraph 49 above and Dr. Gass' findings in the Gass Report under the rubric "psychological adjustment" that:

> *"The MMPI-2 results suggest that she attempted to portray herself in a very highly favorable light in regard to psychological health and moral virtue. For this reason, the resulting clinical profile is likely underestimate the extent of her psychological difficulties. Nevertheless, taken as is, the clinical profile reveals evidence of physical symptom exaggeration (Fake Bad Scale raw score = 24) that could be due to either conscious or unconscious motivational factors or both). Psychological stress is likely to be a significant contributing factor to her physical symptom picture*
>
> …
>
> *However, strong evidence of exaggeration or feigning of memory problems emerged as positive self-report of highly unusual memory complaints on the Structured Inventory for Malingered Symptomatology (SIMS). She endorsed complaints that occur with extreme rarity in severely brain-injured patients…"*

[78]. With respect to the Plaintiff's strokes, the Defendant argued that the Plaintiff's attempt to draw a causal nexus to the Index Accident was "perplexing" because, at the time of the Index Accident, the Plaintiff was not a "picture of good health". The Defendant further noted that, so far as "cognitive impacts" were concerned, Dr. Kuljis noted his impression was the Plaintiff's chronic use of multiple neurotropic drugs resulted in adverse cognitive impacts.

[79]. Regarding the Plaintiff's retirement from Canadian Imperial Bank of Commerce, the Defendant submitted that the Plaintiff's contention that her stroke and other injuries from the Index Accident caused her to retire early was inconsistent with Dr. Gass recording in the Gass Report that the Plaintiff resigned from Canadian Imperial Bank of Commerce after frequent sick-related absenteeism created problems with her boss and that her daily activities in 2006 included a focus on interests such as cooking, hosting parties, entertaining friends, fishing with her husband and travel, which are all activities that would require her to move around quickly and remember things such as events, dates and times, and suggest the Plaintiff's way of life was not as hampered as she claims.

[80]. The Defendant submitted that the many inconsistencies in the Plaintiff's evidence surrounding the injuries she sustained and the absence of medical expert evidence corroborating the injuries suffered as a result of the Index Accident should lead the Court to conclude that the Plaintiff failed to discharge her burden of proof.

[81]. Concerning the Plaintiff's argument that 'as there is no evidence that she suffered previously from any of the effects of the degenerative changes to her spine, it should be accepted the injuries would not have occurred but for the Index Accident', the Defendant submitted that the mere fact there is no evidence that a person suffers from degenerative changes in their spine does not mean those changes were not present before the accident; the person may simply never have done any tests to determine the overall status of their spine and spinal degenerative changes happen over a period of time as one goes through life. Relatedly, the Defendant submitted that the Plaintiff had not proven any exacerbation of pre-existing injuries.

[82]. Relying on **Jobling v Associated Diaries Ltd** [1982] AC 794, the Defendant invited the Court to find that based on the Defendant's medical history of diabetes, hypertension and mild obesity, "she would have succumbed to the majority of the injuries alleged in any event" as her "comorbidities" "…would ultimately have had a drastic effect on [the Plaintiff's] health regardless of whether the [Index Accident] transpired or not". In **Jobling v Associated Diaries Ltd**, the House of Lords held that, in a personal injury action, where a supervening illness or injury which is unconnected with the tort manifests itself before trial, it must be taken into consideration when assessing damages for the personal injury.

[83]. Having considered the evidence and the submissions of the parties, I find that, on the balance of probabilities, the Plaintiff did suffer the injuries pleaded in her amended statement of claim and that those injuries were caused by the Index Accident. Granting that she was obese at all material times, I accept the Plaintiff's evidence that she was healthy, pain-free and not on medication before the Index Accident and there is no other compelling explanation for the injuries, which were proximate to the Index Accident, other than the Index Accident on the evidence.

[84]. I accept the Plaintiff's evidence that, after she twisted her ankle, hit her head and "blacked out" (the Index Accident), she experienced strong headaches and a "terrible burning sensation" which led her to attend Doctor's Hospital, where she underwent a variety of tests, x-rays and MRIs and was prescribed medication. I also accept that, while at Doctor's Hospital, the Plaintiff was diagnosed by her attending emergency physician, Dr. Iferenta, as having a cerebral hemorrhage. I also accept the Plaintiff's evidence that she was treated at Doctor's Hospital for a period of time; that she travelled to the United States for medical treatment; that she saw Dr. Munnings "for a long time" "for headaches"; that she was prescribed neurotropic medications as part of her treatment; and that, in the aftermath of the Index Accident, she was "in and out of hospital" and "last a lot of time from work" attending doctors' visits.

[85]. While Dr. Munnings did not himself give evidence at the assessment, in the context of the "battle of hearsay" that took place, I am content to place reliance on his report dated 21 January 2004 as a reasonably satisfactory account of the Plaintiff's history, treatment and Dr. Munnings' opinions at the time of the letter. Dr. Munnings was associated with the Plaintiff's care for a period of years, the Plaintiff went under his care soon after the Index Accident and Dr. Munnings has no obvious incentive to misrepresent or conceal facts. Even if one takes issue with Dr. Munnings' assessment of the Plaintiff as 30-35% disabled, the National Insurance Board's assessment of 20% disablement for life in September 2003 is other evidence that the Plaintiff's injuries were substantial.

[86]. Although I am prepared to place reliance on Dr. Munnings' report dated 21 January 2004, I am not prepared to find that the Index Accident caused a cerebral hemorrhage, despite Dr. Munnings' view that the old hemorrhage possibly detected in the Plaintiff's MRI scans was likely to have come from the Plaintiff's head injury. Nor am I prepared to find that the Index Accident caused the Plaintiff's strokes (a matter suggested by the Plaintiff in her evidence). In both cases, there was inadequate evidence led, to warrant reaching those conclusions.

[87]. Furthermore, I find, based on the Kuljis Report and Gass Report that the Index Accident no longer substantially interfered with the Plaintiff's normal way of life by August 2006. The evidence is not clear enough to enable me to be specific about the longer-term impacts of the Index Accident. Dr. Jackson's reports are quotidian and do not suggest the Index Accident continues to have significant continuing effects.

[88]. The Plaintiff sought an award of damages for pain, suffering and loss of amenity in the amount of $180,304.80 made up of the following awards (references to the "***Judicial College Guidelines***" are references to the ***Judicial College Guidelines for Assessment of General Damages in Personal Injury cases (15th edn)***):

(i) $125,336.70 for the Plaintiff's brain and head injuries (on the basis that the injuries fall within category (c)(ii) of brain and head injuries under the ***Judicial College Guidelines***, Moderate Brain Damage);

(ii) $26,011.40 for the Plaintiff's cervical radiculopathy (on the basis that the injury falls within category (b)(ii) of neck injuries under the ***Judicial College Guidelines***, Moderate Neck Injuries);

(iii) $20,953 for the Plaintiff's low back pain (on the basis that the injury falls within category (b)(ii) of back injuries under the ***Judicial College Guidelines***, Moderate Back Injuries); and

(iv) $8,003.20 for the Plaintiff's ankle sprain (on the basis that the injury falls within category (d) of ankle injuries of the Judicial College Guidelines, Modest Ankle Injuries).

[89]. The Defendant did not address quantum for pain, suffering and loss of amenity as it focused its submissions on causation.

[90]. Counsel for the Plaintiff commended the case of **Gibson v Public Hospital Authority** [2005] 5 BHS J. No. 298 as a comparator case for the purpose of this Court's assessment of general damages. In ***Gibson***, as a result of falling off of a chair while at work, the plaintiff suffered a compression fracture of her cervical spine, degenerative arthritis with osteophythic spurring and posteriorly bulging discs between C4-5 and C5-C6, bulging discs of the lumbar sacral spine at L4-5 with disc degeneration with endplate changes between L4-5, migraine headaches, dizziness, numbness in the fingers and abrasions to the forearm. Her disability for National Insurance purposes was assessed at 35% for life. ***Registrar Evans*** (as she then was) awarded $55,000 for general damages.

[91]. Counsel for the Defendant provided the Court with the case of **Ferguson v Island Hotel Company Limited** [2012] 1 BHS J. No. 112 although it was not cited as a comparator case. In **Ferguson**, after a slip and fall at work, the plaintiff was diagnosed as suffering a closed head injury, cerebral concussion, post traumatic headaches, dizziness and vertigo syndrome consistent with a post concussive syndrome, cephalgia, cervical strain, cervical radiculopathy and myelopathy, low back syndrome, and herniated nucleus pulposis. The medical prognosis revealed that the plaintiff would continue to experience depression, pain from both the lumbar

sacral disease and the cervical injury and loss of equilibrium which would remain with him for the remainder of his life. The plaintiff had to undergo surgery, was on painkillers and required medication as well as physiotherapy to help with the spasticity of his limbs seven years after the accident. The injuries prevented him from returning to work in his former capacity and he was eventually terminated. The plaintiff needed to seek more sedentary employment, could not participate in sports and his sexual life had been affected creating marital issues. ***Stewart J (Ag.)*** (as she then was) awarded $70,000 for pain, suffering and loss of amenity and loss of earning capacity.

[92]. Having considered the parties' submissions, the case law and the ***Judicial College Guidelines*** and having regard to all relevant factors, including the Plaintiff's age, her testimony regarding her injuries, the medical reports to which I have adverted, her health, and loss of amenity, I consider the sum of **$62,500** reasonable compensation to the Plaintiff for pain, suffering and loss of amenity.

Future medical expenses and physical therapy

[93]. The Plaintiff produced no reliable evidence establishing a present need for medical follow up and physical therapy caused as a result of the Index Accident and, similarly, no reliable evidence was produced substantiating the cost of what medical follow up and physical therapy the Plaintiff might presently require. No award of damages can therefore be made for this item of loss.

Loss of future earnings

[94]. No issue of loss of future earnings arises on the facts. Compensation for loss of future earnings is in principle compensation for prospective loss. The Plaintiff is now 72 years old and there is no evidence she would have worked beyond the age of 72 "but for" the Index Accident.

Special damages

[95]. As appears from the extract from ***Lord Goddard's*** speech in **British Transport Commission v Gourley** [1956] AC 185 quoted at paragraph 41 above, special damages must be pleaded and proved. This point was made by Lord Diplock in **Ikew v Samuels** [1963] 2 All ER 879 insofar as he stated "***it is plain law…that one can recover in an action only special damage which has been pleaded and, of course, proved***".

[96]. 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."***

[97]. With respect to the requirement that special damages must be proved, in **Lubin v Major** [1992] BHS J. No. 22, a decision favourably referred to in **Thompson v Strachan** [2017] 1 BHS J. No. 108, ***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 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, 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."***

[98]. 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."***

[99]. There is no strict rule that special damages must be proven by documentary evidence. In **Ferguson v Island Hotel Company Limited** [2012] 1 BHS J. No. 112, ***Stewart J (Ag.)*** in illustrating the principle that in order to recover any special damage the plaintiff must prove the same, referred to the decision of ***Osadebay JA*** in **Automotive and Industrial Distributive Limited v Omerod** [2003] BHS J. No. 103, at paragraph 50:

> ***"50 In Automotive and Industrial Distributive Limited v Omerod, [2003] BHS J#103, Justice of Appeal Osadeby, stated at paragraph 41:***
>
> ***'In George Lubin v Miriam Major, Civil Appeal #6 of 1990, their Lordships on appeal specifically held that despite the absence of documentary evidence an award could be made under this head. The Law simply requires the special damage claimed to be proved, not proved only by documentary or expert evidence. For in Lubin it was stated "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 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 being deliberately dishonest.'"***

[100]. In the case of Barr, while the Plaintiff sought damages for medical expenses, loss of earnings, airline tickets and living accommodations while in the United States, little evidence was led to

substantiate the Plaintiff's claim. Instead, reliance was placed on the case of **Dr. Philip Thompson v Sioban Riley** SCCiv App No. 21 of 2007, in which the Court of Appeal stated at paragraphs 13 to 16:

> ***"13 Mr. Harvey Tynes Q.C, Senior Counsel for the Appellant submitted that at the assessment hearing, the Respondent was required to prove the items claimed and that it was not enough for the Respondent to write down the particulars and throw them at the Court saying: 'This is what I have lost; I ask that you give me these damages' (See Bonham-Carter v. Hyde Park Hotel [1948] 64 TLR 177 at 178).***
>
> ***14 Mr. Tynes queried each and every head of the Special Damages, including the sum of $100.00 for 2 taxi fares during the Respondent's visit to Jamaica for the post operative surgeries.***
>
> ***15 In Supplemental Submissions to his Skeleton Arguments, Mr. Ian Winder, Counsel for the Respondent modified his claim for Special Damages to $ 6,826.00 and submitted that the evidence tendered by the Respondent at the assessment hearing supported that sum. Mr. Winder relied on the authority of Bonham-Carter (supra 13 above) and George Lubin v. Miriam Major Civil Appeal No. 6 of 1990, a decision of this Court, to support his contention that the Court may, despite dissatisfaction with the award, assess damages in the absence of receipts and invoices.***
>
> ***16 It seems to us that in the instant case the Learned Deputy Registrar was entitled, as the Registrar did in Lubin v. Major, to consider that airline tickets, taxi fares and medical expenses would be incurred as a natural incident of traveling to Jamaica for post operative surgery. Accordingly, he was entitled, in our view to accept the evidence of the Respondent on these issues, even though the amounts were not fully substantiated."***

[101]. Having considered the parties' submissions, I accept the Defendant's general submission that the Plaintiff's claim for special damages has not been made out and there will accordingly be no award of special damages.

The cost of medical consultation, treatment, physiotherapy and medication ("medical expenses")

[102]. In relation to medical expenses, the Plaintiff sought to recover $17,414.07 based on invoices contained in the Agreed Bundle. However, the Plaintiff was unable to convincingly relate the invoices to her injuries. While the Plaintiff submitted that the Defendant "obviously accepted and approved" an invoice from Doctors Hospital dated 7 August 2015, that submission was flatly contradicted by the Defendant's total denial of the Plaintiff's claim.

Loss of earnings

[103]. In relation to the claim for loss of earnings, the Plaintiff sought to recover the sum of $231,000 for loss of earnings on the basis set out at paragraph 6.2.2 and 6.2.3 of her written closing submissions:

> *"6.2.2 The Plaintiff was employed by CIBC Trust from 4 December 2000 to 30 December 2004. In her Amended Witness Statement she states at paragraph 8:*
>
> *'In 2004, I had a stroke that landed me back in the hospital causing more time off from work. And combined with the other injuries I was suffering as a result of the accident, I was unable to continue working. Thus my*

employment with CIBC Trust came to an end. In 2005 I had a second stroke, all resulting from hitting my head on the hard floor when I fell.'

6.2.3 Mrs. Lindsay was at the time fifty-four (54) years of age. Under normal circumstances, she had another eleven (11) years of working eligibility before retirement. She was paid a salary of $21,000.00 per annum. For this head of damages."

[104]. The Plaintiff led no admissible evidence of her wages and it is not possible on the scant evidence before the Court to properly assess the effect of the Index Accident on her ability to maintain or seek employment as a secretary or receptionist or to isolate the effects of her strokes and her age on her ability to maintain employment. I therefore make no award for pre-trial loss of earnings. (The Plaintiff was paid her full salary while employed.)

[105]. While Counsel for the Plaintiff sought to provide evidence of the Plaintiff's salary in closing submissions, this was fairly objected to by Counsel for the Defendant. In **Bates v the Post Office Ltd (No 6: Horizon issues) (Rev 1)** [2019] EWHC 3408 (QB), ***Fraser J*** criticized a party's attempt to give evidence at the stage of closing submissions, stating at paragraph 71:

> ***" Submissions should not contain evidence, or positive evidential assertions, that are not present in the evidence served in the trial. This is a fundamental point. … Blurring (or ignoring) the lines between submission and evidence is entirely unhelpful. Evidence is something that comes from a witness (lay or expert) and which the opposing side is entitled to test by way of cross-examination. It is not appropriate for detailed factual assertions to be made in closing submissions that are not directly referable to evidence in the case. There is no way such factual assertions can be tested; if they come in closing submissions, there is no way that the opposing party can deal with those assertions in their own evidence, or even put relevant points to witnesses for the other party in cross-examination."***

Airline Tickets to and from USA and living accommodation there

[106]. The Plaintiff claimed the sum of $998 for airline tickets to and from the United States and $858 for living accommodation while in the United States. The Plaintiff provided no particulars regarding these expenses and did not address these special damages in her evidence or link the figures claimed in her amended statement of claim, which were, in any event, unsubstantiated, to the Index Accident. I therefore make no award in relation to these items.

Total award

[107]. The total award ordered to the Plaintiff is as follows:

General Damages

a) Pain, Suffering and Loss of Amenities $62,500

b) Future Surgery, Medical Treatment etc. Nil

c) Loss of Future Earnings Nil

Special Damages

a) Medical expenses and physical therapy Nil

b) Loss of earnings Nil

c) airline tickets to and from USA for medical evaluation and cost of living accommodation while in USA Nil

Total: $62,500

[108]. Judgment is awarded to the Plaintiff in the sum of **$62,500**. 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. Interest is to accrue on the judgment sum from the date of judgment at the statutory rate.

Costs

[109]. The Plaintiff filed two untaxed bills of costs. The Plaintiff's bill of costs in respect of the trial of liability filed on 8 March 2021 claimed $4,030 in disbursements and $53,000 in professional fees. The Plaintiff sought an hourly rate of $500 per hour. The Plaintiff's bill of costs in respect of this assessment filed on 1 July 2022 claimed $1,874.99 in disbursements and $31,500 in professional fees. The Plaintiff sought the same hourly rate as with the trial of liability. Taking into consideration disbursements, the time spent and research involved in this matter, costs (inclusive of disbursements) are awarded the Plaintiff in the amount of **$35,000.00** with respect to the trial of liability and **$20,000** for this assessment.

Dated 19th January A.D. 2024

Renaldo Toote
Deputy Registrar