

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

Claim No. 2016/CLE/gen/01404

B E T W E E N

KYRENIA NEWBOLD-ROBERTS

Claimant

AND

SHANDWICK TAYLOR

First Defendant

AND

**KIRKWOOD SMITH
t/a GOLDEN RULE BUS SERVICE**

Second Defendant

Before: The Honourable Madam Justice Camille Darville-Gomez

Appearances: Brian Dorsett and Judith Smith for the Claimant
Raynard Rigby, KC and Asha Lewis for the Defendants

Hearing Dates: 17 October 2024; 29 October 2024

Submissions Received: 13 August 2025 and 24 September 2025

Tort — Negligence — Road traffic accident — Personal Injury — Liability admitted — Assessment of damages — Conflicting expert evidence — Causation and degenerative changes — Past and future loss of earnings — Handicap on labour market (Smith v Manchester award) — Special damages — Future medical expenses — Extraordinary delay in prosecution of claim — Reduction in interest award to reflect delay — Interest pursuant to Civil Procedure (Award of Interest) Act — Costs

RULING

DARVILLE GOMEZ, J

[1.] This is the Court’s ruling on an assessment of damages arising from personal injuries sustained by the Claimant in a road traffic accident which occurred on 6 December 2013 (the “accident”). At the material time, the Claimant was a fare-paying passenger on a certain Golden Rule jitney bus owned

by the Second Defendant and driven by the First Defendant, when that bus collided with the rear of a Kia Sportage Jeep.

- [2.] The Claimant alleged that the accident was caused by the negligence of the First Defendant and that the Second Defendant was vicariously liable for his acts and omissions. Liability having been admitted by the Defendants, the sole issue for determination is the quantum of damages.

Background

- [3.] By a Specially Indorsed Writ of Summons filed on 12 October 2016, the Claimant commenced proceedings against the Defendants, claiming general damages, special damages, interest, costs, and such further or other relief as this Honourable Court deemed just. The Statement of Claim set out particulars of negligence, injury, and special damages as follows:

PARTICULARS OF NEGLIGENCE

The accident was caused by the negligence of the 1st Defendant in that he:

- a. Failed to drive with due care and attention.
- b. Failed to maintain a safe and adequate distance between the bus he was driving and the vehicle he collided into.
- c. Failed to stop in sufficient time or at all before colliding into the rear of another vehicle.

The 2nd Defendant is vicariously liable for the acts of the 1st Defendant and was further negligent in that he:

PARTICULARS OF NEGLIGENCE

- a. Failed to train or to properly train the 1st Defendant on maintaining a safe and adequate distance between the bus and other vehicles.
- b. Failed to train or properly train the 1st Defendant on safe driving techniques.

As a result of the negligence of the 1st and 2nd Defendants the Claimant has suffered loss and injury.

PARTICULARS OF INJURY

The Claimant was born on September 1, 1975 and experiences pain in her neck, chest, spine and shoulder. She has been diagnosed with a mild to severe spondylosis and diffuse posterior bulges at C2-3, C3-4, C4-5, C5-6 and C6-7 and C7-T1.

PARTICULARS OF SPECIAL DAMAGE

8 weeks loss of wages and tips (and continuing)	\$61,200.00
Surgery	\$48,000.00
Medical Fees	\$1,585.63
Hospitalization	\$1,046.39
Cervical Collar	\$565.00
Loss of future earnings	<u>\$10,800.00</u>
TOTAL	\$123,197.02

- [4.] The Defendants filed their Defence on 16 February 2017. Liability was formally conceded on 12 April 2022, and judgment on liability was entered against the Defendants by Brathwaite J., with damages to be assessed.
- [5.] However, prior to the hearing of the assessment of damages which proceeded before this Court on 17 October 2024 and 29 October 2024, a number of interlocutory steps were taken. A Notice to Insurers was filed on 4 January 2017, and an application for an interim payment was filed on 20 February 2017. That application was heard before Winder J. (as he then was) on 6 April 2017, who by a ruling delivered on or about 28 June 2018, awarded the Claimant an interim payment of \$20,000.00. In addition, Brathwaite J. made a further order for costs thrown away, payable by the Defendants.
- [6.] For the reasons hereinafter set out, the Court assesses the damages payable to the Claimant as follows:

Head of Damage	Amount
PSLA	\$50,000.00
Past Loss of Earnings	\$12,000.00
Future Loss of Earnings	\$109,200.00
Smith v Manchester Award	-0-
Special Damages	\$3,197.02
Future Surgery	<u>\$33,332.07</u>
Gross Total	\$207,729.09
Less Deductions	\$27,970.75
Net Total	<u>\$179,758.34</u>

The Claimant's Case

Mrs. Kyrenia Newbold-Roberts

- [7.] The Claimant, Mrs. Kyrenia Newbold-Roberts, relied on her Witness Statement filed on 3 July 2024 and her Supplemental Witness Statement filed on 10 October 2024 as her evidence-in-chief at trial. She further relied on the expert evidence of Dr. Susheel Wadwha, Consultant Neurosurgeon and Spine Surgeon, whose evidence-in-chief comprised his Witness Statement filed on 13 June 2024, his medical report dated 18 December 2023, the addendum to that report dated 5 March 2024 and his oral testimony given at trial.
- [8.] In her evidence-in-chief, Mrs. Newbold-Roberts recounted that at the time of the accident she was seated two seats behind the driver. Upon impact, she was jolted forward and backward, experiencing immediate severe neck and shoulder pain. Although she initially exited the bus once it came to a stop, the intensity of the pain caused her to re-enter and remain seated until paramedics arrived.
- [9.] She was immobilized at the scene with a cervical collar and transported by ambulance to the Accident and Emergency Department of Princess Margaret Hospital where she was admitted from 6 to 10 December 2013. During that period, she was seen by several medical practitioners, including Dr. Magnus Ekedede, Dr. Jimmy Abubakar and Dr. Richardson. Her account was corroborated by contemporaneous medical records which recorded a possible fracture to the T1 vertebra and the need for several days of inpatient care.
- [10.] Following her discharge, the Claimant remained under medical supervision and was certified unfit for work for approximately three months and two weeks, as reflected in the sick slips tendered in evidence. Her evidence, however, was that her symptoms persisted well beyond that period.
- [11.] She described her post-accident treatment as prolonged, continuous, and financially burdensome, including multiple medical consultations, MRI investigations, and ongoing reviews between 2013 and 2024.
- [12.] According to the Claimant, surgical intervention in the form of an anterior cervical discectomy and fusion (ACDF) at the C5-C6 level was recommended on multiple occasions between 2014 and 2017. She testified however, that she did not undergo surgery because she could not afford the private cost. Although she accepted under cross-examination that surgery may have been available at Princess Margaret Hospital at a reduced cost, she maintained that this was "*never an option*" for her. Rather, she said that private surgical costs were quoted at sums in excess of \$65,000, which were entirely beyond her means.

- [13.] The Claimant also explained that she did not pursue physiotherapy because, according to Dr Abubakar, "*physiotherapy would not help [her] situation*", "*it wasn't effective*" for her injury, and "*it would not have helped it*".
- [14.] Regarding causation, the Claimant stated that prior to her consultation with Dr. Barnett, she had never been told that her symptoms might be attributable to degenerative or age-related "wear and tear" changes in her spine. She maintained that prior to the accident she had no history of neck or back complaints and had never been involved in any prior motor vehicle accident.
- [15.] At the time of the accident, the Claimant was employed as an aesthetician at Windermere Day Spa and Salon, earning approximately \$600.00 per week inclusive of tips. She described the work as physically demanding, and requiring sustained use of the neck, shoulders and upper body. She testified that, as a result of her injuries she was unable to continue in that role. Although she was not formally terminated, she accepted, under cross-examination that "*she could always go back after surgery*", but explained that, in the interim, she was not offered any alternative position.
- [16.] The Claimant also gave evidence to the wider impact of her injuries on her life. She stated that she earned no income between 2013 and 2019, having been medically advised that she "*should not have been on the job*". She said that this prolonged loss of income significantly strained her household finances and contributed to the breakdown of her marriage, ultimately resulting in she and her husband having to leave the matrimonial home.
- [17.] During this period she received assistance from social services "*to pay for the medication that [she] was getting*" and she also received sickness benefits from the National Insurance Board for a limited period in or about 2014. She accepted, however, that she did not seek renewal of her Med-Card she received from social services once it had expired.
- [18.] Emotionally, the Claimant described chronic distress associated with pain, loss of independence, and inability to pursue the career she had chosen. She also reported feelings of anxiety, particularly when travelling by jitney.
- [19.] The Claimant testified that eventually hunger compelled her to retrain. In 2019, she completed a four-month course as a patient care assistant, despite her evidence that the pain had not subsided and without having had surgery to improve her condition. She subsequently obtained employment with the Ministry of Health in 2021 at an initial gross monthly salary of approximately \$954.17, later increasing to \$1,141.67.
- [20.] Notwithstanding her return to employment, her evidence was that her symptoms never resolved. She stated that she continued to suffer chronic pain, reduced mobility and neurological symptoms, which have persisted for more than a decade since the accident occurred.

[21.] Under cross-examination, the Claimant acknowledged that she had been involved in a further motor vehicle accident in 2021, when “*a vehicle ran into the back of [a car she was in] and left the scene*”. She said that she attended the hospital as a precaution because of her pre-existing condition but denied sustaining any new injuries as a result.

[22.] She also accepted that she remained able to carry out some activities of daily living, including attending to personal hygiene, meal preparation, and certain household chores. Her evidence remained, however, that her condition has “*gotten worse*” over time and continues to have an adverse effect on her daily functioning and overall quality of life.

Dr. Susheel Wadwha

[23.] Dr. Susheel Wadwha, first examined the Claimant on 30 October 2023 and subsequently reviewed her on 17 and 22 November 2023. At the time of assessment, the Claimant complained of chronic neck pain of some ten years’ duration radiating into her shoulders and upper limbs, and being more pronounced on her right side.

[24.] In his medical report dated 18 December 2023, Dr. Wadwha described the pain as intermittent but persistent, aggravated by movement and activity, interfering with her sleep and daily activities, and only partially relieved by medication.

[25.] On clinical examination, Dr. Wadwha found features “*suggestive of a whiplash associated disorder; [...] cervical spondylosis with right C5 to C7 radiculopathy*” and “*subtle signs of myelopathy*”.

[26.] MRI imaging revealed multilevel disc degeneration, including mild disc bulges at C3-4, C4-5 and C6-7, together with severe degeneration at C5-6 characterized by posterior disc bulging and mild right foraminal stenosis. The imaging also demonstrated loss of lordosis and early kyphosis with an apex at C5-6.

[27.] An x-ray of the cervical spine corroborated these findings and showed “*severe degenerative changes involving [the] C5 and C6 vertebral bodies with large anterior and posterior osteophytes*”, but no evidence of spinal instability.

[28.] Based on the clinical findings and radiological evidence, Dr. Wadwha diagnosed cervical spondylosis with right C5 to C7 radiculopathy, degenerative disc disease at C5-C6 with right foraminal narrowing, and a grade 3 whiplash associated disorder.

[29.] In light of the Claimant’s longstanding symptoms and the severity of the C5-C6 pathology, Dr. Wadwha advised that surgical intervention, and specifically a C5-6 anterior cervical discectomy and fusion (ACDF) was an available treatment option. In his addendum dated 5 March 2024,

however, he qualified this recommendation, explaining that surgery might address symptoms referable to the focal C5-6 disc pathology but would not necessarily resolve pain arising from chronic whiplash or more generalized cervical spondylosis. He further cautioned that outcomes in chronic pain cases are inherently unpredictable and may only result in partial relief.

[30.] Against that background, under cross-examination, Dr. Wadwha accepted that, at the time of his assessment, he did not have the benefit of the Claimant's prior medical records or imaging studies. He further accepted that the Claimant had not disclosed the 2021 accident to him.

[31.] In a similar vein, he acknowledged that the radiological findings were degenerative in nature and consistent with age-related "wear and tear", and accepted that such degeneration may arise from a number of factors, including aging, smoking and prior trauma. However, while he accepted that trauma may constitute a contributing or aggravating factor, he was unable to state that the Claimant's disc pathology was caused by the 2013 accident.

[32.] Consistent with that evidence, he further confirmed that non-surgical treatment options remained available to the Claimant, including physiotherapy, medication, and spinal injections, though such interventions would be directed to symptom management rather than cure.

[33.] Taken as a whole, Dr. Wadwha's evidence established the presence of long-standing symptoms and significant degenerative cervical pathology. However, his opinion on causation remained cautious and qualified. While he accepted that trauma may have contributed to the Claimant's clinical presentation, he did not definitively attribute the underlying degeneration to the accident alone.

Claimant's Submissions

[34.] Counsel for the Claimant submitted that the evidence established that the Claimant suffered a significant injury as a result of the 6 December 2013 accident and that she continues to experience pain and limitation more than a decade later. Counsel argued that the prolonged period between the accident and the assessment of damages meant that the Claimant has endured many years of pain and suffering, and that the Court should assess damages on that footing.

[35.] Counsel submitted that, at the time of the accident, the Claimant was 38 years old and employed as an aesthetician. Immediately after the accident, Counsel reiterated that the evidence showed that the Claimant was taken by ambulance to the Princess Margaret Hospital, where she underwent investigations which recorded pain on palpitation of the lower cervical spine and a fracture of the transverse process of the first thoracic vertebra, with an assessment of blunt trauma and thoracic vertebra transverse process fracture secondary to the motor vehicular accident.

- [36.] Counsel further submitted that the Claimant thereafter came under the care of a number of medical practitioners, including Dr. Abubakar, Dr. Clyde Munnings, Dr. Magnus Ekedede, Dr Michael Barnett and Dr Wadwha. Counsel emphasized that Dr Abubakar recommended surgery as necessary to prevent further neurological deterioration, including paralysis; that Dr Munnings' report referred to moderate to severe discogenic disease, spondylosis, diffuse posterior disc bulges, and neuroforaminal stenosis, and that Dr. Ekedede, who examined the Claimant at the request of the Defendants, likewise recommended ACDF surgery at C5-C6.
- [37.] Counsel submitted that the Court should note the similarity in the findings of Drs. Abubakar, Munnings, Magnus and Wadwha, particularly in relation to cervical spondylosis, discogenic disease and foraminal stenosis. It was argued that the consistency of those findings across multiple practitioners supported the Claimant's case that she sustained a significant cervical injury in the accident.
- [38.] By contrast, Counsel submitted that Dr. Barnett's opinion should be approached with considerable caution. Counsel argued that Dr. Barnett's report sought to attribute the Claimant's symptoms predominantly to pre-existing degeneration and thereby to undermine the body of opinion expressed by several other specialists. Counsel submitted that the Court should prefer the evidence of the Claimant's treating and examining specialists, several of whom saw her closer in time to the accident than did Dr. Barnett.
- [39.] In relation to the Court's treatment of competing expert evidence, Counsel relied on **Theresa Stubbs et al v Dr Hubert Minnis et al [2004] 1 BHS J. No.13** and **Sidaway v Governors of Bethlehem Royal Hospital [1985] AC 871 (HL)** for the proposition that where expert opinions conflict, the Court must consider whether the opinion relied on reflects a responsible body of professional opinion in the relevant field. Counsel also relied on **Miguel Fernandez v Neptune Waterboys Limited [2020] 1 BHS J. No. 22** for the principle that expert witnesses must act independently and that their duty is to assist the Court rather than the party who pays them.
- [40.] Counsel also submitted that, in light of the Defendants' admission of liability, no real argument on causation ought now to be entertained at the assessment stage. In support, Counsel relied on **Ryan Strachan v Raynor Russell and Another [2023] 1 BHS J. No. 141** and **Ruffin Crystal Palace Ltd. v Laniccini Brathwaite [2013] 1 BHS J. No. 65**, for the proposition that a Defendant cannot go behind an admission of liability at that point.
- [41.] Turning to the assessment of general damages, Counsel submitted that the governing principles are well settled. Reliance was placed on **Matuszowicz v Parker [1987] 1 BHS J. No. 80**, as the leading local authority on the use of comparative awards. Counsel referred specifically to the observation in that case that, until a pattern of local decisions emerges, English authorities may be treated as a

guide, though not inflexibly, and with such adjustments as may be appropriate to reflect local conditions in The Bahamas.

[42.] Counsel also relied on **Scott v Attorney General [2017] 3 LRC 704**, for the proposition that damages must be compensatory and fair both to the claimant and to the defendant; on **Livingstone v Rawyards Coal Co (1880) 5 App Cas 25** for the basic compensatory principle that the Court should award such sum as will place the injured party, so far as money can do so, in the same position as if the wrong had not been committed; and on **British Transport Commission v Gourley [1956] AC 185** to similar effect.

Pain and Suffering Loss of Amenities (PSLA)

[43.] In relation to the assessment of pain, suffering and loss of amenities, Counsel relied on the well-known factors stated in **Cornilliac v St Louis (1965) 7 WIR 491**, namely; the nature and extent of the injuries sustained; the nature and gravity of the resulting disability; the pain and suffering endured; the loss of amenities suffered; and the extent to which the Claimant's pecuniary prospects have been materially affected.

[44.] Counsel submitted that, on the evidence, these factors strongly favoured a substantial award. It was argued that the Claimant suffered a significant cervical injury, continues to complain of chronic pain, has endured these symptoms for more than a decade after the accident, and has suffered substantial disruption to both her personal and working life.

[45.] In support of the appropriate range of awards, Counsel relied on a number of comparative authorities. Particular emphasis was placed on **Ryan Strachan v Raynor Russell and Another [2023] 1 BHS J. No. 141**, in which an award of \$100,000.00 was made for pain, suffering and loss of amenities in respect of injuries which Counsel submitted were comparable in part to those suffered by the present Claimant, including whiplash and cervical radiculopathy.

[46.] Counsel also relied on **Stubbs v Wells [2006] 2 BHS J. No. 67** in which \$60,000.00 was awarded for neck injuries arising out of a traffic accident, and submitted that, having regard to the fact that the case was decided in 2006 and to the asserted greater severity of the present Claimant's injuries, it supported an upwardly adjusted award. Further reliance was placed on **Bethel and another v McDonald [2013] 2 BHS J. No. 75**, in which the Court of Appeal upheld an award of \$80,000.00 in general damages in respect of injuries including whiplash and cervical spondylosis.

[47.] Counsel also referred the Court to **Chandler v Kaiser and Another [2007] BHS J. No. 22**, not for the quantum awarded, but for the Court's approach in cases involving multiple injuries and multiple heads of loss. It was submitted that the Court should consider the cumulative effect of the Claimant's injuries and losses, rather than assessing each in isolation.

[48.] Counsel further drew attention to the *Judicial Studies Board Guidelines* as a useful aid in categorizing the severity of neck injuries. It was submitted that the Claimant's injuries, described as cervical whiplash associated disorder, cervical spondylosis with right C5-C7 radiculopathy, and C5-C6 cervical disc degeneration with right foraminal narrowing, fell within the severe category for neck injuries. Counsel submitted that this classification was supported in particular by Dr. Wadwha's findings and by his assessment of the Claimant's Neck Disability Index at 62%, which was said to be indicative of severe disability. Counsel also referred to the severe category range in the *Guidelines* and submitted that, when adjusted for local conditions, it supported an award in the vicinity sought by the Claimant.

[49.] It was further submitted that the Claimant's suffering extended beyond pain alone. Counsel pointed to the Claimant's evidence that she could no longer continue in the work that had previously earned her significantly more, that her enjoyment of life has been materially diminished, and that aspects of her personal and marital life have been adversely affected. Counsel also relied on the Claimant's evidence that she could no longer dance as she once had and is unable to wear heels because of her condition.

[50.] Accordingly, Counsel submitted that an award of \$100,000.00 for pain, suffering and loss of amenities would be fair and not excessive.

Past and Future Loss of Earnings

[51.] Turning then to economic loss, Counsel submitted that the Claimant had suffered both past and future income loss and a substantial handicap on the labour market. Counsel argued that before the accident, the Claimant earned a base gross salary of \$430.00 per week plus tips averaging \$170.00 per week for a total of approximately \$600.00 per week, and that evidence from her former employers substantiated those earnings.

[52.] Counsel submitted that the Claimant remained unemployed from the date of the accident until she secured employment with the Ministry of Health as a patient care assistant commencing 1 June 2020. On that basis, Counsel advanced a claim for past loss of earnings calculated at 338 weeks at \$600.00 per week, for a total claim of \$202,800.00.

[53.] Counsel further submitted that the Claimant's current earnings are substantially lower than her pre-accident earnings. It was argued that, based on the salary information exhibited, the Claimant's annual income in her later employment was approximately \$11,450.00, or \$220.19 per week, giving a differential of \$379.81 per week when *compared* with her pre-accident earnings of \$600.00 per week.

[54.] On that footing, Counsel advanced a claim for future loss of earnings calculated over a further 15 years to retirement age, in the sum of \$296,251.80.

Smith v Manchester Award

[55.] Counsel also sought a separate award for handicap on the labour market in the nature of a **Smith v Manchester** award. Reliance was placed on **Moeliker v Reyrolle & Co Ltd [1977] 1 All ER 9**, and it was submitted that although the Claimant is now employed, she is not employed in her field of training and there remains a real possibility that she may never return to her former career as an aesthetician, particularly given Dr. Wadwha's guarded prognosis and the fact that surgery might only partially relieve her symptoms. Counsel therefore submitted that the Claimant has suffered a substantial diminution in earning capacity and sought \$100,000.00 under this head.

[56.] As to medical expenses, Counsel submitted that the Claimant had produced, in her Supplemental Witness Statement filed on 10 October 2024, receipts and supporting material for out-of-pocket expenses totaling \$11,353.91, exclusive of certain quotations and estimates. Counsel submitted that these receipts were unchallenged.

Future Medical Expenses

[57.] In relation to future medical expenses, Counsel submitted that Dr. Wadwha's report supported the need for surgery and that the Claimant had produced estimates for the cost of the surgery and associated treatment. Counsel referred to an estimate from Doctors Hospital in the sum of \$65,500.00, together with physician's fees of \$29,734.50, anesthesiologist's fees of \$2,800.00, physiotherapy of \$2,380.00, and a cervical collar of \$565.00, giving a total of \$100,979.50. Counsel also referred to the prospect of a further short period away from work following surgery.

[58.] Counsel submitted that the Defendants' point that surgery might have been obtained at Princess Margaret Hospital was unsupported by evidence as to cost and did not displace the Claimant's evidence regarding the private cost of treatment.

Deductions

[59.] Counsel also addressed deductions. It was acknowledged on behalf of the Claimant that she had received \$5,000.00 from the Defendants' insurers on or about 17 July 2014, an interim payment of \$20,000.00 on or about 25 July 2018, and National Insurance Board payments totaling \$2,970.75. Counsel submitted that the total deduction should therefore be \$27,970.75, unless the Defendants could show otherwise.

[60.] Drawing those heads together, Counsel submitted that the Claimant's claim (less deductions) should be assessed as follows:

General Damages

a. Pain and Suffering Loss of Amenities:	\$100,000.00;
b. Past loss of earnings:	\$202,800.00;
c. Future loss of earnings:	\$296,251.80;
d. Smith v Manchester award:	\$100,000.00;

Special Damages

e. Out-of-pocket medical expenses:	\$ 11,353.91;
f. Future medical expenses:	\$100,979.50
Sub- Total	\$811,385.21

Deductions **\$27,970.75**

Total less deductions **\$783,414.46**

Costs

[61.] Finally, Counsel addressed costs. It was submitted that costs should follow the event; that the Claimant had already obtained costs orders in relation to the interim payment application and costs thrown away; that the matter had been in the system for many years; and that the Defendants had not conceded liability until 2022. Counsel referred in that regard to **Part 71.6** and **Part 72** of the Supreme Court Civil Procedure Rules, 2022 and to **Robert Forbes v Ministry of Tourism and another [2024] 1 BHS J. No. 72**. Counsel invited the Court either to make a fixed costs order in the range of **\$80,000.00** to **\$100,000.00**, or alternatively to carry out a summary assessment upon receipt of an itemized bill.

The Defendants' Case

[62.] The Defendants' case was advanced primarily through the medical evidence of Dr. David N. Barnett, their only witness. Dr. Barnett's evidence-in-chief was contained in a Witness Statement filed on 17 October 2024, and his opinions set out in a medical report dated 26 June 2023.

[63.] The crux of the Defendants' case is the issue of causation, and in particular, the extent to which the Claimant's current condition can be attributed to the accident of 6 December 2013 as opposed to pre-existing degenerative changes in her cervical spine.

Dr. Barnett

- [64.] Dr Barnett is a consultant orthopaedic surgeon with expertise in orthopaedics and biomechanics. He testified that he examined the Claimant, reviewed her medical history and records, and conducted both an in-person examination and subsequent tele-consultation with her.
- [65.] Dr. Barnett recounted that, at the time of the accident, the Claimant already exhibited radiological evidence of degenerative spinal changes. He explained that such changes necessarily pre-dated the accident, since they develop over a prolonged period and could not have arisen suddenly.
- [66.] While he accepted that the Claimant sustained an acute injury consistent with a soft tissue or “whiplash-type” injury, he considered that such injuries ordinarily resolve within a relatively short period and would not account for symptoms persisting over many years.
- [67.] In his view, the Claimant’s ongoing complaints were best understood as arising from a combination of acute and chronic factors, with the dominant cause being her underlying degenerative condition. The accident, at most, he said caused a temporary exacerbation of symptoms rather than any material alteration of the underlying pathology.
- [68.] Dr. Barnett disagreed with aspects of Dr. Abubakar’s diagnoses, particularly the diagnosis of cervical disc disease and an extruded disc. He maintained instead that the imaging supported a diagnosis of bulging discs associated with degenerative change.
- [69.] He was also critical of the recommendation that urgent anterior cervical discectomy and fusion (ACDF) surgery was required, including the suggestion that without surgery the Claimant would become paralyzed. He noted that more than nine years (at that time) had passed since that advice was given, during which the Claimant had not undergone surgery and had not developed the predicted paralysis. Dr. Barnett further considered that the medical records did not demonstrate clear and objective neurological deficits of a kind that would justify surgical intervention. In his view, pain alone is not an indication for surgery absent demonstrable “*hard, definitive neural deficits that you can correct by surgery*”.
- [70.] Further, Dr. Barnett expressed similar concerns regarding the opinions of Drs. Munnings and Ekedede, noting that their conclusions did not adequately account for the Claimant’s pre-existing medical history or the natural progression of degenerative spinal disease.
- [71.] Dr. Barnett emphasized that the radiological findings shortly after the accident already demonstrated established osteoarthritic changes, including cervical spondylosis and disc degeneration. He explained that such findings “take years to form” and could not have developed in the short interval between the accident and the imaging. He further observed that subsequent imaging showed

progression consistent with the natural history of degenerative disease, rather than the consequences of acute trauma.

[72.] Dr. Barnett also placed weight on the Claimant's functional capacity over time. He noted that she is able to perform her activities of daily living and had returned to full-time employment, notwithstanding the absence of surgical intervention and the progression of degeneration. He considered this inconsistent with the suggestion that the Claimant suffered from a disabling condition caused by the accident and that surgery had been urgently required.

[73.] While accepting that the Claimant continues to experience intermittent symptoms, including neck pain and occasional radicular complaints, Dr. Barnett considered those symptoms characteristic of degenerative spinal disease and amenable to conservative management, including over-the-counter medication.

[74.] He accepted that surgery might become necessary in the future, but assessed that risk as relatively low, in the range of 10%-20%. He attributed any future need for surgery predominantly to the natural progression of degeneration (65%), with lesser contributions from the 2013 accident (30%) and the subsequent accident in January 2021 (5%).

[75.] Dr. Barnett also addressed the Claimant's psychological condition. He noted what she described as a history of pre-existing psychological vulnerability and emotional difficulties dating back to childhood. In his view, the advice given to the Claimant that she might become paralyzed contributed significantly to her anxiety and fear, which in turn adversely affected her willingness to continue working. He considered that these psychological factors, rather than her physical condition alone, materially contributed to her prolonged absence from employment.

Defendants' Submissions

[76.] In the Defendants' Closing Submissions on Damages, Counsel for the Defendants submitted that the critical issues for determination are the precise injury sustained by the Claimant in the accident and the losses which directly flowed from it. Counsel contended that the accident was a low velocity one and that, having regard to the totality of the medical evidence, it is highly probable that the exact injury sustained by the Claimant was not severe or life threatening.

[77.] Counsel accepted that the Claimant was taken to Princess Margaret Hospital after the accident and that the contemporaneous records noted that she presented with neck and shoulder pain. Counsel also accepted that the initial CT scan referred to a fracture of the transverse process of the first thoracic vertebra and an assessment of blunt trauma with thoracic vertebra transverse process fracture secondary to the motor vehicular accident. However, Counsel emphasized that the Claimant was discharged on 10 December 2013 with just a cervical collar and medication.

- [78.] Counsel submitted that the contemporaneous radiology from Princess Margaret Hospital also showed “OA” changes”, which Counsel said referred to osteoarthritic change, and further relied on the MRI report of 31 January 2014, which recorded multilevel cervical spondylosis including mild bilateral neural foraminal narrowing at C5-C6.
- [79.] Counsel accepted that Dr. Abubakar, Dr. Munnings and Dr. Ekedede each at various times recommended surgery, but emphasized that none of those doctors was called by the Claimant to give oral evidence at the trial. Counsel submitted that limited weight should therefore be attached to their opinions, particularly where those opinions were advanced in support of the proposition that the Claimant’s long-term condition and possible future surgery were attributable to the accident.
- [80.] Counsel submitted that the medical evidence demonstrated that the Claimant had pre-existing degenerative changes in the cervical spine, including discogenic disease and spondylosis, and that such conditions were consistent with the natural ageing process rather than trauma. Counsel argued that the Claimant’s ongoing symptoms were, in substantial part, manifestations of that pre-existing condition.
- [81.] In support of that position, Counsel relied on the reports of Dr. Barnett and on the evidence of Dr. Wadwha. It was submitted that there was no substantive difference between them on the central point that the Claimant had degenerative disc disease which pre-dated the accident and was not caused by it. Counsel pointed in particular to Dr. Wadwha’s evidence that he could not conclude that the C5 to C7 disc prolapse was caused by the accident and that trauma “*could be a possible etiology*” only. Counsel also relied on his evidence that the severe changes seen on x-ray were degenerative or “*wear and tear*” related and that all the changes he saw at the time of this examination were degenerative in nature.
- [82.] Counsel also submitted that the surgery referred to by Dr. Wadwha was aimed at addressing symptoms arising from disc degeneration, disc bulge and neural involvement, and therefore any future surgery and its associated cost were not directly recoverable as losses caused by the accident.
- [83.] Counsel relied heavily on the evidence of Dr. Barnett. It was submitted that Dr. Barnett’s report and oral evidence showed that, at the time of the accident, the Claimant already had ongoing degeneration in her spine and that her discomforts were caused by a combination of acute and chronic problems. Counsel submitted that even if the Claimant sustained fractures initially, they would have been minor and expected to heal within six to eight weeks, and in any event later imaging did not confirm them.
- [84.] Counsel further submitted that Dr. Barnett was justified in criticizing the recommendations for urgent surgery made by Drs. Abubakar, Munnings and Ekedede. It was argued that the subsequent

history, including the fact that the Claimant never underwent surgery and never became paralyzed, demonstrated that the prediction of paralysis had been overstated.

- [85.] Counsel also relied on Dr. Barnett's evidence that the Claimant's current symptoms were characteristic of ongoing degenerative spinal disease, that they could continue to be managed conservatively, and that the future risk of surgery was only 10% to 20%. Counsel further relied on his apportionment of any future surgical need as 65% attributable to pre-existing and inevitable degeneration, 30% to the 2013 accident and 5% to the 2021 accident.
- [86.] Counsel submitted that the Claimant's own evidence under cross-examination materially supported the Defendants' case on mitigation. In particular, Counsel relied on the Claimant's evidence that she declined surgery because she did not want it performed at Princess Margaret Hospital, even though she understood that the surgery would have been available there and more affordable. Counsel submitted that this was a personal choice, not a medical impossibility, and that it should weigh against the Claimant on the issue of mitigation.
- [87.] Counsel also relied on the Claimant's evidence that she was not terminated by Windermere Day Spa, that she could have returned there after surgery, that she did not work for approximately six years after the accident, and that the reason she returned to work in 2019 was in her own words, "hunger". Counsel submitted that this showed not only that she was capable of eventual employment without surgery, but also that there was no sufficient evidential basis for a claim that she was wholly unable to work throughout the full period claimed.
- [88.] Counsel further submitted that there was no evidence that the Claimant actively sought employment between 2013 and 2019, and that there was no medical evidence from Dr. Wadwha or Dr. Barnett stating that she was unable to work for six years. Counsel relied on the Claimant's ability to look after her personal hygiene and some household tasks as further indication that she retained meaningful functionality.
- [89.] In support of the legal treatment of pre-existing injuries, Counsel relied on **McCoy v Williams and another** and **Clarke v Williams and another** [2014] 1 BHS J. No. 112, emphasizing that although a tortfeasor must take a claimant as found, the defendant is not liable for injuries not caused by the accident. Counsel also relied on **Cutler v Vauxhall Motors Ltd** [1970] 2 All ER 56, for the proposition that losses which would likely have been incurred in any event are not recoverable.
- [90.] Counsel further relied on **Regina (London Fire and Emergency Planning Authority) v Board of Medical Referees** [2009] ICR 697 to submit that not every acceleration of symptoms in the presence of degeneration justifies full recovery, and that the distinction between aggravation and mere acceleration is ultimately one of medical judgment.

Pain and Suffering Loss of Amenities

- [91.] In relation to the general approach to damages, Counsel relied on **Thompson and another v Strachan and others** [2017] 1 BHS J. No. 108, which Counsel said summarized the governing principles from **Livingstone v Rawyards Coal Company (1880) 5 App Cas 25**, **Cornilliac v St Louis (1965) 7 WIR 491**, **H West & Sons Ltd v Shephard** [1964] AC 326 and **Matuszowicz v Parker** [1987] BHS J.No. 80. Counsel submitted that the Court must first identify the exact injuries sustained, and then assess damages by reference to those injuries and their impact on the particular claimant.
- [92.] As to the proper award for pain, suffering and loss of amenities, Counsel submitted that the Claimant's injuries attributable to the accident should be found to consist of a minor whiplash injury together with pain in the neck, bilateral shoulders, chest and upper back, and that the Claimant's cervical degenerative changes were not caused by the accident. Accordingly, Counsel submitted that the Claimant's proposed award of \$100,000.00 was excessive.
- [93.] In support of that submission, Counsel relied on **Sharon Goodman and Garon Brown SCCivApp No. 2 of 2015** for the proposition that the assessment of pain, suffering and loss of amenities (general damages) must focus on the nature and severity of the injury and its effect upon the particular claimant. Counsel also relied on the *Judicial College Guidelines* and submitted that the Claimant's injuries fell within the moderate (ii) bracket for neck injuries attracting an award in the range of approximately B\$18,480.18 to B\$33,611.33. In further support of this position, Counsel referred to **Maria Wells v Oneika Stubbs SCCivApp 29 of 2006** and **Grant v Smith [2003] BHJ No.32 of 2002** submitting that those authorities supported a significantly lower award than that sought by the Claimant. Counsel proposed **\$40,000.00** as a reasonable sum for pain, suffering and loss of amenities.

Special Damages

- [94.] In relation to special damages for medical expenses, Counsel submitted that the Claimant was confined to the amount pleaded, namely **\$3,197.02** and could not recover the higher figures reflected in receipts later exhibited in her witness statements. Counsel emphasized that special damages must be specifically pleaded and strictly proved, relying on the discussion in **Thompson and another v Strachan and others** [2017] 1 BHS J. No. 108 and the authorities there cited, including **Ilkiw v Samuels** [1963] 2 All ER 879 and the Bahamian authorities referenced in that passage. Counsel submitted that, since the Writ was never amended, the Claimant could not recover more than the sum pleaded.

Past Loss of Earnings

- [95.] On past loss of earnings, Counsel rejected the Claimant's calculation of **\$202,800.00** over the period 6 December 2013 to 1 June 2020. Counsel submitted that the proper approach is to have regard to the period during which inability to work is substantiated by medical evidence. In that regard, Counsel relied on **Rolle v Strachan [1998] BHS J. No. 110** and **Chandler v Kaiser and another [2007] 4 BHS J. No.22**.
- [96.] Counsel submitted that the only sick certificates before the Court supported incapacity for work for approximately five months, from January 2014 to May 2014, and that on the basis of earnings of \$600.00 per week the gross figure for that period would be **\$12,000.00**. Counsel further submitted that from that sum there should be deducted National Insurance Board benefits received by the Claimant in the amount of \$2,970.72, resulting in a net past loss of earnings claim of **\$9,029.28**.
- [97.] Counsel further argued that no award should be made for the period from June 2014 to June 2020 because the Claimant had failed to mitigate her loss. In support of that contention, Counsel relied on **Delone Symonette v Charles Turnquest [2020] 1 BHS J. No. 48**, **Veranique Collie and Island Hotel Company Limited BHS 2013**, **Yetton v Eastwoods Froy Ltd [1967] 1 WLR 104**, **Ingraham v Ruffin's Crystal Palace Hotel Corp [2000] BHS J. No. 23**, **Swain v Forbes [1985] BHS J. No. 109**, and the extracts from **Kemp and Kemp**, together with **Samuels v Benning [2002] EWCA Civ 858** and **McAuley v London Transport Executive [1957] 2 Lloyd's Rep 500**. Counsel submitted that the Claimant's refusal to undergo surgery, failure to follow through with further NIB processes, failure to seek work for a prolonged period, and eventual return to employment without surgery all demonstrated a failure to take reasonable steps to mitigate.
- [98.] Counsel also submitted that the Claimant had not fully availed herself of NIB benefits and that any loss calculation should take account of those benefits and of what she could reasonably have done to reduce her losses.

Future Loss of Earnings

- [99.] In relation to future loss of earnings, Counsel submitted that the Claimant's claim of \$296,251.80 was legally flawed. It was argued that, because the Claimant is in full employment, any future loss must be assessed cautiously. Counsel relied on **Thompson and another v Strachan and others [2017] 1 BHS J. No. 108**, **Delone Symonette v Charles Turnquest [2020] 1 BHS J. No. 48**, **Heastie's Cleaners Ltd. (c.o.b. Heastie's Lumber and Building Supply) v Duffy [1994] BHS J. No. 7** and **Burrows v Parks [2006] 2 BHS J. No. 157**. Counsel rejected the Claimant's proposed multiplier of 15 and submitted that, having regard to her age and circumstances, a multiplier of 10 was more appropriate.

[100.] Counsel further submitted that the multiplier should be reduced to reflect the contribution of the Claimant's pre-existing degeneration. On that basis, Counsel proposed a future loss of earning figure of \$41,475.25.

Smith v Manchester Award

[101.] As to the Claimant's separate claim for a **Smith v Manchester** award of \$100,000.00, Counsel submitted that no award should be made under that head. It was argued that the Claimant had returned to full-time employment, had done so without surgery, and had not shown that she was unable to carry out her duties or that she was handicapped on the labour market in the relevant legal sense. Counsel relied on **Moeliker v A Reyrolle and Co Ltd** [1977] 1 All ER 9, **Cadet's Car Rentals and another v Pinder** [2016] 2 BHS J. No. 82, and **Delone Symonette v Charles Turnquest** [2020] 1 BHS J. No. 48.

Future Surgery

[102.] On future surgery, Counsel submitted that the evidence was conflicting as to whether the Claimant would in fact require surgery. Counsel emphasized that the surgery had been recommended as far back as 2014, yet was never undertaken, and the feared paralysis did not occur. Counsel relied on Dr. Barnett's evidence that the future risk of surgery was only 10% to 20 %, and on **Eldon Johnson v Devaughn Brown and Pinder's Customs Brokerage SCCivApp No. 107 of 2015** for the proposition that a risk of future surgery at that level is too remote to justify an award. Accordingly, Counsel invited the Court to make no award under this head. However, alternatively, if the Court were minded to make an award, Counsel submitted that it should be reduced to reflect the 65% contribution of the Claimant's pre-existing disc degeneration, in the sum of \$33,332.07 based on the estimates exhibited.

Interest and Costs

[103.] On interest, Counsel submitted that the Claimant was not entitled to the usual approach because there had been inordinate delay in advancing the matter to trial, some 12 years after the accident. Reliance was placed on **Jefford v Gee** [1970] 2 QB 130 and **Delone Symonette v Charles Turnquest** [2020] 1 BHS J. No. 48. Counsel further submitted that, if the Court were minded to award interest, it should be limited to a nominal rate of 2% on special damages from the date of the award, and that no interest should be awarded on general damages.

[104.] Finally, on costs, Counsel submitted that while the Court retains a discretion and costs generally follow the event, this was a case in which the Court should depart from the usual rule. Counsel relied on **Re Elgindata** [1993] 1 All ER 232 and submitted that the Claimant's want of prosecution, delay, failure to prove parts of the claim and failure to discontinue unsubstantiated heads justified

a reduction in any costs award. Counsel therefore invited the Court to order that the Claimant recover only 60% of her costs.

[105.] In summary, Counsel submitted that the Court should award:

a. Special damages:	\$3,197.02;
b. Past Loss of Earnings (NIB deduction applied):	\$9,029.28;
c. Future Loss of Earnings:	\$41,475.25;
d. Smith v Manchester Award:	\$0.00;
e. Pain and Suffering Loss of Amenities:	\$40,000.00;
f. Future surgery:	\$0.00 or alternatively \$33,332.07
Total	\$127,033.62

Issues

[106.] The issues for determination in relation to quantum are:

- a. The nature and extent of the injuries caused by the accident;
- b. The appropriate award (if any) for the various heads of damages:
 - (i) Pain and Suffering Loss of Amenities;
 - (ii) Past Loss of Earnings;
 - (iii) Future Loss of Earnings;
 - (iv) Smith v Manchester Award;
 - (v) Future Medical Expenses;
 - (vi) Special Damages

[107.] Both parties accept that there will be deductions for past payments made to the Claimant in the sum of \$25,000 representing sums received from the Insurers and \$2,970.75 received from the National Insurance Board for a total of \$27,970.75.

Quantum of Damages

[108.] The assessment of damages for injuries sustained as a result of an accident fall under two generic heads namely general and special damages.

[109.] The Court's task in an assessment of damages is compensatory. The governing principle, reflected in **Livingstone v Rawyards Coal Co** (1880) 5 App Cas 25 and **British Transport Commission v Gourley** [1956] AC 185, is that the Court should, so far as money can do so, place the injured party in the position she would have been in had the wrong not occurred. That exercise must be

fair to both parties, as emphasized in **Scott v Attorney General** [2017] 3 LRC 704. The award must therefore compensate proved loss, but avoid overcompensation.

[110.] Although liability has been admitted, causation remains to be determined. In that regard, I accept the Defendants' submission that there is an important distinction between liability for the accident and proof that the injuries and losses claimed were caused by the accident. I therefore do not accept the Claimant's submission insofar as it suggests that causation is no longer open for examination because liability has been admitted. The burden remains on the Claimant to prove on a balance of probabilities that the damages claimed were caused by the accident.

[111.] I bear in mind the guidance in **Cornilliac v St Louis** (1965) 7 WIR 491 that, in assessing general damages, the Court considers the nature and extent of the injuries, the nature and gravity of the resulting disability, the pain and suffering endured, the loss of amenities, and the extent to which pecuniary prospects have been affected. I also bear in mind the observations in **Thompson and another v Strachan and others** [2017] 1 BHS J. No. 108, **Matuszowicz v Parker** [1987] BHS J. No. 80 and **H West & Sons Ltd v Shephard** [1964] AC 326 as to the use of comparable awards and the need for the award to be fair and reasonable in the circumstances of the particular claimant.

Medical Evidence and Causation

[112.] I begin with the medical evidence. The contemporaneous records from Princess Margaret Hospital are clear. They support the Claimant's evidence that following the accident she suffered immediate neck and shoulder pain, and was admitted to hospital for several days. Whatever reservations may later arise about the precise nature of the injury, those records do not support the proposition that the Claimant suffered only trivial injury.

[113.] I therefore accept that the Claimant sustained an acute cervical injury in the accident. I also accept that in the period immediately following the accident she suffered pain and restriction and required medical treatment.

[114.] The more difficult question is the extent to which her long-term complaints are attributable to the accident, as opposed to underlying degenerative change. On that issue, the evidence demonstrated that radiological investigations revealed osteoarthritic changes, cervical spondylosis and multilevel discogenic disease relatively soon after the accident. Dr. Barnett's evidence was that such changes take years to develop and necessarily pre-dated the accident. Dr. Wadwha, the Claimant's medical expert, also accepted that the radiological changes were degenerative in nature and consistent with age-related wear and tear.

[115.] I accept the Claimant's submission that several doctors over time identified cervical pathology of a broadly similar type. I also accept that this tends to support the genuineness and persistence of

the Claimant's complaints. However, I do not accept the Claimant's further submission that the Court should simply reject Dr. Barnett's evidence because he is not a neurologist or because his view differs from those of other doctors. The proper approach, consistent with **Sidaway v Governors of Bethlehem Royal Hospital [1985] AC 871 (HL)** and **Miguel Fernandez v Neptune Waterboys Limited [2020] 1 BHS J. No. 22**, is to evaluate the reasoning, expertise, consistency and evidential foundation of the competing opinions.

- [116.] In my judgment, the Defendants are correct to submit, by reference to **McCoy v Williams and another; Clarke v Williams and another [2014] 1 BHS J. No. 112** and **Cutler v Vauxhall Motors Ltd [1970] 2 All ER 56**, that they are not liable for conditions and consequences that would likely have arisen in any event from a pre-existing degenerative condition. Equally, however, the law is clear that a defendant takes the claimant as found. If the accident materially triggered, aggravated or rendered symptomatic an underlying condition, the resulting loss remains compensable to that extent.
- [117.] I also note that although several treating doctors including Drs. Abubakar, Munnings and Ekedede had recommended surgery over the years, only Dr. Wadwha gave oral testimony. The reports of the other Doctors form part of the history and may be considered, but their opinions on contested matters of causation and prognosis carry less weight because they were not tested in cross-examination.
- [118.] Dr. Wadwha's evidence, though, was in my view, balanced. He confirmed the Claimant's ongoing complaints and significant pathology, but he also candidly accepted the degenerative nature of the radiological findings and was unable to state that the disc pathology was caused by the accident. Dr. Barnett's evidence went further, attributing the dominant cause of the Claimant's ongoing complaints to degeneration rather than trauma. I do not accept Dr. Barnett's evidence in every respect, particularly to the extent that it tends to minimize the lasting effect of the accident too greatly. However, I do accept his evidence that the Claimant had significant pre-existing degenerative change and that the accident was not the sole cause of her present condition.
- [119.] As to the initially recorded T1 fracture, the later imaging did not clearly confirm it. I therefore approach that aspect with caution. I am satisfied that the Claimant sustained a cervical injury and that she was properly admitted and treated, but I am not satisfied on the evidence before me that the fracture finding should drive the overall assessment of damages as if a serious structural fracture injury had been definitively established.
- [120.] I also take into account the evidence relating to the subsequent accident in 2021. The Claimant stated that she attended hospital as a precaution but sustained no new injury. Dr. Barnett attributed 5% of possible future surgical need to that later accident, but there is otherwise no clear evidential basis before me to treat it as a significant independent cause of the Claimant's present condition. I

therefore make no substantial deduction on that basis. Dr. Wadwha was not made aware of this accident, therefore, he was unable to address it at all in his findings.

[121.] Drawing these matters together, I find that the Claimant sustained a moderate cervical injury in the accident, including a whiplash-type injury with significant pain and residual symptoms, and that the accident aggravated or rendered symptomatic an underlying degenerative cervical condition. I am not satisfied that the accident alone caused the whole of the Claimant's current pathology, nor am I satisfied that all of her present complaints can be laid entirely at the Defendants' door.

Pain and Suffering Loss of Amenities

[122.] In assessing general damages for PSLA, I have considered the guidance in **Cornilliac v St Louis (1965) 7 WIR 491**, the comparable authorities relied on by both parties, and the need for fairness and proportionality emphasized in **H West & Sons Ltd v Shephard** [1964] AC 326, **Scott v Attorney General** [2017] 3 LRC 704 and **Matuszowicz v Parker** [1987] BHS J. No. 80.

[123.] I accept the Claimant's evidence that she experienced real and persistent pain for a prolonged period; that her enjoyment of life was materially affected; that her ability to continue in her former work as an aesthetician was impaired; and that she suffered anxiety, especially in relation to travelling by jitney. I also accept that the pain and uncertainty surrounding her condition had broader emotional and financial consequences.

[124.] At the same time, the award must reflect the Court's findings on causation. The Claimant did return to work. She retained a meaningful level of independence in activities of daily living. The more extreme prognosis of paralysis did not materialize. A substantial part of her condition is attributable to pre-existing degeneration. I also bear in mind the Defendants' submission, supported by the *Guidelines* and cases such as **Maria Wells v Oneika Stubbs** SCCivApp 29 of 2006 and **Grant v Smith** [2003] BHJ No. 32, that the injuries attributable to the accident were more limited than the Claimant contends. Those matters must temper the award.

[125.] Having regard to the totality of the evidence, I assess damages for pain, suffering and loss of amenities at \$50,000.00. In my judgment, that figure more appropriately reflects the moderate nature of the injury attributable to the accident, the persistence of symptoms, and the substantial role played by the Claimant's pre-existing degenerative condition. It is sufficient to compensate the Claimant fairly without overcompensating her for symptoms and pathology not wholly caused by the accident.

Past Loss of Earnings

[126.] The Claimant's evidence was that she earned approximately \$600.00 per week inclusive of tips at Windermere Day Spa and Salon and that she earned no income between the period December 6, 2013 and June 1, 2020. The Defendants submit that any claim for such an extended period is overstated and unsupported by the medical evidence, particularly in light of the Claimant's eventual return to work without surgery.

[127.] I accept that the accident caused an immediate interruption to the Claimant's earning capacity and that the documentary evidence, in the form of the sick slips tendered, medically certified her as unfit for work from approximately January 2014 to May 2014, viz., that is five months. Given her weekly gross salary of \$600, her proven past loss of earnings would amount to \$12,000.

[128.] I also accept that her symptoms persisted beyond that initial certified period.

[129.] The Claimant admitted having received benefits from NIB for the period 6 February, 2014 to 12 June, 2014 in the sum of \$2,970.72.

[130.] She did not apply for an extension from NIB because in order to do so she was required to be examined by a doctor from NIB and she never followed up to obtain the appointment.

[131.] This is what she had to say in relation to the reason for not following up:

Q. Did you apply for an extension of sickness benefit of NIB?

A. I usually had went back and I had to make an appointment with the doctor, well they were giving me information on how the six months. I think they only give you checks for six months and then you would have to get evaluated again I think.

Q. By your doctor.

A. So they were giving me that information. It was just getting a ride, back and forth to National Insurance was like an issue for me. So the turn around, it was just up and down, constantly asking for a ride and it was just a lot of up and down without getting the information that I needed. So I just didn't.

[132.] However, I am not satisfied that the Claimant has proved a complete incapacity to work for the entirety of the period claimed because it is unsupported by the medical evidence. Her job as an aesthetician at Windermere Day Spa required her to perform massages, body scrubs, body polishing, manicure and pedicures which required her to use her shoulders and stand on her feet. Therefore, after the accident she was unable to return to work in this capacity.

[133.] However, she re-commenced employment in 2021 after undergoing training in a patient care course with the National Training Institute some eight years after the accident. Her evidence was that she started working with the Ministry of Health at the clinic as a patient care assistant. She had this to say about the duties of that post:

“27. A Patient Care Assistant tasks includes lifting patients or assisting with movement of patients, I am not asked to do this because of my situation.”

[134.] While she claimed past loss of earnings for 2013 to 2020, her medical certificates only accounted for approximately five months of incapacity immediately following the accident. While she continued to report pain thereafter, no medical certificates were produced beyond May 2014 to explain her prolonged absence from the workforce.

[135.] It is difficult to reconcile why, given the pain and limitation she was experiencing, she did not return to her doctor to obtain further medical certification so as to secure additional medical leave, nor attempt re-engagement with Windermere Day Spa in another capacity, or pursue employment elsewhere in a role that might have enabled her to earn some income. This failure to take reasonable steps in light of her condition raises the question of whether she adequately discharged her duty to mitigate her loss.

[136.] The Claimant advanced a claim for past loss of earnings in the sum of \$202,800, calculated at 338 weeks at \$600 per week for the period 6 December 2013 to 1 June 2020. For the reasons discussed in the previous paragraphs, this figure is unsubstantiated and must be rejected.

[137.] As Winder J (as he then was) observed in **Delone Symonette v Charles Turnquest [2020] 1 BHS J. No. 48** at paragraph 56, citing Sir John Donaldson MR in *The Solt* [1983] 1 Lloyd’s Rep. 605:

“A plaintiff is under no duty to mitigate his loss, despite habitual use by lawyers of the phrase duty to mitigate. He is free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff’s loss as is properly caused by the defendant’s breach of duty.”

[138.] In summary, as observed previously, the extended period of non-employment from 2013 to 2019 is not adequately explained. The evidence demonstrated that she failed to take meaningful steps to mitigate her loss. This is further exacerbated by her failure to pursue an extension of sickness benefits from NIB in addition to her delay in seeking alternative employment. She would not become “hungry” enough to pursue employment until some eight years post the accident. **Eldon Johnson v Devaughn Brown and Pinder’s Customs Brokerage Ltd** SCCivApp No. 107 of 2015, **Samuels v Benning** [2002] EWCA Civ 858 and **McAuley v London Transport Executive** [1957] 2 Lloyd’s Rep 500.

[139.] In all the circumstances, I am satisfied that the appropriate award for past economic loss is limited to the actual loss substantiated by medical certificates, namely \$12,000. While I appreciate that she obtained the sum of \$2,970.72 from NIB, I will make the deduction from the total award given. Accordingly, under this head of damages, the Claimant is awarded \$12,000.00.

Future Loss of Earnings

[140.] The Claimant also asserted that the accident has adversely affected her future earning ability. In the Statement of Claim, this head was pleaded as “loss of future earnings” and the sum of \$10,800.00 claimed. However, in closing submissions, the sum of \$296,251.80 was sought as future loss of earnings over a further 15 years to retirement age.

[141.] The Claimant, born on 1 September 1975, was 38 years old at the time of the accident. She is now 50 years old soon to be 51 years old and is employed with the Ministry of Health, where—as is standard in government service—the mandatory retirement age is 65. Accordingly, her remaining working life expectancy is approximately 14 years, which forms the basis for assessing future loss using the appropriate multiplier.

[142.] In **Thompson and another v. Strachan and others - [2017] 1 BHS J. No. 108**, Justice Charles (as she then was) set out the dicta when calculating future loss of earnings when there are a number of uncertainties. Justice Charles opined:

Loss of future earnings/ loss of earning capacity

48. As regards the assessment of general damages in respect of future loss of earnings, there are a number of uncertainties, which have to be brought in and these, necessarily, make the calculation of future loss of earnings so problematic because the court has to engage in the exercise of prophesying both what will happen to the plaintiff in the future and what would have happened if he had not been injured. The uncertainties include such matters as the probable length of time of the plaintiff's future incapacity, his prospects of obtaining employment and the normal hazards of life. To reach a figure for the award of a lump sum, the normal method of assessment which is used by the courts, is first to calculate, as accurately as possible, the net annual loss suffered, which is usually based on an average of the plaintiff's pre-accident "take-home" pay. This is to be used as the multiplicand.

The multiplicand

49. This is the starting point. I have already calculated his annual yearly earnings to be \$19,200: see paragraph [27] [supra].

50 In the circumstances, I will fix a multiplicand of \$19,200. I am conscious of the principles enunciated in *Cookson v Knowles* (1979) AC 556 and followed in *Alphonso v Ramnath* [1997] 56 W.I.R. 229., that for the purpose of arriving at the multiplicand, the basis should be the least amount that Mr. Thompson would have been earning if he had continued working without being injured.

The multiplier

51 In determining the multiplier, the court has to be conscious that it is assessing general and not special damages; that it is evaluating prospects and it is a once for all and final assessment. It must take into account the many contingencies, vicissitudes and uncertainties of life. It must remind itself that the plaintiff is receiving money now as a capital sum instead of installments over the rest of his working life. The court must also remind itself that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident.

52 In the present case, Mr. Thompson was 60 years old at the time of the accident having been born on 16 June 1951. He is now 65 and will soon be 66. He would have had a normal working life of 65 or 70 as he says. If 65, he is already a retired man but I will accept his evidence that cab drivers can go a bit longer although I observed that Mr. Thompson could not read without his glasses. I also take into account the many contingencies, vicissitudes and imponderables of life and that damages will be a lump sum award.

53 Learned Counsel Mr. Armbrister suggested a multiplier of 18. No doubt, he faced an uphill task to produce an authority to demonstrate that the court can fix a multiplier of 18 for a man who has passed 65 (the retirement age for civil servants). In *Matuszowicz v Parker*, the plaintiff was 30 years old at the date of the accident. He could, in the normal course of events, have had a working span of some 35 years. Georges CJ opined that a multiplier of 18 seems appropriate in the circumstances. In my opinion, multipliers of 18 are non-existent for persons like Mr. Thompson due to his age: see Table of Multipliers for authenticated awards and unauthenticated awards at pages 136 -- 139 of Kemp & Kemp Vol. I (4th Edition).

54 In the circumstances, I would give Mr. Thompson a working life of 70 years and fix a multiplier of 4.

55 Using the multiplier of 4 and a multiplicand of 19,200, the award under this head is \$76,800.00. I will allow that award.”

[143.] The Claimants have used a multiplier of 15 and the Defendant has asserted that it is wholly unreasonable and suggested 10. In support of this proposition, he has relied on **Delone Symonette v Charles Turnquest [2020] 1 BHS J. No. 48** where a multiplier of 10 was used for a plaintiff who was 47 years old. This was to be contrasted with the case of **Heastie’s Cleaners Ltd (c.o.b. Heastie’s Lumber and Building Supply) v Duffy [1994] BHS J. No. 7** where a multiplier of 15 was found reasonable where the plaintiff was 33 at the time of the trial.

[144.] Accordingly, the Defendant’s proposed multiplier of 10 is consistent with the authority of **Delone Symonette v Turnquest**, where a multiplier of 10 was applied to a plaintiff aged 47. By contrast, the higher multiplier of 15 in **Heastie v Duffy** was appropriate only for a much younger claimant aged 33. I therefore accept the reduction to 10 as fair and reasonable given the Claimant’s age of 50.

[145.] The Claimant used the multiplicand of \$19,750.12 based on the Claimant’s current income and the Defendant has rejected this given that she can earn more and can find alternative employment which meets her pre-accident income. The submission was to use a lower multiplicand based on a 65% reduction attributed to the Claimant’s pre-existing injury of disc degenerative disease - \$6,912.54. Therefore, on this basis, the Defendant has arrived at the damages for future loss of income of \$41,475.25.

[146.] I do not agree. To reduce the multiplicand even further would be unfair because her existing salary is already 63% less than what she previously earned in her previous role at Windermere. Therefore, if there is a reduction on the 65% basis, it ought to be based on what she previously earned - \$10,920. I do accept that she may possibly be able to obtain alternative employment and earn more, however, given her limitation and her age, it may not reach her pre-accident income.

[147.] Therefore, I award her \$109,200 for future loss of earnings.

Smith v Manchester Award

[148.] In her closing submissions there was an additional claim advanced of \$100,000 for diminished earning capacity or handicap on the labour market in the nature of a **Smith v Manchester** award. This was claimed on the basis that even though the Claimant is now employed that she is not employed in her field of training and may never return to her former position as an aesthetician particularly given Dr. Wadwha’s guarded prognosis and the fact that surgery might only partially relieve her symptoms.

[149.] The medical evidence regarding the pre-existing injury – disc degenerative disease – prior to the accident was undisputed by both Dr. Wadwha and Dr. Barnett.

[150.] I refer to the dicta of Winder J (as he then was) in **Delone Symonette v Charles Turnquest [2020]** where he had this to say about the Smith v Manchester Award:

Smith v Manchester

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

29. Smith v Manchester award would be compensation for diminution in earning capacity. It takes into account whether the Plaintiff may be unemployed for a long period or whether he may be forced to accept a less attractive job than he would have prior to his injuries. As Allen P. noted in Cadet's Car Rentals and another v. Pinder - [2016] 2 BHS J. No. 82, [f]rom the authorities of Smith v Manchester, Moeliker v A Reyrolle & Co. Ltd [1977] 1 WLR 132, and the 2015 case of Billett v Ministry of Defence [2015] EWCA Civ. 773, it is clear that a Smith v Manchester award is warranted where there is no present or foreseeable financial loss, but there is loss which the claimant is likely to suffer in the future by reason of decreased difficulty in obtaining or retaining employment. It represents an award for damages which one is likely to suffer in the future by reason of increased difficulty in obtaining or retaining employment.

30. In the circumstances, whilst I am satisfied that the plaintiff is disabled in the labour market, I am of the view that this is not a case in which a Smith v Manchester award would be appropriate. The plaintiff is disabled; his disability affects his ability to pursue his chosen career as a boat engineer. It cannot be said that there is no present or foreseeable financial loss, but there is loss which the claimant is likely to suffer in the future by reason of decreased difficulty in obtaining or retaining employment.

[151.] Applying these principles to the present matter, I accept that the Claimant is no longer able to work as an aesthetician, the field in which she was previously trained and employed. The medical evidence established that her injuries have rendered her unable to perform the physical duties required in that profession. However, the evidence also demonstrated that she remains capable of employment in alternative fields, albeit at a reduced earning capacity. I have therefore made an award for future loss of earnings to compensate for the real and measurable diminution in her earning capacity arising from her injuries.

[152.] A Smith v Manchester award is intended for cases where there is no present or foreseeable financial loss, but where the claimant is nonetheless disadvantaged in the labour market and may suffer future loss if employment is lost. As Allen P. explained in **Cadet's Car Rentals v Pinder**, and as

reaffirmed in **Smith v Manchester, Moeliker, and Billett**, such an award addresses the risk of future disadvantage, not an already-established loss.

- [153.] In this case, the Claimant's loss is not speculative. It is current, identifiable, and quantifiable: she has lost the ability to continue in her chosen profession and may earn less in the alternative employment available to her. This is precisely the type of loss for which an award of **future loss of earnings** is designed. As in **Symonette v Turnquest**, this is not a situation where the Claimant has returned to work and merely faces an increased vulnerability on the labour market. Rather, she has suffered an actual and ongoing impairment of earning capacity.
- [154.] Accordingly, while I am satisfied that the Claimant is disadvantaged in the labour market, this is not an appropriate case for a **Smith v Manchester** award. Her loss has already been addressed through the award for future loss of earnings, and a further award under the **Smith v Manchester** principle would amount to double compensation.
- [155.] Therefore, for these reasons I am not satisfied that the Claimant is disabled in the labour market, I am of the view that this not a case in which a case a Smith v Manchester Award would be appropriate. In **Delone Symonette v Charles Turnquest [2020] 1 BHS J. No. 48** where the Court found that the plaintiff was disabled and it affected his ability to pursue his chosen career as a boat engineer, the Court still did not make a Smith v Manchester award.
- [156.] Further, I am of the view that the future loss of earnings would adequately compensate her for any loss caused by her inability to work in her previous role as an aesthetician.

Special Damages

- [157.] As regards special damages, it is trite that special damages must be specifically pleaded and strictly proved. The pleaded heads included wages and tips, surgery, medical fees, hospitalization, cervical collar and loss of future earnings. Not every pleaded head may properly remain within special damages, and future losses, if awarded, must not be duplicated.
- [158.] On the issue of special damages, I accept the Defendants' submission that the Claimant cannot recover more than was pleaded in the absence of amendment, notwithstanding that additional receipts were later exhibited.
- [159.] I refer to Charles J. (as she then was) in **Thompson and another v. Strachan and others - [2017] 1 BHS J. No. 108** opined:

19. Special damages are quantified damages of which a plaintiff has already spent as a result of the damage and loss suffered. This type of damages must therefore be pleaded for, particularized and proved. This was the view of Lord Diplock in *Ilkew v Samuels* [1963] 2 All E.R. 879, [1963] 1 WLR 991 where he said: "Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and

particularized...it is plain law...that one can recover in an action only special damage which has been pleaded, and of course, proved."

[160.] On the evidence before me, I am satisfied that the Claimant proved the following out-of-pocket expenses as specifically pleaded:

(i)	medical fees	\$1,585.63;
(ii)	hospitalization	\$1,046.39;
(iii)	cervical collar	<u>\$565.00</u>
	Total	<u>\$3,197.02</u>

[161.] This sum of \$3,197.02 is not disputed by the Defendant and I award that sum as proven special damages for medical and related expenses.

[162.] As to the pleaded sum of \$48,000.00 for surgery, I am not prepared to award that figure as a present item of special damage. I will address that under a separate head which I will discuss later.

[163.] As to the pleaded amount of \$61,200.00 for "8 weeks' loss of wages and tips (and continuing)", that claim is better addressed under the head of past loss of earnings and future loss of earnings and will not be separately duplicated within special damages.

[164.] Likewise, the pleaded figure of \$10,800.00 for "loss of future earnings" is not to be added again as special damages. That aspect of the Claimant's claim has instead been addressed by the Court through a separate lump-sum award for future loss of earnings.

[165.] Accordingly, I have assessed special damages at \$3,197.02 only.

Future Surgery

[166.] The Claimant sought substantial sums for future surgery and related treatment. The Defendants submitted that no award should be made because the need for future surgery is too remote and because, in any event, any such need is predominantly attributable to degeneration.

[167.] I accept the force of the Defendants' reliance on **Eldon Johnson v Devaughn Brown and Pinder's Customs Brokerage** SCCivApp No. 107 of 2015. The medical evidence before me does not establish with sufficient certainty that surgery will in fact be required. Dr. Barnett placed the future risk at only 10% to 20%. Dr. Wadwha regarded surgery as an available option, but also accepted that it might only partially alleviate symptoms and that other conservative measures remained available.

[168.] The surgery was recommended over ten years ago by Dr. Magnus Ekedede and Dr. Clyde Munnings but was never undertaken by the Claimant who did not wish to have it performed at the Princess Margaret Hospital and was unable to afford to have it privately performed elsewhere.

[169.] On future surgery, Counsel for the Defendant concluded that the risk of future surgery was too remote to justify an award. Accordingly, Counsel invited the Court to make no award under this head. Alternatively, he submitted that if the Court were minded to make an award, that it should be reduced to reflect the 65% contribution of the Claimant's pre-existing disc degeneration, in the sum of \$33,332.07 based on the estimates exhibited.

[170.] I am not persuaded that a 20% risk is too remote. The medical evidence established a real and material possibility of future surgery, and I am satisfied that it is appropriate to make provision under this head. In assessing the quantum, however, I concur with Counsel for the Defendant that the reduction is warranted, given that the Claimant and the Defendant's medical expert alike accepted the contribution of pre-existing disc degeneration. This approach is consistent with the principle that damages must reflect both the real contingency of future medical intervention and the proper apportionment for pre-existing conditions. I therefore award the sum of \$33,332.07 for future surgery.

Conclusion

[171.] The damages are therefore assessed as follows:

Head of Damage	Amount
PSLA	\$50,000.00
Past Loss of Earnings	\$12,000.00
Future Loss of Earnings	\$109,200.00
Smith v Manchester Award	-0-
Special Damages	\$3,197.02
Future Surgery	\$33,332.07
Gross Total	\$207,729.09
Less Deductions	\$27,970.75
Net Total	\$179,758.34

Interest

[172.] The Claimant is entitled to interest. In exercising the Court's discretion on interest, I have taken into account the extraordinary delay in the prosecution of this matter. The accident occurred on 6 December 2013, yet the Writ was not filed until 12 October 2016—almost three years later. An application for interim payment was made in 2017 and ordered in 2018, but it would take another six years before the matter reached trial. These timelines are inexplicable. Even if settlement discussions were ongoing from 2013, the Claimant's delay in commencing proceedings until 2016 is unjustifiable. The responsibility for prosecuting the claim lay squarely with the Claimant, and

the delay cannot be attributed to the Defendant, even if the Defendant was reluctant to settle. It was incumbent upon the Claimant to advance the proceedings with diligence. Indeed, it may fairly be said that had the matter been prosecuted more vigorously, settlement might have been achieved at an earlier stage.

- [173.] Winder J. (as he then was) in **Delone Symonette v Turnquest** observed that one year was more than sufficient time for settlement negotiations before filing an action and that the Claimant had not “*prosecuted this matter with alacrity*”. Applying that logic here, the Claimant took an additional two years beyond what could in my judgment reasonably be justified, and thereafter allowed the matter to languish for over eight years before trial.
- [174.] Pursuant to section 3 of the Civil Procedure (Award of Interest) Act, 1992, the Court has discretion to award interest on damages from the date of the cause of action or such later date as the Court thinks fit, and at such rate as is just.
- [175.] Further, the Defendant has properly referred me to the principle in **Jefford v Gee [1970] 2 QB 130** per Lord Denning MR, that “*interest should be awarded on this lump sum as from the time that the claimant can be said to have been kept out of the money.*” Lord Denning further noted that “*in exceptional cases, such as when one party or the other has been guilty of gross delay, the Court may depart from the guidelines by diminishing or increasing the rate of interest, or altering the periods for which it is allowed.*” This case is in my judgment, such an exceptional one.
- [176.] Accordingly, I exercise that discretion to award interest at 2.5% per annum from the date of the Statement of Claim to judgment, with interest thereafter accruing at the statutory rate.”

Costs

- [177.] Costs are in the discretion of the Court, though the general rule is that costs follow the event.
- [178.] I have considered the Claimant’s submission that she should recover her costs of the action and assessment, and her further request for either a fixed costs order or a summary assessment. I have also considered the Defendants’ submission that, because of delay, want of prosecution, failure to prove substantial aspects of the claim, and the maintenance of heads of claim that were not ultimately made out, the Claimant should recover only 60% of her costs.
- [179.] I do not agree with the Defendant that the Claimant did not succeed to the full extent of her claim. The only award that she was unsuccessful in obtaining was the Smith v Manchester Award. Therefore, I find no justification for her being deprived of her costs to the extent sought or at all.
- [180.] At the same time, I am not persuaded that this is an appropriate case in which to fix costs in the broad range proposed by the Claimant, nor do I consider it appropriate to carry out a summary assessment in the absence of an itemized bill and supporting material where necessary or applicable.

[181.] I had also been invited to certify this action as fit for two counsel by the Claimant. I do not agree. Certification is reserved for cases of unusual complexity, novelty, or difficulty. This is a straightforward personal injury claim involving assessment of damages. The pleadings, medical evidence, and authorities are settled, and the issues raised are neither novel nor intricate. I am satisfied that this case does not meet the threshold for certification.

[182.] In the circumstances, the proper order is that the Defendants shall pay the Claimant's costs, such costs to be assessed on the papers, if not otherwise agreed between the parties.

[183.] I thank both Counsel for their helpful submissions.

[184.] I make the following orders:

- (i) Judgment is entered for the Claimant in the sum of \$179,758.34
- (ii) Interest at the rate of 2.5% from the date of the Statement of Claim to the date of judgment;
- (iii) The Defendants shall pay the Claimant's costs, to be assessed on the papers if not otherwise agreed.

Dated this 15th day of May, 2026



Camille Darville Gomez
Justice