EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. ANUHCV 2011/0280

BETWEEN:

BEVERLEY JOSEPH

Claimant

and

MICHELLE KING-GEORGE

Defendant

Before:
Mr. Raulston Glasgow — Master [Ag.]

Appearances:
Kathleen Bennett for the Claimant
Leon Symister for the Defendant

2014: March 19; May 23; November 4

JUDGMENT

APPLICATION

[1] **GLASGOW, M [AG.]:** On September 11, 2012, the claimant (hereinafter the applicant) filed the present application for an assessment of damages following the grant of a default judgment on April 27, 2012

BACKGROUND

[2] The assessment has some history. The applicant is employed as a data processing clerk with the utilities entity, Antigua Public Utilities Authority. She is also engaged in part time employment with a local casino. On November 12, 2010, the applicant was driving her motor vehicle, registration number A24782 in an east to west direction along the Old Parham Road in St. John's when the defendant (hereinafter the respondent) who was driving the vehicle behind her (registration number A32756), manoeuvred the vehicle in such a manner that it collided with the rear of the applicant's vehicle. The applicant was injured and filed suit against the respondent on May 3, 2011 in which she claimed relief for special damages, personal injuries, pain and suffering and associated loss. The respondent failed to file a defence to the claim. Accordingly the applicant obtained the aforementioned default judgment.

[3] At the time of filing the application, the applicant also swore and filed an affidavit in support. When the matter was first listed for hearing on October 16, 2012, the court gave directions for the applicant to file further evidence by way of affidavits along with submissions and authorities on the question of the damages sought. The defendant was allowed to respond on the question of costs. The applicant duly filed a further affidavit in support of the application on October 22, 2012 in which she set out particulars of her injuries and exhibited several medical reports. Submissions were also filed on even date along with authorities. The respondent filed submissions in response on December 12, 2012.

[4] The continued hearing of the application for assessment was conducted on January 28, 2013 at which time the applicant was allowed to file further evidence. The applicant duly filed a further affidavit on April 9, 2013 in which she addressed additional medical expenses incurred in respect of her injuries. Further submissions were also filed on June 17, 2013 to supplement the further affidavit filed on April 9, 2013. The defendant responded on June 20, 2013 by filing additional submissions. On November 4, 2013 the assessment was again listed for hearing. The court gave the applicant an opportunity to file evidence by witness statements. The respondent was asked to comply with CPR 16 if he wished to cross examine the applicant's witnesses. The respondent was given leave to file responses to the applicant's witness statements.

[5] The applicant duly filed a witness statement on January 14, 2014 to which witness statement is exhibited several medical reports along with receipts for medical and other expenses. The assessment was listed again on January 16, 2014 at which hearing the respondent was given an opportunity to file and serve witness statements and submissions in response to the applicant's witness statement of January 14, 2014. The claimant was given leave to respond. The respondent did not file any evidence but filed submissions on March 5, 2014 to which the applicant responded on March 18, 2014[1]. By the time this matter was listed for hearing on May 23, 2014 a number of affidavits and several different sets of submissions had flown back and forth on the question of the applicant's entitlement to damages. Suffice it to say, there is not much convergence on what she is to receive.

THE APPLICANT'S CLAIM FOR DAMAGES

[6] On the claim form and statement of claim, special damages is requested in the sum of $4,745.45 along with damages for personal injuries, pain and suffering and associated loss, in essence, a request for general damages. A number of receipts are attached to the statement of claim to support the request for special damages. By the time of the hearing of this application for assessment of damages, the applicant had, however, filed several additional affidavits and a number of submissions in which she asked the court to award special damages above the sum recited in her claim form and statement of claim. For instance, in her additional affidavits filed on April 9, 2013 and June 4, 2013, the applicant asserts that she had to fly to seek medical intervention in Trinidad as her condition following the traffic collision had not improved. The medical assessment and treatment on that island cost her monies that she now claims as special damages. In her submissions filed on June 17, 2013, the special damages were stated as $10,825.29. Later on the applicant incurred further expenses which are also claimed.

[7] A useful compendium of all the special damages is set out in the witness statement of January 14, 2014. The applicant explains therein that after obtaining the default judgment she continued to

[1] The respondent filed a Form 31 notice on March 5, 2014 in which she asked only to be heard on submissions on damages.

experience severe pain to her lower back despite treatment for the same. A visit to a local doctor resulted in a referral to Dr. Steve Mahadeo, a neuro- physician in Trinidad. His assessment led to a recommendation for surgical intervention. The medical assessment prognosticated a 30% permanent partial disability if the applicant did not proceed with the recommended surgery. The surgery was to be performed in 2 stages; surgery to address injuries to the cervical spine and surgery to adress injury to the lumbar spine. The applicant underwent the surgery to her cervical spine, the cost of which she claims as special damages. She alluded to the fact that part of the bill was met by insurance offered by her employers but that she is required to reimburse the insurers the money that they have paid. The surgery to the lumbar spine is claimed as general damages which I will address below. The total sum claimed as special damages amounts to $55,781.83 for "medical and non-medical expenses due to my injuries' plus an amount of $724.49 that is part of the bill for the surgery done so far but this amount has not been paid.

[8] In terms of general damages, the applicant's evidence establishes that she is a 43 year old mother of 3 children. The youngest child is aged 5 years old. The applicant is employed in two jobs which yield her income of $5468.00 per month. Despite physiotherapy and other treatment, the applicant continued to suffer severe pain in her lower back. She visited several doctors, including overseas medical practitioners who assessed her injuries as –

(1) Post traumatic severe lumbrosacral sublaxation syndrome;
(2) Degenerative joint disease of lower lumbar spine;
(3) Left side lumbar sacral strain to illo-lumbar and sacro-lumbar ligaments;
(4) Diminished sensation in the distribution of L5/S1 dermatones suggesting prolapsed lumbar intervertebral disc;

Further medical assessment revealed –

(5) Reversal of the lordosis;
(6) Sagittal opening of the C4-C5 disc with anterior angulation at the C4-C5 level, diffuse disc bulging contacting the cervical cord and a small annular tear. At C5-C6 there was also a small annular tear but no significant disc bulge;

(7) Diffuse disc bulge at the L4-L5 level which along with ligament flavum hypertrophy was producing moderate narrowing of the spinal canal bilateral recess.

[9] Initial medical assessment set out in the reports of Dr. Allred and Mathews, prescribed different forms of therapy and medications to alleviate complications related to the applicant's injuries. Dr. Allred referenced future exacerbations and the need for *"an award for future medical/chiropractic care..."* Both medical professionals saw the applicant within days of the traffic collision. The applicant's evidence is that due to continuing pain she saw Dr. K.K Singh in December 2012, some two years after receiving the injuries. His assessment found that the applicant *"is still temporarily disabled in the full functions of her lumbo sacral spine..."* He referred her to the Trinidad consultants for future assessment. It was the medical intervention in Trinidad which recommended surgery and prognosticated that, should the applicant fail to submit herself to the surgery, she would *"be left with a total permanent partial disability of thirty percent 30 %."*

[10] Based on the foregoing, the applicant submits that she is entitled to an award for pain and suffering, loss of amenities and future medical expenses as general damages. In terms of pain and suffering and loss of amenities, the court is invited to look at awards of damages in cases involving similar injuries. Accordingly, the applicant relied on the cases of **Syne v Bank of Nova Scotia** where the court awarded the sum of USD $11,765.00 as damages for a whiplash injury with direct trauma to the lower back. This was a 1991 award. The case of **Manwaring et al v C.L Singh Transport Service Ltd** was also cited in aid. In that case the claimant was awarded USD $10,588.00 after claiming injuries of muscle tenderness and pain in the back. This was also a 1991 award. The claimant in the Barbadian case of **Heath v Jordon** received an award of USD $8,025.00 for loss of amenities and pain and suffering due to a neck sprain suffered due to a traffic collision. These authorities are all recited in the BVI case of **Monique Andrade-Puttley v Lake**[2] where an award of USD$26,200.00 was granted in a case involving neck and spine injuries. The applicant's view is that an award of $90,0000.00 would be an adequate award for pain and suffering and loss of amenities.

[2] Claim No. BVIHCV 1997/0115

[11] The applicant also seeks an order for future medical expenses. By the time of the filing of the witness statement on January 14, 2014, the applicant had already undergone the cervical spine surgery recommended by Dr. Mahadeo. Thus she claims for the cost of the lumbar spine surgery as future medical expenses. The estimated cost for this surgery along with rehabilitative physiotherapy amounts to $102,419.50.

THE RESPONDENT'S REPSONSE

[12] As noted above, the respondent has filed several submissions in response. In terms of special damages, the respondent in her several submissions has conceded that she has no objections to the applicant's requests for special damages, *"where such expenses can be substantiated."* However, the applicant should not be permitted to give evidence of any special damage which is not stated expressly on her pleadings. Some contention arises over the sum claimed as special damages for the cervical spine surgery. The respondent's view is that there is no evidence as to how much of this money must be paid back to the insurers. The respondent posits that this is quite an unusual insurance arrangement and the applicant should not be allowed to claim damages from the insurance company and the respondent under the same head of losses. The applicant would achieve a windfall in those circumstances. Additionally, the entire medical bill for the cervical spine surgery having been paid by the Ministry of Health should liquidate that loss and it should not be recovered;

[13] There are significant quarrels with the applicant's claim for general damages. For one thing, the respondent does not agree with the request for pain and suffering and loss of amenities in the sum of $90,000.00. The respondent's view is that this request is too high. While the applicant would have experienced some pain, there is no evidence of enduring pain. Certainly, it was the applicant's evidentiary obligation to satisfy the court of enduring pain. There is no evidence of any significant negative impact on the applicant's life style. The respondent observed that the respondent did not say, for instance, whether she was off work for any period after returning thereto in December 2010. There is no evidence that there was any effect on conjugal relations. A

fair compensation, the respondent concludes after summarising several authorities, would lie in the region of $50,000 to $60,000.00 for any pain and suffering and loss of amenities.

[14] The claim for future medical expenses is also resisted. The respondent submits –

(1) that the medical reports which are the foundation for the request for future medical expenses lack any *"substantial link to the Claimant's proposed requirement for surgery..."* ;

(2) Dr Allred's reports may have indicated a pre-existing condition;

(3) Despite Dr. Allred's recommendation of supervised therapy, anti-inflammatory medication and chiropractic treatment, the applicant sought medical assessment from NSA Medical Surgical Rehab Centre 6 days later. Dr. Mathews' report prescribed therapy, rehabilitation and medication for 6 weeks. The applicant took therapy and rehabilitative attention from November 2010 to December 2012;

(4) There is no evidence of the efficacy of any of the treatment received from Dr. Allred and Mathews;

(5) The diagnosis of the doctors in Trinidad is inconsistent with the reports of Dr. Allred and Mathews. The visit to Dr. K.K. Singh, who then sent her to the Trinidad professional, was unreasonable in that this action was taken after two years of therapy without results. The condition diagnosed in Trinidad *"may be attributed to this delay or the treatment she had for two year without proper diagnosis";*

(6) A comparison of the Trinidad reports with the earlier reports of Dr. Allred and Mathews may reveal that the applicant may have fabricated her injury as detailed therein or she received another injury separate from those consistent with the incident of November 12, 2010. In fact none of the Trinidad reports even remotely suggests that the injury for which the applicant claims future medical expenses is consistent with the injuries suffered as a result of the collision;

(7) There is no evidence that the claimant ever missed a day of work due to her injuries. As a data processing clerk and casino worker her injuries would have severely impacted this lifestyle due to her injuries;

(8) While the applicant pleads that she intends to proceed with the lumbar spine surgery, she has not provided proof that this surgery is necessary. The applicant has not supplied any evidence that the cervical spine was successful or when she intends to pursue the lumbar spine surgery. The applicant's medical reports indicate that the lumbar spine surgery is an option and failure to complete *"would not result in any permanent disability."* Even if the applicant is to pursue the surgery, her evidence lacks any information as to whether the state insurance or the Ministry of Health would pick up the tab;

(9) Notwithstanding this paucity of material, if the court is minded to make an award for future medical expenses, a nominal award should be made. An order should be made that the money should be paid directly to the medical service provider once it is proven that the surgery was performed.

THE APPLICANT'S RESPONSE

[15] In respect of the respondent's opinion on special damages, the applicant rejoins that the respondent's concession that special damages should be allowed where the damages can be substantiated is met by the several receipts and documents appended to the claim for this head of loss. With regards to the criticism that the money for the cervical spine surgery should not be reimbursed, the applicant relies on the case of **Tropical Builders v Gloria Thomas**[3] and **McGregor on Damages**[4] for the proposition that insurance payments are recoverable by a claimant on an assessment of damages;

[16] In respect of the various objections about the application for general damages, the applicant emphatically perseveres in answer that her injuries are consistent with injuries flowing from the November 12, 2010 incident. She submits that each of the medical reports references the traffic

[3] ANUHCV 2004/0228
[4] 16th edn, paragraphs 1674 to 16676

incident and relates findings of injuries thereto. The necessity of the surgery was highlighted in the medical report of Dr. Mahadeo wherein he stated that *"in view of the persistence and severity of Ms. Joseph's symptoms along with the clinical findings and lack of progress with physiotherapy, i recommend surgical intervention..."* *"should she not agree to surgery in my opinion she will be left with a total disability of thirty percent 30 %."* This finding, in the applicant's assessment is sufficient to dispose of the respondent's complaints that the surgery was not necessary. Indeed, the applicant submits that throughout her ordeal she *"has sought to do everything which her doctors have recommended to achieve total recovery."*

ANALYSIS AND CONCLUSIONS

Special damages

[17] Special damages cover all pecuniary losses which a claimant has incurred to the date of trial. Both parties accept this legal principle. They both accept as well that these kinds of losses must be pleaded and proved. It is only special damages that are pleaded and proved that may be recoverable.[5] The respondent agrees that where the requests for pecuniary losses are substantiated, the claim for special damages ought to be awarded. However, she disputes the claim for special damages for the cervical spine surgery. I observe that some of the reasons provided for the respondent's disagreement on the question of general damages for future medical expenses also apply to the disagreement on the question of special damages for the cervical spine surgery.

[18] I disagree with the respondent's position on special damages. The evidence supplied to support the applicant's request for this head of loss is set out in the various affidavits, the witness statement and the medical reports filed by the applicant. None of this material has been challenged by the respondent and as such remains uncontroverted. This is not to say that the burden has been removed from the applicant to prove the claim. The court is tasked throughout this exercise with assessing all the evidence provided by the applicant before it accepts any of it as in support of

[5] British Transport Commission V Gourley [1956] A.C 185 at 206; IKW v Samuel [1963] 1 WLR 991

the matters asserted therein[6]. But it is difficult to see how the respondent could, for instance, challenge the conclusions reached by the doctors when she expressly opted out of testing the applicant's evidence by requesting the attendance of the applicant or any of the medical professional for cross – examination. In fact, the respondent chose not to probe any of the applicant's evidence but instead filed a Form 31 Notice in which she chose to rely on submissions to the court on the question of damages.

[19] Therefore, with the respondent's posture on cross – examination in mind, the court will examine the evidence to ascertain whether it meets the standard required to prove the losses claimed. I have perused the medical reports provided by the applicant and I do not find any merit in the contention that the applicant may have had a pre- existing condition or that she fabricated further complaints. There is also no merit in the assertion that there are inconsistencies in the medical findings. The respondent's view is that the inconsistencies may have arisen from the fact that the applicant took about two years to seek the medical intervention of DR. K.K Singh and ultimately the doctors in Trinidad. However, when one looks at the medical reports, there is no basis for this supposition. From the time of the first medical assessment, it was noted that the applicant's condition had not improved. Future deterioration was also portended. I will quote extensively from Dr. Allred's report of February 21, 2011;

"It is impossible to estimate the exact amount of residual impairment Ms. Joseph has suffered, but it can be stated with certainty that the joints of her lumbar spine will be intolerant to unusual stress or strain. Ms. Joseph's lumbar spine will be subject to further damage with even slight provocation. Her resulting impairment will be dependent on the functional demands on her lumbrosacral spine and her ability to adjust to and tolerate the limitations imposed on her activities...

Permanent impairment has resulted from this injury... Ms. Joseph should avoid repetitive bending, stooping, lifting or any other activities which involve physical exertion.

In view of the nature of Ms. Joseph's residual disability and the degenerative joint disease that has been aggravated in her lumbar spine, and the fact that she is still symptomatic Ms Joseph will experience exacerbations in the future and provisions should be provided for her to receive

[6] See for instance Benjamin J (as he then was) in Andrade – Puttley v Lake, supra note 2.

treatment in the form of supervised therapy, anti – inflammatory medications, as well as chiropractic treatment.

It is my opinion that an award for future medical/chiropractic care be afforded to her."

[20] The evidence shows that very early in this entire affair, Dr. Allred's assessment diagnosed permanent impairment and forecasted possible aggravation of her injuries with a recommendation for future medical or chiropractic intervention. Dr. Mathews' assessment does not carry matters much further but supports the view that the applicant's symptoms arose from her injuries sustained in the traffic collision. It would seem to me that, especially considering Dr. Allred's early prognosis of the future prospects of impairment and a need for future medical care, that I must disagree with the respondent's contention that the applicant's approach to Dr. K.K Singh in December 2012 was unreasonable. Based on that early assessment, it was entirely within the realm of reason that the applicant's condition may have improved or may have deteriorated. I do not find anything in her evidence to suggest to me that she is spinning a long tale in respect of her injuries and losses. Rather I find the assessments and prognosis of the various medical professionals to be fair and consistent;

[21] I would also have to disagree with the respondent for the very reasons on the question of the referral to medical professionals in Trinidad. The assessment in Trinidad was unequivocal in its statement that the applicant's conditions had not improved. Medical care in the form of surgery was recommended to address the resultant findings. It must also be recalled that Dr. Allred proposed an award for future medical care or physiotherapy based on what he had seen in the early days. Further, when Dr. Mahadeo proposed surgery he specifically advised that a 30% permanent partial disability would emanate from failure to undergo the recommended surgery. The respondent's view is that the applicant did not show how the surgery would be necessary. But I fail to see how one could dispute the necessity of such medical intervention where other remedial recourse had not removed the underlying disabilities or when it is clear that a refusal to do the surgery would result in permanent disability. I would add that a 30% spinal disability is not an insubstantial matter;

[22] Accordingly, the sum claimed for the cervical spine surgery is recoverable as part of the claim for special damages.

[23] On the question of the deductibility of insurance money, insurance payments and benevolent receipts have long been held to be non-deductible[7]. In this context the respondent has not sought to distinguish or address the authority of **Tropical Builders v Gloria Thomas**[8] or the recital of the law in **McGregor on Damages**[9] which both restated this principle. Therefore, I would also allow the claim for the sums paid by the insurance.

[24] The respondent sought to argue that that a part of claim for special damages was not recited on the claim form or statement of claim. But I do not find that there is much to this argument. The applicant has pleaded that she has incurred financial loss for medical expenses which have been proved[10]. The total award for special damages is $56,506.32.

GENERAL DAMAGES

[25] There is no disagreement on the applicable principles under this head of award. The guidelines set out in **Cornilliac v St. Louis**[11] are accepted as the basis on which the court ought to proceed under this feature of the assessment. In this regard, the court is to consider (a) the nature and extent of the injuries sustained; (b) the nature and gravity of the resulting physical disability; (c) the pain and suffering endured; (d) the loss of amenities and (e) the impact on the claimant's pecuniary prospects.

[26] The nature and extent of the applicant's injuries are extensively set out in the several medical reports recited above in this judgment. The gravity of the resulting injuries has also been reproduced above. I have also found that from the time of the earliest report given by Dr. Allred, permanent impairment was foreshadowed with a recommendation for an award for future medical care or physiotherapy. It must be conceded that Dr. Allred did not indicate the degree of the future impairment or any prognosis for improvements.

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[7] Parry v Cleaver [1970] A.C 1 for a full discourse on the history of this principle.
[8] Supra, note 3. n
[9] Supra, note 4
[10] See Smith v Fleming and White AXAHCV 2008/0050 at paragraph 70; see also Haynes C in Doodnauth Heeralall Also Known As Sadhoo v Hack Bros Constructing Co Ltd And Joseph Benn (1977) 25 W.I.R 117 at page 124
[11] (1967) 7 W.I.R 491

[27] More than two years after the incident, Dr. K.K Singh found that the state of the resulting injury required further assessment. The further assessment disclosed that more than two years after the incident, the applicant still experienced pains due to her injuries. Dr. Mahadeo found that *"the pain is present everyday and is aggravated by standing or sitting for more than a hour, bending, lifting and is relieved by lying on her right side. It radiates down the left leg to the heel. At times she experiences neck pains radiating to the shoulders especially on the left. Occasionally, she experiences numbness down the left side of her body."* There is great consistency here with the earlier diagnosis from Dr. Allred that *"Ms. Joseph's lumbar spine will be intolerable to unusual stress or strain. Ms. Joseph's lumbar spine will be subject to further damage with even slight provocation... Permanent impairment has resulted from this injury. The impairment is pain in the lower back and especially over the left sacroiliac joint after doing activities of daily living such as housekeeping which did not bother her prior to the instant injury... Ms. Joseph should avoid repetitive bending, stooping, lifting or any other activities which involves physical exertion".*

[28] In terms of pain and suffering, the applicant does not speak much on this issue in her various affidavits and the sole witness statement. It is however evident that the applicant continued to complain of considerable pain which compelled her to seek repeated medical assistance. Much more assistance could have been forthcoming from the applicant on the request for an award for loss of amenities. The applicant is a mother of 3 children, the youngest being 5 years old. Dr. Allred makes mention of the permanent impairment which has been induced by performing *"activities of daily living such as housekeeping."* It is also clear to me that a working mother of 3 children would, without more, subjected to significant stress and strains as a consequence of the type of injuries under discussion. To this extent, the applicant's ability to engage in certain aspects of her life has been diminished due to her injuries.

[29] An award for pain and suffering and loss of amenities is not assessed with forensic exactitude. The court will grant what is termed a "conventional" sum that may be closely approximated to awards in cases involving similar facts[12]. The parties have assisted the court with a number of such authorities. The applicant's authorities on this head of loss have been repeated above. The respondent submitted the following –

[12] See Lord Hope in Wells v Wells [1983] 3 ALL E.R 481 and Haynes C. in Doodnauth Heeralall Also Known As Sadhoo v Hack Bros Constructing Co Ltd And Joseph Benn, supra, note 10 at pages 136 et seq.

(1) **Lealia Hatchet v First Caribbean International Bank and Edwards**[13] which the respondent asserts that an award of $54,000.00 was made to a 40 year old claimant who suffered a degenerative disc with herniation;

(2) **Marcel Fevriere et al v Bruno Canchan et al**[14] where the sum of $50,000.00 was awarded for pain and suffering and loss of amenities in respect of a fracture to the leg, fractures of the toes of both feet, a fracture of the right hip and right knee. The claimant suffered pain and hospitalisation for two months and was then placed on bed rest for a period of 4 months during which he was not ambulatory;

(3) **Monica Lansiquot v Geest PLC**[15] where the claimant was allowed the sum of $40,000.00 for pain and suffering and $20,000.00 for loss of amenities. The claimant suffered a slipped disc associated with continuing pain. There was evidence of a diminution in the claimant's quality of life. For instance, she could no longer do gardening and sewing. The respondent in this case argues that there is no evidence that the applicant suffered any effects on a normal existence;

(4) **Eugene Teague v Claxton Ralph**[16] a 35 year old claimant was awarded $64,000 in general damages where his injuries included a supracondylar comminuted spiral fracture of the left femur with a swelling deformity in the lower third of the thigh, abrasion on the anterior aspect of the lower third of the leg and laceration of about 1cm long on the anterior of the knee. There was evidence in that case of a reduction in the claimant's capacity to find employment and a diminished ability to play sports.

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[13] This authority was mentioned but not supplied. A search of the ECSC website revealed Hatchett v FirstCaribbean International Bank and Edwards which has the same claim number has recited by the respondent. However, there was a global award for general damages in the sum of $20,000.00 and no award of $54,000.00 for pain and suffering as asserted by the respondent.

[14] SLUHCV 1989/0313

[15] SLUCAP 1999/0001

[16] ANUHCV 2007/0417

[30] On the whole, with the exception of the **Monica Lansiquot decision,** I find the authorities provided by the applicant to be more useful with regards to the similarities in injuries. I have already alluded to the paucity of evidence from the applicant on the question of enduring pain or the impact that the resulting injuries have had on her daily existence. That is not to say that it is not apparent from the evidence that the applicant endured considerable pain and that her resulting injuries have impacted her abilities to, for instance, perform her functions as a mother of 3 children. In all the circumstances, I find that an award of $40,000.00 would be an appropriate sum to compensate for pain and suffering and loss of amenities.

FUTURE MEDICAL EXPENSE

[31] Both parties accept that medical expenses incurred both up to trial and prospective expenses are recoverable. Prospective medical expenses are recoverable as general damages.[17] For the applicant, it is argued that the cost of the lumbar spine surgery is recoverable under this head of loss. The respondent argues to the contrary that the applicant has not shown that the surgery is necessary or that she intends to pursue the surgery. In fact there is nothing in the applicant's evidence to show that the cervical spine surgery was successful or that the lumbar spine surgery is necessary. There is just a recommendation of surgery by the applicant's doctor which is available as an option to the applicant. The applicant must go beyond this recommendation to show the necessity of the operation, that she will pursue it and when she will pursue it. For these propositions, the respondent relies on the cases of **Aubrey Smith v Calvert Fleming**[18] and **Claudette Francis v Cecilia Martin**[19]**.**

[32] Respectfully, I must disagree with the respondent's position. In the **Claudette Francis** case, the evidence disclosed the availability of a medical procedure that may have produced a 50 % relief from the chronic pain endured by the claimant. There was no evidence that the claimant in that case would elect to do the surgery. The necessity of the procedure and the claimant's intention to undergo it were clearly absent in that case. Similarly in **Aubrey Smith,** the court found the

[17] McGregor on Damages, 18th edn., paragraph 35-185

[18]

[19] BVIHCAP 2009/0007

evidence of the claimant's disposition to surgery to be speculative at best. The evidence was that the claimant *"might probably"* pursue surgery.

[33] As I have already found in this judgment, the evidence in this case speaks more loudly than in the **Claudette Francis** and **Aubrey Smith** cases. Of consequence is the specific finding of the medical professionals that the applicant would endure permanent impairment due to her injuries. More than two year after the injuries, it was found that she continued to endure daily pain aggravated by normal daily activities such as bending or lifting objects. Significantly the applicant was advised that if she did not pursue the surgical procedure, she would endure a 30% permanent partial disability. I have also stated my opinion that a 30% permanent partial disability cannot be an insubstantial matter.

[34] In terms of the applicant's disposition to performing the surgery, the applicant has stated clearly and it is evident on the facts that she has sought to comply with every medical recommendation given to her. In this regard, she has demonstrated her commitment to this process by completing the cervical spine surgery. The applicant has also disclosed a medical report dated September 25, 2013. That medical report details significant improvement in the area of the cervical spine since the surgery was performed. Further, the applicant has stated her intention to complete the lumbar spine surgery. Her evidence is that she wishes to proceed with that surgery but financial limitations preclude this pursuit. I therefore find that the applicant has demonstrated that the lumbar spine surgery is necessary and that she intends to pursue it. For this head of damage, the applicant is awarded the sums of $74,209.50 for the costs of the surgery and $28,210.00 for physiotherapy post - surgery.

[35] Interest will be awarded on the general damages for pain and suffering and loss of amenities at the rate of 5% per annum from the date of service of the writ (May 18, 2011) to the date of trial (May 26, 2014). There is no interest before judgment on future medical expenses. Special damages will attract interest at 2½ % per annum from the date of the accident (November 12, 2010) to the date of trial (May 26, 2012). Damages are assessed as follows –

(1) Pain and suffering and loss of amenities - $40,000.00
plus $1655.84 (being interest at 5% per annum from

	May 18, 2011 to May 23, 2014)	-	$41,655.84
(2)	Future medical expense	-	$102,419.50
(3)	Special damages - $$56,506.32 plus $1351.96 (being interest at 2½% per annum from November 12, 2010 to May 23, 2014)	-	$57,858.28
(4)	Total damages	-	$201,933.62
(5)	Prescribed Costs	-	$12098.03
(6)	Total award to be paid with interest at 5% per annum from the date of judgment		
		-	$214031.65

[36] I thank counsel for their assistance

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Raulston Glasgow
Master (ag.)