

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **HOLDEN AT GEORGE TOWN**

3 **Cause No: 462/2003**  
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6 **BETWEEN:**

7 **BRENDA ARCHER**

8 **PLAINTIFF**  
9

10 **AND:**

11 **UBS (CAYMAN ISLANDS) LIMITED**

12 **DEFENDANT**  
13  
14

15 **Appearances:**

15 **Mr. Howard Hamilton Q.C. and Mr. Barrington**  
16 **Frankson instructed by Ms Keva Reid for the**  
17 **Plaintiff**

18 **Mr. Nick Dunne of Walkers for the Defendant**  
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21 **Before:**

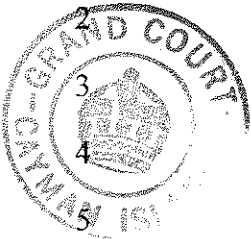
**Honourable Justice Charles Quin Q.C.**

22 **Heard:**

22 **June: Thursday 11<sup>th</sup> & Friday the 12<sup>th</sup> and Tuesday**  
23 **to Friday, the 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> & 19<sup>th</sup>.**  
24

25 **JUDGMENT**

- 26  
27 1. On the 11<sup>th</sup> of July 2003 the Plaintiff, Mrs Brenda Archer, issued a Writ of  
28 Summons and the indorsement of the writ stated that the Plaintiff's claim is:  
29 a. As a former employee under a written contract of employment and an  
30 Acceptance and Release with the Defendant, UBS (Cayman Islands) Limited  
31 dated the 9<sup>th</sup> of July 1987 and the 25<sup>th</sup> of April 2002, respectively, for damages  
32 for negligence on the part of the Defendant as employer, owner and occupier of  
33 the premises known as UBS House, 227 Elgin Avenue, Grand Cayman, (herein  
34 after referred to as "the premises") where the Plaintiff worked, for failing to  
35 take reasonable care to make the premises as safe as reasonable care and skill  
36 could have made them;



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b. For damages for personal injury and consequential loss and/or damages suffered by the plaintiff on the 13<sup>th</sup> of July 2000 when, whilst at work, she slipped and fell while walking down an uncovered cement staircase at premises owned and occupied by the Defendant;

c. In the alternative for damages for breach of statutory duty imposed on the Defendant by s.58 and s.60(d) of the Labour Law (2001 Revision) in failing to ensure so far as is reasonably practicable the health, safety and welfare at the workplace of the employee – the said Brenda J Archer.

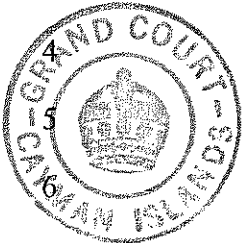
2. On the 25<sup>th</sup> of July 2005 the Plaintiff filed her Statement of Claim in which she claimed damages for injuries, loss and damage by reason of the breach of statutory duty owed by the Defendant to the Plaintiff pursuant to s.58 and s.60(d) of the Labour Law and by reason of the negligence of the Defendant, its servants or agents.

3. The particulars of negligence alleged in the Statement of Claim are that the Defendant:

a. Failed in its duty to take any or any reasonable care to see that the Plaintiff would be reasonably safe in using the premises;

b. Exposed the Plaintiff whilst at her place of work to the risk of damage or injury as a result of an unsafe staircase of which the Defendant knew or ought to have known;

c. Failed in its duty to take any adequate or effective precautions to ensure that the staircase was safe and would not cause injury to the Plaintiff;



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- d. Caused or permitted the staircase to become or to remain in an unsafe and dangerous state;
- e. Failed in its duty to give the Plaintiff any or any sufficient warning of the state and condition of the staircase;
- f. In all its circumstances failed to discharge its common law duty of care to the Plaintiff as well as its statutory duty to her under the Labour Law in breach of the said Law.

4. The Plaintiff in her Statement of Claim claimed for damages and for pain, suffering and loss of amenities resulting from the injuries she sustained in the slip-and-fall accident, as well as for psychological damages. In addition the Plaintiff claims for future medical expenses, future home care and future loss of income.

5. On the 2<sup>nd</sup> of September 2003 the Defendant filed an acknowledgment of service confirming that it intended to contest the proceedings.

6. On the 19<sup>th</sup> of December 2003 the Defendant filed its defence which, *inter alia*, denied that it was negligent and or in breach of statutory duty as alleged in the Statement of Claim, or at all, and further expressly denied that the injury the plaintiff sustained was caused by any negligence or breach of statutory duty on the part of the Defendant, its servants and agents. The Defendant averred in its defence that the injuries the Plaintiff may have sustained as a result of the alleged accident were exacerbated by the treatment the Plaintiff received from both Dr Volivu and or Dr Kantrowitz, and that any alleged injury from which the Plaintiff continues to suffer was caused, and or exacerbated by the said treatment.

1 In addition the Defendant averred in its defence that any injuries, loss and damage,  
2 as the Plaintiff might prove at trial, were wholly caused, or, alternatively,  
3 contributed to by her own negligence in failing to exercise proper care and attention  
4 when using the said stairs, and further, by being inappropriately attired.  
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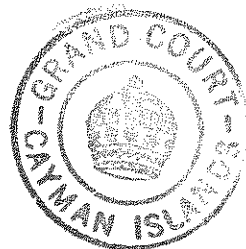
6 *FACTS*

7 7. On or about the 13<sup>th</sup> of July 2000 the Plaintiff was in the process of leaving the  
8 Defendant's premises by using the rear stairs. The Plaintiff was going down the rear  
9 stairs from the first floor down to the ground floor when she slipped and fell,  
10 sustaining scrapes to her right elbow and hand as well as injuries to her back and  
11 her ankle.  
12

13 8. The Plaintiff said that she did not remember whether her left or right foot gave way,  
14 but she hit her bottom on one of the steps half way down the flight of stairs.  
15

16 9. The Plaintiff in her evidence stated that it was a concrete staircase of a grayish-  
17 bluish colour. She said in her witness statement that the stairs were narrow, the  
18 steps short and high and quite different from ordinary stairs she was accustomed to  
19 seeing.  
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21 10. Although the Plaintiff's accident happened nine years ago it appears that on and  
22 around the time of the Plaintiff's accident there is some evidence that other  
23 employees also slipped on the stairs.  
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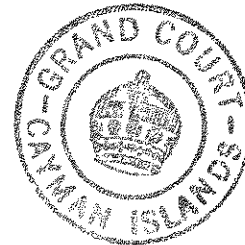


1 11. The Defendant has not adduced any evidence before the Court that the Plaintiff was  
2 inappropriately attired or in any way negligent in descending the stairs on the 13<sup>th</sup>  
3 of July 2000.

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5 12. Furthermore another former employee of the Defendant, namely Valmalee Bush  
6 Valerio, said that the rear staircase was very steep and narrow and that it was of  
7 gray cement, painted with no tiles. She said the steps were very short, or narrow,  
8 and she knew of another employee who had fallen on the same staircase and was  
9 badly injured.

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11 13. Andrea Williams, an employee of UBS, gave evidence that there were no reported  
12 incidents to the Bank (the Defendant) other than one involving Dena Roberts in  
13 2005, and that the Defendant is not aware of any incident in which Tara Goddard or  
14 Christian Albrecht ("Mr Albrecht"), or any other employee, fell on the rear staircase  
15 as alleged.

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17 14. In addition another employee of the Bank, Elaine Brown, gave evidence that she  
18 did not consider the stairs dangerous.



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*EXPERT WITNESSES*

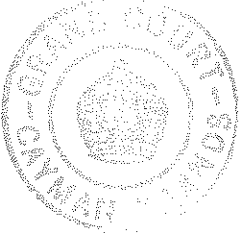
15. The Plaintiff called Danny Owens (“Mr. Owens”) – an architect with OA&D Architects, a company formed in 1993. Mr. Owens had been an architect with the Cayman Islands Government and then set up OA&D Architects. He has been involved in many significant projects in the Cayman Islands.

16. Mr Owens referred to the requirements of the Standard Building Code for the Cayman Islands (the “Code”) which had been enacted in 1994. He referred in particular to the Code’s requirements relating to treads and risers on stairways. Section 1007.3.1 of the Code states:

*“Treads and risers shall be so proportioned that the sum of two risers and a tread, exclusive of projection of nosing, is not less than 24 inches nor more than 25 inches. The height of risers shall not exceed 7 ¾ and treads, exclusive of nosing, shall not be less than 9 inches wide.”*

17. Mr. Owens noted that a rubber tile which added ½ inch to the nosing of the stair tread was not installed as part of the original construction and was added after the Plaintiff’s fall. Mr. Owens confirmed that the treads and the risers were not Code-compliant and stated in his report that:

*“There are wide variations in the dimensions of the risers and treads such that even if they were designed as compliant when constructed they were several that were not compliant.”*



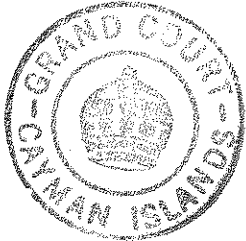
1        18.     Section 1007.3.4 of the Code states:

2                    *“Treads shall be of uniform depth and risers of uniform depth in any stairway*  
3                    *between two floors. There should be no variation exceeding 3<sup>1/16</sup> inches in the*  
4                    *depth of adjacent treads or in the height of adjacent risers and the tolerance*  
5                    *between the largest and the smallest riser or between the largest and smallest*  
6                    *tread shall not exceed 3/8ths of an inch in any flight.”*  
7

8        19.     Mr. Owens did an examination of the flight of stairs on which the Plaintiff fell and  
9                    found that on eight of them the depth of adjacent treads exceeded 3<sup>1/16</sup> inches and  
10                    on five of them the height of adjacent risers exceeded 3<sup>1/16</sup> inches.

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12        20.     Mr. Owens said that under the Code these risers and treads should be uniform. The  
13                    Code allows for some variations but sets limits. Mr. Owens’ evidence was that the  
14                    treads and risers are supposed to be uniform to prevent accidents and the Code was  
15                    implemented to protect public safety and health. Mr. Owens was of the view that  
16                    non-compliance with the Code could cause someone to fall, and that coming down  
17                    the stairs was as dangerous as going up the stairs. Mr. Owens’ evidence was that  
18                    there was non-compliance with the Code and the differences in the risers and treads  
19                    were discernable. He said small differences can throw someone off balance and that  
20                    is why the Code is so stringent. Mr. Owens said that if the step is not where it is  
21                    expected to be, it throws one off and can cause a fall. It was his opinion that there  
22                    was a high likelihood that the Plaintiff’s fall was due to non-compliance by the  
23                    Defendant with the Code.

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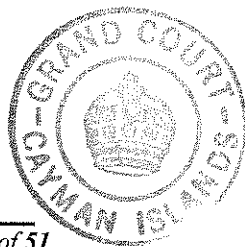


1       21.     Mr. Owens admitted in cross examination that he had never closely examined stairs  
2             as he had the Defendant's stairs but his evidence was that he had never seen stairs  
3             so "out of whack" as this one and they were the worst he had seen in 18 years.

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5       22.     The Defence called Mr. Brian Eccles ("Mr Eccles") – an architect and principal of  
6             DDL – as their expert witness. In Eccles' examination of the premises he also  
7             noticed that in the flight of stairs in question certain steps were  $1^{1/16}$  or  $1^{6/8}$  inches  
8             too high and there were variances of a  $\frac{1}{4}$  inch to  $\frac{4}{16}$ ths of an inch. Mr. Eccles'  
9             evidence was that the variations in the riser heights did not comply with the Code  
10            and that the risers were non-compliant. Mr. Eccles also confirmed that the treads  
11            were not uniform and therefore non-compliant with the Code, although not as  
12            glaring an issue as the risers.

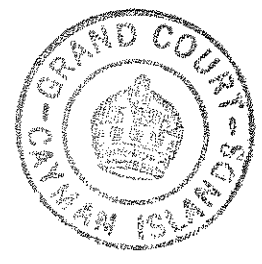
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14       23.     Accordingly, this Court finds that both the Plaintiff's expert, Mr. Owens of OA&D  
15             Architects, and the Defendant's expert Mr Eccles of DDL, gave clear evidence of  
16             non-compliance with the Code on the stairs where the Plaintiff fell and this was in  
17             relation to both the heights of the risers and the depths of the treads. The Defendant  
18             owed the Plaintiff a duty of care. The steps on the lowest flight of the rear staircase  
19             were in breach of the Code. The Defendant was in breach of its statutory  
20             obligations and negligent in allowing the breach to continue. The steps should have  
21             been uniform. The Court finds that on the balance of probabilities the Defendant's  
22             failure to comply with the Building Code constituted negligence, a breach of its  
23             statutory duty and the probable cause for the Plaintiff to have fallen on the stairs  
24             and sustain the injuries she received.

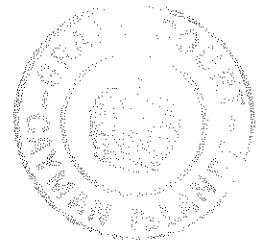
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1       24.     There is no evidence before this Court that the Plaintiff in any way contributed to  
2             the fall, either in her manner of descending the stairs, or in the wearing of any  
3             inappropriate attire. Therefore I find that there was no contributory negligence on  
4             the part of the Plaintiff.

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*MEDICAL EVIDENCE*

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25. The plaintiff called Dr Allen Kantrowitz (“Dr Kantrowitz”) – a US board-certified neurosurgeon who trained at MIT, University of Michigan and Mount Sinai Hospital and received his Board Certification in 1991. Dr Kantrowitz said that in the first phase of his career he did brain surgery – extracting benign tumours from difficult locations in the cranium. He moved on to spinal fusion and was involved in many cases where tumours were destroying the spine and the spine had to be strengthened. He did this spinal work up to 1995. Since then he has been involved in general neurosurgery covering a broad range of work, but mainly he said he had a heavy concentration on spinal fusion – doing one per week.

26. Dr Kantrowitz’s evidence was that the Plaintiff started a fall which developed a vertical velocity, and which came to an abrupt halt when her buttocks met the floor. Dr Kantrowitz described the spine as accordion-type mechanism, and with the fall there was perhaps with some twisting and perhaps with some huge spike in pressure to the disc.

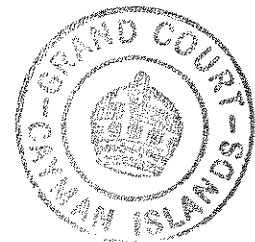
27. The Defendant called Dr Frank Smith (“Dr Smith”). He is licensed as a medical practitioner and registered with the General Medical Council of Great Britain and the Royal College of Physicians and Surgeons in Ontario, Canada, and the Royal College of Physicians and Surgeons. He is a registered specialist in orthopaedic surgery and Associate Professor of Surgery at McMaster University, Hamilton, Ontario Canada.

1 28. Dr Smith's evidence was that the Plaintiff's buttocks fell down on to the steps  
2 subjecting her to a vertical force which constituted a loaded torsion injury.

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4 29. There seems to be common ground between both parties as to the type of fall  
5 sustained by the Plaintiff.

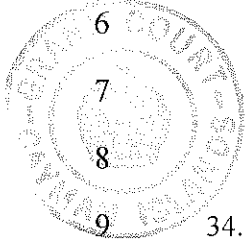
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7 30. As a result of the fall the Plaintiff experienced pain and soreness and had to take  
8 painkilling tablets that same evening. The Plaintiff went to work the next day. She  
9 complained of a sore back and continued to take painkillers every two to four hours.  
10 The Plaintiff stated that she had been off from work sick with the flu and bronchitis  
11 just prior to the incident and did not wish to take any more sick leave at that time.  
12 The Plaintiff experienced two weeks of pain before going to see Dr Viviani on the  
13 1<sup>st</sup> of August 2000 at the Cayman Orthopaedic Centre. The Plaintiff asked Dr  
14 Viviani if there was anything he could do for her without her having to take any  
15 sick leave. He confirmed that she would have to take some time off from work. He  
16 gave her an injection for the pain along with some medication, which helped  
17 alleviate the pain temporarily.

18  
19 31. On the 3<sup>rd</sup> of August she attended the Accident and Emergency Room (A&E) at the  
20 George Town Hospital and was admitted after x-rays and being administered pain  
21 medication. On the 4<sup>th</sup> August 2000 the Plaintiff received morphine and had a CT  
22 scan and was then given an epidural by Dr Vivek. The Plaintiff remained in hospital  
23 for six days as an in-patient.



1 32. It appears to be common ground between the parties that the epidural was  
2 successful, in that, it alleviated the pain for some months.

3  
4 33. It appears that the pain relief provided by the epidural started to wear off towards  
5 the end of 2000. The Plaintiff went to Miami on or about the 5<sup>th</sup> of March 2001 in  
6 order to get a CAT scan and saw Dr Kantrowitz, who, at that time, was practicing  
7 as a neurosurgeon in Miami Beach.  
8



9 34. The Plaintiff was seen by Dr Kantrowitz on the 5<sup>th</sup> of March 2001. Dr Kantrowitz  
10 noted that at that time the patient had a one-year history of mechanical back pain  
11 with left L5 features. Further, he believed that the problem would be found to be  
12 due to the diffuse annular bulge at L4 and L5 – producing lateral recess stenosis. Dr  
13 Kantrowitz felt the herniated nucleus pulposus at L5-S1 on the right was  
14 asymptomatic at the present time. At that time Dr Kantrowitz recommended an  
15 MIR and flexion extension plain films to rule out any gross mechanical stability.  
16

17 35. Dr Kantrowitz examined the Plaintiff on the 29<sup>th</sup> of March 2001 and diagnosed that  
18 the Plaintiff had back problems which he interpreted as discogenic back pain due to  
19 degenerative disc disease at the L4-L5 level with superimposed herniated nucleus  
20 pulposus on the left lumbar at L4-L5, producing a superimposed L5 left  
21 radiculopathy dating from her accident on the 13<sup>th</sup> of July 2000. Dr Kantrowitz's  
22 recommendations on the 29<sup>th</sup> of March, having now had sight of the MRI, were that  
23 the patient would not be well served by a simple lumbar discectomy. Dr Kantrowitz  
24 stated that he believed that a simple lumbar discectomy in this situation would leave  
25 the patient with her L5 radicular symptoms attenuated.

1  
2 Dr Kantrowitz said he would be concerned that the patient would have significant  
3 back pain residual, perhaps even with an exacerbation of her back pain due to the  
4 destabilization brought on by the lumbar discectomy. Accordingly Dr Kantrowitz  
5 recommended one level lumbar fusion. He said the method he would use would be  
6 to perform a lumbar decompression at L4-L5, followed by posterior lumbar  
7 interbody fusion (the so called PLIF technique), supplemented with pedicle screw  
8 instrumentation, bridging the L4-L5 level, supplemented with transverse and  
9 posterolateral fusion.

10  
11 36. Dr Kantrowitz recommended this procedure to the patient and asked her to consider  
12 it. The Plaintiff agreed to undergo this operation as recommended by Dr  
13 Kantrowitz.

14  
15 37. On the 12<sup>th</sup> of June 2001 Dr Kantrowitz carried out the operation at the Miami  
16 Heart Institute and Medical Centre for what, in short terms, would be called a spinal  
17 fusion and lumbar discectomy at L4-5.

18  
19 38. After the operation the Plaintiff had regular checkups with Dr Kantrowitz. On the  
20 11<sup>th</sup> of April 2002 Dr Kantrowitz confirmed that the Plaintiff had reached maximum  
21 medical improvement from a neurological point of view, and indicated that the  
22 patient could suffer from progressive degenerative conditions in the lumbar spine at  
23 adjacent levels, being the so-called junctional syndrome.

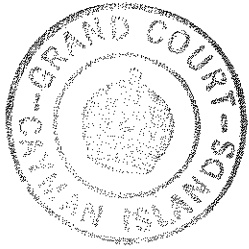


1 39. On the 6<sup>th</sup> of May 2002, approaching a one-year status post PLIF fusion, Dr  
2 Kantrowitz confirmed that the Plaintiff still had residual lower back pain and  
3 residual leg pain. After further checkups in 2002 and 2003, on the 12<sup>th</sup> of May 2004  
4 Dr Kantrowitz confirmed that the Plaintiff was one hundred percent permanently  
5 disabled. He also confirmed that the patient had post-laminectomy syndrome. The  
6 current lumbar radiculopathy further confirmed that the Plaintiff was not capable of  
7 working and, as it was approaching two years post-surgery, the possibility of this  
8 improving was nil.

9  
10 40. Furthermore on the 12<sup>th</sup> of May 2004 Dr Kantrowitz raised the possibility of future  
11 spinal surgery – either for revision or extension of the existing surgery and that the  
12 Plaintiff would need, in the long term, ongoing physical therapy and chronic multi-  
13 disciplinary long term pain management.

14  
15 41. On the 22<sup>nd</sup> of November 2004 Dr Kantrowitz confirmed that the Plaintiff did suffer  
16 from post laminectomy syndrome. The patient continued to have pain in her lower  
17 back region, with some discomfort in the left leg and the Plaintiff remained one  
18 hundred percent permanently disabled.

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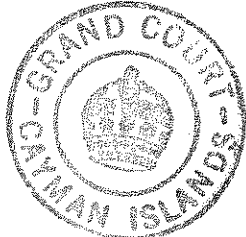
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42. The Defendant contends in paragraph 52 of its written Closing Submissions that in the event that the Defendant is liable, it can only be liable for the injury as it originally stood and not as the injury now is, having been worsened by Dr Kantrowitz. The Defendant submits that the lumbar fusion operation conducted by Dr Kantrowitz was not, in all probability, necessary, and was at best, very premature. In summary the Defendant contends that there was nothing about the injury the Plaintiff sustained by falling on the stairs that should render her one hundred percent disabled and unable to work again. The Defendant submits that more conservative options which often bring about significant, if not full recovery, were almost wholly ignored by Dr Kantrowitz, who adopted what the Defendant contends was an unnecessary and unjustifiable invasive approach – treating the patient with little or no consideration given to a measured, conservative and progressive approach.

43. Consequently the Defendant contends that the final outcome is that Dr Kantrowitz’s treatment of the Plaintiff has substantially worsened the Plaintiff’s symptoms and that the Plaintiff is now left with “post-laminectomy syndrome.”

44. The Defendant contends in paragraph 50 of its written Closing Submissions that “Dr Kantrowitz’s treatment was patently beyond what was reasonable and thus operates as a *novus actus interveniens*.”

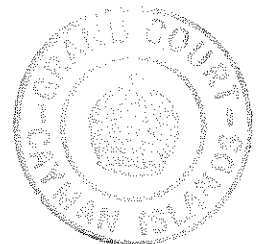


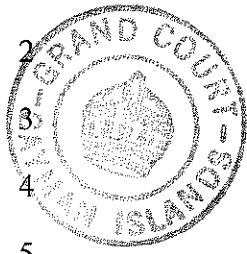
1 45. In support of its contention the Defendant relies on the evidence and on the reports  
2 of Dr Smith. In his first report dated the 27<sup>th</sup> of June 2002 Dr Smith reviewed the  
3 patient's history and performed physical examinations. He notes that the Plaintiff  
4 had much more flexibility before the operation. Based on his clinical examination  
5 and review Dr Smith is of the view that the patient recorded no evidence of  
6 neurological deficits and now she is reporting symptoms that indicate that at L5  
7 there is a possible S1 nerve problem on the left side. It was his view in 2002 that on  
8 the evidence before him "It is highly unlikely that she should have undergone a  
9 fusion procedure." Dr Smith could not see any evidence to suggest that the Plaintiff  
10 had damage to the facet joints and her back at the L4-5 level. Furthermore he found  
11 that the Plaintiff now has neurological deficits where none existed prior to the  
12 operation. Dr Smith went on to state that no consideration seems to have been given  
13 to minimal access simple discectomy, which would surely have been more  
14 indicated than the procedure undertaken.

15  
16 46. As for the lumbar fusion Dr Smith said there does not appear to be any evidence of  
17 bony injury at the time of her accident, which would have been an appropriate  
18 indication for internal fixation in order to stabilize the back. Furthermore, pre-  
19 surgery examination does not demonstrate any evidence of lumbar instability.

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21 47. In his Addendum to his report dated the 27<sup>th</sup> of June 2002 Dr Smith said:

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*“The initial x-rays do not show any evidence of instability on the L4-5 level. Also, the disc space is well preserved and is in absolute normal proportion in relation to those above and below it.” “I reviewed the CT scan and a report by the radiologist. I am not impressed with the findings on the CT scan as being significant with the particular large disc extrusion. There is certainly no evidence seen in this CT scan of facet arthritis at the L4-5 level or other signs to indicate instability.”*

48. In his supplementary report dated the 28<sup>th</sup> of October 2002 Dr Smith states that his examination of the x-rays and CT scan taken by the Cayman Islands Health Services Authority fails to support the surgery carried out by Dr Kantrowitz.

49. Dr Smith accepts in a supplementary opinion that disc surgery may have been indicated, given that the Plaintiff improved with the epidural injection for a while, and was shown to have a disc extrusion. However, Dr Smith was of the view that there is no evidence to indicate that the Plaintiff needed to undergo a spinal fusion. Dr Smith suggests that it can be argued that since the Plaintiff did not have neurological deficits prior to the surgery, and has had neurological deficits ever since the surgery, that the surgery must be responsible for those symptoms.

50. Dr Smith provided an updated report dated the 19<sup>th</sup> of March 2009. He confirms in the report that the Plaintiff continues to have low back pain and pain in both her legs. He notes that she now has some symptoms affecting her right leg with pain. He notes that she has numbness in the left foot and some in the calf.

1 He notes that her left leg is weak and gives way on her frequently; this causes her to  
2 fall and sustain further injuries. In summary Dr Smith's supplementary report stated  
3 that the Plaintiff has not made any improvement over the past seven years. She now  
4 has symptoms affecting the right leg and signs of instability or increased motion at  
5 the L3-4 level. Dr Smith confirms that the Plaintiff did not appear to have any  
6 significant neurological deficit prior to the surgery and now she has continued  
7 weakness, giving way, and sensory changes in her left leg.

8  
9 51. In his evidence at the trial Dr Smith said that it was extremely unusual that an  
10 injury such as the one the Plaintiff sustained on the UBS stairs on the 30<sup>th</sup> of July  
11 2002 should result in one hundred percent disability.

12  
13 52. It was Dr Smith's opinion that his favourite approach in a case of this sort is to

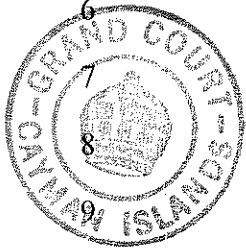
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15 *"Treat with the most conservative management that one can at all times, as*  
16 *there had been so many dramatic changes being made year to year in*  
17 *medicine; that if you do something irreversible you may have then rendered the*  
18 *next development not feasible for that particular patient, if you have exceeded*  
19 *what is required to manage that problem. If you keep them at a managing*  
20 *functioning level then you can avail yourself of new methods and procedures."*

21  
22 53. Dr Smith's evidence was that one would only use a more aggressive intervention  
23 when there is progressive neurological deficits, that is to say losing function in the  
24 nerves, be it numbness or pins and needles, paresthesia or motor function – that is  
25 to say the muscles are weakening and you develop things like foot drop and  
26 weakness and the thigh muscles giving way of the legs.

1 Dr. Smith went on to say that one only considers spinal fusion when there is frank  
2 evidence of instability which is causing the above symptoms.

3

4 54. Dr. Smith would recommend conservative physical therapy with epidurals. He  
5 described the use of an epidural steroid injection: It reduces the inflammatory  
6 reaction around the nerve root which causes the pain, and further, in a large number  
7 of cases the extrusion shrinks down and it gradually becomes smaller over a period  
8 of time. He adds that a large number of patients have recovered to the point that  
9 they do not need any surgical intervention.



10

11 55. Dr. Smith was of the view that it was quite possible for a person with an extruded  
12 disc to effectively continue to function in day to day life. There may well be some  
13 modifications such as the patient would have to be careful about lifting and  
14 especially about twisting when the annulus is at risk. Avoiding torsional activity for  
15 a significant period of time afterwards helps to heal the prolapsed disc without  
16 surgical intervention.

17

18 56. In cross examination Dr. Smith confirmed that the Plaintiff did not have a serious  
19 compression of the spine. She had an ache in the back from a twisting vertically  
20 loaded injury which is a common occurrence. Dr. Smith concluded that he would  
21 have continued with conservative physiotherapy epidural treatment and that is the  
22 treatment he would have chosen for himself. Dr Smith said he would not have  
23 chosen to do the fusion and the discectomy together. In fact Dr Smith said the main  
24 reason for doing a fusion is "when you have demonstrable, significant instability  
25 which is never shown in this case.

1 If you do a fusion without demonstrable instability the likelihood of you getting  
2 pain relief is very slim, because you are postulating that the pain is coming from  
3 instability at the disc level. The pain however may be coming from the facet joints  
4 behind. They also may be coming from other soft tissues – the longitudinal  
5 ligaments and so on. And you have to investigate those thoroughly first.” In fact Dr  
6 Smith ended up by saying that it would be extremely unlikely that he would ever  
7 treat the Plaintiff with a lumbar fusion.

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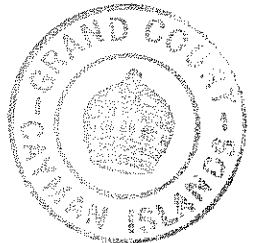
9 57. Dr Smith’s evidence was that he would opt for a wait-and-see approach with  
10 conservative physiotherapy and epidural injections. If it needed an operation it  
11 should be done by minimal access surgery to do a simple discectomy.

12

13 58. There is a sharp contrast between the opinions of the two medical experts. Dr  
14 Kantrowitz’s evidence was that he believed that the patient would not be well  
15 served by a simple lumbar discectomy. He stated that he believed that a simple  
16 lumbar discectomy in this instance would leave the patient with her L5 radicular  
17 symptoms. He was concerned about the patient having significant back pain –  
18 residual back pain, perhaps even due to destabilization brought on by the lumbar  
19 discectomy. Dr Kantrowitz told the Court that a surgeon doing a simple discectomy  
20 is faced with the dilemma to the extent that the surgeon removes more disc tissue  
21 from within the disc space thereby reducing presumably a likelihood of a so-called  
22 recurrent disc herniation, while at the same time this is impairing the ability of the  
23 disc structure to function as a cushion and as a flexible joint.

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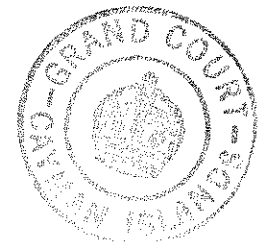


1       59.     In relation to the no-surgery physical therapy approach, Dr Kantrowitz said such a  
2       patient might be okay. He would discuss this with the patient and “we may be left  
3       with pain stiffness.” And, also, if the extruded fragment is left undisturbed then  
4       there might be motor deficits.

5  
6       60.     Dr Kantrowitz said that epidurals are not useful for treating back pain. He also  
7       indicated that repeated epidurals can induce local fibrosis and what are known as  
8       epidural tissues, which are strands of fat on connected tissue, and therefore he did  
9       not feel that epidurals were useful for treating back pain.

10  
11      61.     Dr Kantrowitz said a wait-and-see approach was not appropriate for the Plaintiff.  
12      He said that her back pain was a great problem for her and “I felt I could help her.”  
13      He then stated that with the information he got from the MRI, as well as with her  
14      historical and physical findings, he felt he could help her by doing a lumbar fusion.

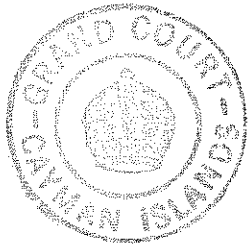
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16      62.     As for the simple discectomy using keyhole surgery to remove the extruded  
17      fragment and release pressure, Dr Kantrowitz said that although he was trained by  
18      the person who introduced this procedure to the world, and that he was extremely  
19      comfortable, because he does it all the time, he felt that a simple discectomy would  
20      not address this problem adequately. Dr Kantrowitz added that if any pain  
21      generators were left unaddressed by the keyhole surgery, the patient may have a  
22      worse course.



1       63.     In response to the Defendant’s counsel Dr Kantrowitz said the plaintiff did not fall  
2           into the category of people suitable for a simple discectomy because she was  
3           experiencing back pain as opposed to simple radicular pain. But Dr Kantrowitz did  
4           accept that the discectomy could sort out the radicular problems, but he would be  
5           concerned that the patient would have significant back pain residual and perhaps  
6           even exacerbation of her back pain due to destabilization brought on by the lumbar  
7           discectomy.

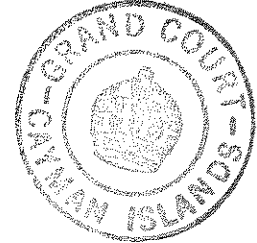
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9       64.     Dr Kantrowitz gave evidence that each individual case receives more or less  
10          surgery depending on the details of the case. In answer to defence counsel’s  
11          suggestion that there was not any heightened risk of destabilization in the Plaintiff’s  
12          spine to justify fusion, Dr Kantrowitz said he was dealing with a back pain situation  
13          and that he did anticipate that he might end up doing a radical or a more aggressive  
14          resection of annular fibres. By doing that Dr Kantrowitz said he is subjecting the  
15          patient to a “risk of destabilization in that, if I were to confine the intervention to a  
16          simple discectomy, as I understand some surgeons would do in this case, I am  
17          condemning the patient to a second trip to the operating room. This time it would  
18          be to fight through scar tissue and to implement a fusion at a hypothetical later  
19          date.”

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1 65. Dr Kantrowitz went on to say that as a surgeon, comfortable with doing both  
2 operations – a simple discectomy, or a simple discectomy supplemented with a  
3 fusion – “you try, and as best you can, understand if the patient is likely to come to  
4 fusion in the future. If you honestly believe that, the ethical thing and appropriate  
5 and moral thing to do is to proceed with fusion at the time of the simple  
6 discectomy.”

7  
8 It was Dr Kantrowitz’s view that:



9  
10 *“If the patient was going to come to a fusion at some point in the future, and in*  
11 *the near future, then the most appropriate recommendation to do them was to*  
12 *do them both at the same time.”*

13  
14 Dr Kantrowitz said this would only involve one surgery, one anaesthetic and one  
15 hospitalization.

16  
17 66. In addition, Dr Kantrowitz said, in relation to the spinal fusion, he had taken into  
18 account the fact that the Plaintiff was a smoker – albeit a social smoker.

19  
20 67. It is clear that the treatment of back injuries and the case for spinal fusion is a  
21 matter of some controversy. Dr Smith produced a number of academic and medical  
22 articles including one from the British Medical Journal 1996 312 by Mr James  
23 Wilson-MacDonald – a consultant orthopaedic surgeon from the spinal unit of the  
24 Nuffield Orthopaedic Centre in Oxford – in which he stated:

1                   *“The case for spinal fusion for back pain has not been proved. Excellent*  
2                   *results have been obtained from non-surgical treatments, and adequate*  
3                   *resources have not been applied to fully assess these methods. Spinal fusion*  
4                   *probably has a place in the treatment of back pain and in certain*  
5                   *circumstances, but many patients selected for spinal fusion at the present time*  
6                   *might be better treated in other ways.”*

7

8           68.     Dr Smith also referred to an article from the Division of Orthopaedic Surgery in the  
9           Department of Surgery at McMaster University by Drs Bhandari, Petrisor, Busse  
10          and Drew, which refers to a 2004 opinion article in the New England Journal of  
11          Medicine which stated that “the emphasis of research efforts should shift from  
12          examining how to perform fusion to examining who should undergo fusion.”

13

14          69.     Another article Dr Smith referred to was in the May 2005 issue of the British  
15          Medical Journal where “a 2007 systematic review of several studies, including the  
16          2005 British Medical Journal Study, stated:

17                   *“It was not possible to reach a definitive conclusion about whether fusion*  
18                   *surgery might be effective in treating discogenic pain.” Furthermore “the*  
19                   *review did state that the nature of nonsurgical treatment of back pain may be*  
20                   *critical in determining whether it is a better approach than fusion.”*

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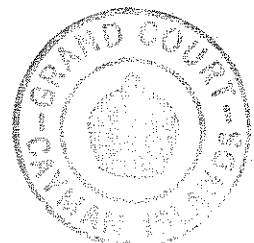
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1 70. Drs Bhandari, Petrisor, Busse and Drew came to the practical conclusions that:

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3 *“Lumbar fusion surgery in patients with chronic low back pain does not appear*  
4 *to offer any major benefit in outcomes over conservative rehabilitation*  
5 *programmes, incorporating physical activity and cognitive-behavioural*  
6 *therapy.”*

7

8 71. Furthermore they stated that:

9

10 *“Patients undergoing lumbar fusion may have a slightly lower, but a clinically*  
11 *unimportant decrease in disability scores in exchange for an increased risk of*  
12 *complications, higher medical costs and no difference in quality of life at two*  
13 *years after surgery.”*

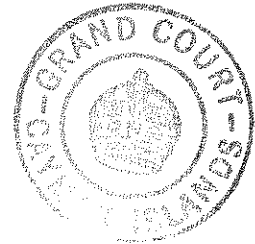
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15 72. Indeed Dr Kantrowitz accepted that this field is the subject of professional  
16 controversy and conceded that in a room of one hundred surgeons who operate on  
17 the spine one is going to get a very broad range of opinion on which ideas are  
18 important, and, further “if we knew the answers to the questions in every patient  
19 there would not be any controversy.”

20

21 73. Dr Kantrowitz also added that despite a spine surgeon’s best efforts, patients can  
22 still have persistent pain, persistence of stiffness, and perhaps some motor deficits.  
23 Indeed I note that Dr Ivor Cranden, a consultant Neurosurgeon and a Professor of  
24 Surgery in the University of the West Indies stated in his report dated the 30<sup>th</sup> of  
25 July 2008 that;

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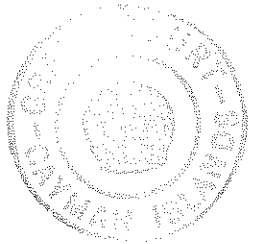


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“Dr Kantrowitz ought to be congratulated on the management of her very difficult spinal problem.”

74. I must record the fact that Dr Kantrowitz did not impress the Court by choosing not to answer some reasonable questions put by defence counsel and, on occasion, insisting on arbitrarily changing the wording of defence counsel’s questions to suit his own answers. Furthermore, to shout and spell the word ‘ethics’ to defence counsel was unnecessary. I take this intemperate response to betray a slightly defensive reaction to the Defendant’s case. Indeed, I would actually prefer Dr Smith’s more measured and conservative approach to the problems the Plaintiff was experiencing.

75. There is a sharp conflict in the evidence and recommendations of the Plaintiff’s surgeon, Dr Kantrowitz, and the Defendant’s expert, Dr Smith. The question this Court has to ask itself is whether Dr Kantrowitz’s spinal fusion operation on the Plaintiff’s back was a *novus actus interveniens*, thereby removing any further liability on the defendant, and placing the liability for the Plaintiff’s current situation on the advice Dr Kantrowitz gave to the Plaintiff and the operation he performed.



1       76.     The Defendant submits that Dr Kantrowitz's decision to proceed direct to fusion  
2             was unjustified and, in fact, contraindicated. The Defendant submits that Dr  
3             Kantrowitz failed to provide any clear justification for his decision to immediately  
4             pursue a spinal fusion, and that his treatment patently went beyond what was  
5             reasonable and thus operated as a *novus actus interveniens*. The Plaintiff's counsel  
6             submits that Dr Kantrowitz's treatment was reasonable and appropriate although, it  
7             has to be accepted, without giving the Plaintiff any degree of recovery or relief  
8             from pain.

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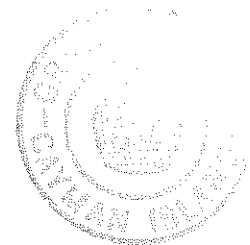
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*THE LAW – CONCLUSION ON NAI*

77. It is noteworthy that the Defendant did not bring any third party proceedings against Dr Kantrowitz and also did not plead in its defence *novus actus interveniens*. Paragraph 6 of the Defendant’s defence filed on the 19<sup>th</sup> of December 2003 merely stated:

*“It is averred that such injury as the Plaintiff may have sustained as a result of the alleged accident was exacerbated by the treatment the Plaintiff received from both Dr Volivu and or Dr Kantrowitz, and that any alleged injury from which the Plaintiff continues to suffer was caused and or exacerbated by the said treatment.”*

78. The English Court of Appeal in the case of ***Roberts and Roberts v Bettany and Bettany***<sup>1</sup> (“*Roberts v Bettany*”) stated that although the doctrine of *novus actus interveniens* was presented simply for the question of causation, it was well recognized that the matter was more complex, and a question of law where the Court had to be satisfied that the act of a third party was such as to exculpate the defendant.



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<sup>1</sup> 2001 EWCA 109

1 79. The English Court of Appeal in *Roberts v Bettany* considered *Clerk & Lindsell* as  
2 the seminal text and stated:

3  
4 “The correct approach was to be found at paragraph 2-41 of *Clerk & Lindsell*  
5 on Torts 18<sup>th</sup> Edition, where reference was made to the decision in *Hogan v*  
6 *Bentinck West Hartley Collieries (Owners) Ltd* [1949] 1 All E. R. at 588 at  
7 592/3 (“*Hogan v Bentinck*”) in which it was held that the question of whether  
8 a later act broke the chain of causation could only be answered by  
9 consideration of all the circumstances and, in particular, of the quality of that  
10 later act or event.”  
11

12 80. The definition of *novus actus interveniens* as set out in *Clerk & Lindsell* on Torts  
13 19<sup>th</sup> Edition at paragraph 2-78 is:

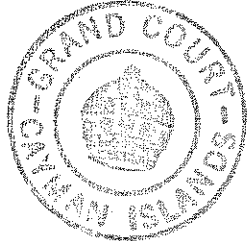
14 “Where the defendant’s conduct forms part of a sequence of events leading to  
15 harm to the claimant (plaintiff), and the act of another person, without which  
16 the damage would not have occurred, intervenes between the defendant’s  
17 wrongful conduct and the damage, the court has to decide whether the  
18 defendant remains responsible or whether the act constitutes a *novus actus*  
19 *interveniens*, i.e. whether it can be regarded as breaking the causal connection  
20 between the wrong and the damage.”  
21

22  
23 81. It has often been stated, and re-stated in *Clerk & Lindsell* that:

24 “Whatever its form, the *novus actus interveniens* must constitute an event of  
25 such impact that it “obliterates” the wrongdoing of the defendant.”  
26  
27

28 82. In paragraph 5-7 of *Charlesworth & Percy on Negligence* 11<sup>th</sup> Edition the learned  
29 editors point out that reasonableness has to be a test as well as foreseeability. The  
30 editors state:

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1                    *“If the negligence of the defendant creates a context in which a third party,*  
2                    *reasonably acts in some way which contributes to the claimant’s damage, it is*  
3                    *unlikely that the consequences of that fresh act would serve to break the chain*  
4                    *of causation. But if there is some unreasonable intervention, it may so*  
5                    *overwhelm the defendant’s wrongdoing that it can be said to be a new*  
6                    *intervening cause. It is a matter of judgment based on the facts of each case*  
7                    *whether the intervening act is reasonable or not. Foreseeability comes into the*  
8                    *equation too. If the defendant ought to have reasonably foreseen the third*  
9                    *party’s intervention as a result of his negligent act or omission, it will not be*  
10                    *open to him to suggest that the intervening act overtakes his own as the effect of*  
11                    *cause of loss.”*  
12

13           83.     The learned editors of *Charlesworth & Percy* cite the case of *Iron & Steel*  
14                    *Holdings and Realisation Agency v Compensation Appeal Tribunal*<sup>2</sup> and the  
15                    judgment of Winn LJ at page 492:

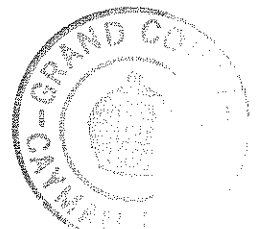
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17                    *“In my opinion, wherever any intervening factor was itself foreseeable by the*  
18                    *actor, the person responsible for the act which initiated the chain of causes*  
19                    *leading to the final result, that intervening cause is not itself, in the legal sense,*  
20                    *a novus actus interveniens breaking the chain of causation and isolating the*  
21                    *initial act from the final result.”*  
22

23           84.     Accordingly, as the learned editors of *Clerk & Lindsell* state four issues need to be  
24                    addressed:

- 25                    a.    Was the intervening conduct of the third party such as to render the original  
26                    wrongdoing merely a part of the history of events?  
27                    b.    Was the third party’s conduct either deliberate or wholly unreasonable?  
28                    c.    Was the intervention foreseeable?  
29                    d.    Is the conduct of the third party wholly independent of the defendant, i.e. does  
30                    the defendant owe the claimant any responsibility for the conduct of the third  
31                    party?  
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<sup>2</sup> [1966] 1 W.L.R. 40

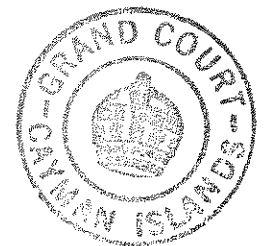


1 85. The learned editors went on to state that “in practice, in most cases of *novus actus*  
2 *interveniens* more than one of the above issues would have to be considered  
3 together.”  
4

5 86. On the evidence before me the Plaintiff at paragraph 14 of her witness statement  
6 states that she spoke to Mr Albrecht about her injury and the outstanding medical  
7 bills, as well as the events leading up to that date. He told her that she would be  
8 reimbursed for all money spent regarding the injury and any shortfall from the  
9 insurance and any other expenses related to the injuries and asked for all the  
10 receipts of the things she had paid for up to that time.  
11

12 87. In her witness statement at paragraph 16 the Plaintiff said she attended a meeting  
13 with Mr. Albrecht and Philip Bigger (“Mr. Bigger”) of the Bank, and advised them  
14 of the situation, and asked them whether they wanted confirmation directly from the  
15 doctor. The Plaintiff’s evidence is that Mr. Albrecht and Mr. Bigger acting as  
16 servants and agents of the Defendant accepted the Plaintiff’s statement and Mr.  
17 Albrecht went on to tell the Plaintiff that she must go and do the surgery and not to  
18 worry about anything, and particularly not to worry about the expenses, because  
19 UBS would continue to cover the shortfall.  
20

21 88. Mr. Albrecht also told the Plaintiff that if she could not return to work she could  
22 always take early retirement or disability leave or possible part-time work.  
23  
24



1 89. It is clear that the Plaintiff had properly apprised the Defendant of the steps she was  
2 taking as a result of the injury she received from the fall on the rear staircase. It is  
3 also clear that the intervention of Dr Kantrowitz's operation was not only  
4 foreseeable, but also the Plaintiff, in her duty to the Defendant, had kept the  
5 Defendant and their servants and agents apprised of what treatment and medical  
6 advice she was receiving. In my view the Plaintiff acted quite properly and  
7 reasonably in all the circumstances of this case.

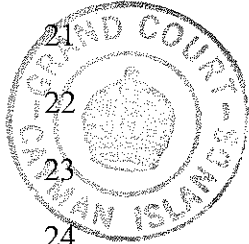
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9 90. The law on intervening medical treatment developed from the often cited dissenting  
10 judgments of Lord McDermott and Lord Reid in *Hogan v Bentinck*. As the learned  
11 editors of *Clerk & Lindsell* state:

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*"A problem arises when it is alleged that the effective cause of the plaintiff's injury was not the original wrongdoing but either inept or ill advised medical treatment, or a refusal by the claimant to undergo effective and available treatment."*

18 91. The question which went to the House of Lords in *Hogan v Bentinck* was whether  
19 the man's incapacity resulted from the original injury or the operation. By a  
20 majority of 3:2 it was held that the inappropriate treatment operated as a *novus*  
21 *actus*. However, Lord McDermott, in a dissenting judgment, stated that the learned  
22 County Court Judge had misdirected himself.



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*"He should have enquired (1) if the workman was reasonable in undergoing the operation, and (2) if the surgeon's fault occurred in the course of advising or carrying out treatment aimed at curing that incapacity."*

29 Lord McDermott was of the view that had the judge asked himself those questions,  
30 the appeal would succeed.

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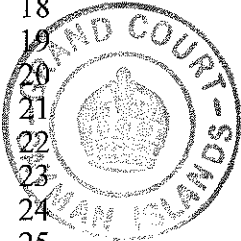
In addition, Lord Reid stated at page 607 paragraph 1, which states:

*“I do not find in any of the cases any warrant for applying the doctrine of novus actus interveniens unless there has been grave lack of skill or care on the part of the doctor.”*

92. The learned editors of *Clerk & Lindsell* 19<sup>th</sup> Edition have indicated that Lord Reid was correct in that:

*“Only medical treatment so grossly negligent as to be a completely inappropriate response to the injury inflicted by the Defendant should operate to break the chain of causation.”*

It is noteworthy that the English Court of Appeal in *Webb v Barclay’s Bank PLC and Portsmouth Hospitals HPS Trust*<sup>3</sup> (“Webb v Barclays”) at paragraph 55 expressly endorsed this statement of the editors of *Clerk & Lindsell*. Lord Justice Henry’s judgment in *Webb v Barclays* also referred to the High Court of Australia decision in *Mahoney v Kruschick Demolitions Pty Ltd*<sup>4</sup> which said *Per curium*



*“What “when” an injury is exacerbated by medical treatment, the exacerbation may easily be regarded as a foreseeable consequence for which for which the first tortfeasor is liable. If the Plaintiff acts reasonably in seeking or accepting the treatment, negligence in the administration of the treatment need not be regarded as a novus actus interveniens which relieves the first tortfeasor of liability for the Plaintiff’s subsequent condition. The original injury can be regarded as carrying some risk that medical treatment might be negligently given.”*

93. It is my view that the Plaintiff acted reasonably in seeking out and accepting Dr Kantrowitz’s advice and treatment. Furthermore, the original injury sustained by the Plaintiff as a result of the negligence and breach of statutory duty of the Defendant can be regarded as carrying some risk that medical treatment might be negligently given.

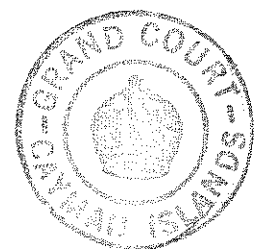
<sup>3</sup> [2002] P.I.Q.R.  
<sup>4</sup> [1985] 156 C.L.R. 522

1 94. Perhaps Dr Kantrowitz should have given further consideration to a more  
2 conservative wait-and-see policy, as set out by Dr Smith, which would have  
3 included physiotherapy, epidurals and physiotherapy and, possibly, a simple  
4 discectomy on its own, before embarking on the lumbar fusion operation.

5  
6 95. However, even if Dr Kantrowitz's operation was somewhat premature, it is not  
7 automatically a *novus actus interveniens* which would relieve the Defendant from  
8 liability for the Plaintiff's subsequent condition.

9  
10 96. To answer the questions posed in 82 above, I don't find that the intervening conduct  
11 of Dr Kantrowitz was such as to render the original wrongdoing merely a part of the  
12 history of events. Secondly I do not find that Dr Kantrowitz's conduct was either  
13 deliberate or wholly unreasonable. Thirdly the intervention was foreseeable and, in  
14 my view, on the facts of this case, and in all the circumstances, the Defendant is  
15 liable for the loss and damage and pain and suffering that the Plaintiff is currently  
16 enduring. Whilst I may prefer Dr Smith's approach I do not find Dr Kantrowitz's is  
17 guilty of either excessive or gross negligence and therefore his operation on the  
18 Plaintiff does not break the chain of the causation. Accordingly, on all the facts and  
19 circumstances of the case I find that Dr Kantrowitz's decision to recommend and  
20 carry out a lumbar fusion on the Plaintiff is not a *novus actus interveniens*.

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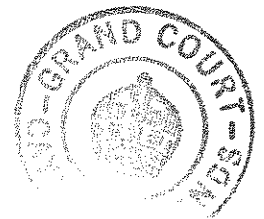
1 *QUANTUM*

2 *GENERAL DAMAGES*

3  
4 97. In her Statement of Claim the Plaintiff claims from the Defendant damages for  
5 pain, suffering and loss of amenities, resulting from the injuries she received in the  
6 slip-and-fall accident on the bottom rear stairway of the Defendant's building as  
7 well as psychological damages.

8  
9 98. The Plaintiff in her witness statement at paragraph 25 states that she still has  
10 continual pain, sleepless nights, limited mobility, numbness in her left foot and  
11 some toes, and, pain in her left leg. She has difficulty sitting and standing for  
12 prolonged periods and is unable to walk for any long periods.

13  
14 99. She is unable to continue running, doing exercise, dancing, and no longer can play  
15 or umpire Netball matches. In addition she has difficulty sleeping and her sex life  
16 has been greatly diminished. The Plaintiff maintains that her entire lifestyle has  
17 changed, whereas before the fall she was an extrovert. Now she feels depressed,  
18 unwanted and lives the life of an introvert. The Plaintiff impressed the Court as a  
19 witness of truth who did not appear to embellish the problems she was  
20 experiencing. In fact, she appeared admirably stoical in facing her difficulties.



1 100. In the Plaintiff's Skeleton Submissions dated the 11<sup>th</sup> of June 2009 her attorneys  
2 submit that the sum of \$300,000.00 is a reasonable figure for pain and suffering and  
3 loss of amenities. I have to say that this is a wildly inflated sum and is not  
4 supported by any relevant authorities in *Kemp & Kemp*, from the *Judicial Studies*  
5 *Board* or from any case law in comparable jurisdictions.

6  
7 101. I have been helpfully provided by with the *Judicial Studies Board Guidelines*,  
8 *Personal Injury Quantum Reports for Orthopaedic Injuries* (Ninth Edition) by the  
9 Defendant's attorneys. Defence counsel has referred to a number of cases one is  
10 very similar to the Plaintiff's case in relation to pain and suffering and loss of  
11 amenities namely *Lane v. Laing Construction Ltd*<sup>5</sup>. In this case the Plaintiff  
12 suffered similar injuries. The symptoms which she suffered were permanent and  
13 there was a likelihood of a spinal fusion operation. The judge found that his  
14 assessment of damages for pain and suffering and loss of amenities fell at the top of  
15 the *JSB Guidelines* (7<sup>th</sup> Edition) "moderate back injuries" category at Chapter  
16 6(B)(b)(ii). In this case he awarded £14,500 for general damages.

17  
18 102. In another case *Saunders v Hammersmith and Fulham*<sup>6</sup>, the injuries comprised an  
19 eight year and six month acceleration of a pre-existing but symptomless back  
20 problem of isthmic spondylolisthesis at L5/S1 with disc prolapses caused at L4/5  
21 and L5/S1. In this particular case of *Saunders v Hammersmith and Fulham LBC*  
22 the Plaintiff was able to work until the fall but not at all thereafter. The Plaintiff was  
23 in severe pain for one year from the date of the fall and in disabling pain thereafter  
24 with limitation of mobility and with social/sexual/hobby restrictions.

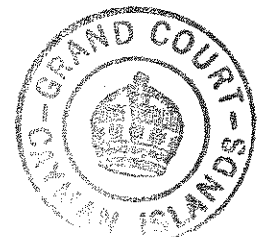
<sup>5</sup> [2006] C.L.Y. 3163

<sup>6</sup> LBC [1998] C.L.Y. 1570

1 There was a possibility of spinal fusion in the future. Physical symptoms included  
2 back pain, severe groin pain and burning sensations in the thighs and legs and the  
3 Plaintiff also suffered a moderately severe depressive illness. In this case the judge  
4 ordered general damages in the sum of £22,265.

5  
6 103. In the third case of *McIlgrew v Devon CC*<sup>7</sup> the Plaintiff suffered very similar  
7 injuries to the Plaintiff in this case and underwent an operation on the lumbar spine.  
8 In the case of *McIlgrew v Devon CC* the spinal fusion was not a success and the  
9 Plaintiff was left with constant pain and restriction of movement. At the date of the  
10 trial she walked with a stick. She could only sit for about an hour before she had to  
11 move, but could stand for somewhat longer. Her sleep pattern had been disturbed.  
12 She could no longer partake in dancing aerobics and hiking. Her sex life had been  
13 severely diminished and her symptoms were expected to be permanent. She was  
14 described as unemployed and unemployable and she was awarded £22,500. The  
15 pain, suffering and loss of amenities in the case before the Court are very similar to  
16 *McIlgrew v Devon CC* which was decided some sixteen years ago in 1993.

17  
18 104. It would appear from the evidence of Dr Kantrowitz and Dr Smith that the pain,  
19 suffering and loss of amenities, which the Plaintiff is suffering from, are at the high  
20 end of the “moderate back injuries” category, as defined in the *JSB Guidelines*, with  
21 some elements at the low end of the “severe” category.



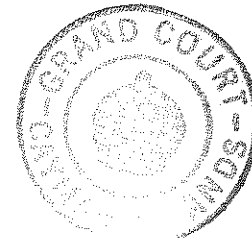
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<sup>7</sup> [1993] C.L.Y. 1487

1       105. This court traditionally follows English case law, and the helpful authorities  
2       contained in *Kemp & Kemp* and the *JSB Guidelines*, with a small increase to reflect  
3       the higher cost of living in the Cayman Islands. It is my view that this Court can  
4       take judicial notice of the fact that we have no income tax, and therefore the cost of  
5       living is higher than in the UK. I have read and reviewed those authorities and the  
6       Plaintiff's claim for damages for pain and suffering and loss of amenities and I find  
7       that in this case damages for pain, suffering and loss of amenities should be  
8       CIS\$65,000.00.

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1 *SPECIAL DAMAGES*

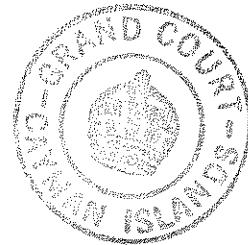
2 *PAST LOSS OF EARNINGS*

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4 106. The Plaintiff was a client advisor or corporate administrator with UBS. She had no  
5 professional qualifications such as a Chartered Secretary or Accountant, and had  
6 not passed any exams other than her Advanced Level Cambridge Exams. There was  
7 no evidence that she was on an upward career path, although it seems that the Bank  
8 was reasonably satisfied with her performance.

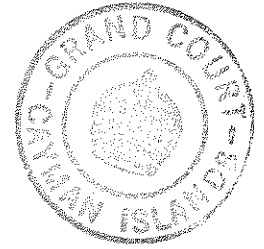
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10 107. At the time of the accident the Plaintiff was employed as a client advisor earning  
11 US\$50,000.00 per annum. After the accident she continued to be employed by the  
12 Defendant until she was made redundant in 2002 as a result of restructuring.

13  
14 108. The Defendant said that the Plaintiff would have had little difficulty in obtaining  
15 similar employment with another institution in the early 2000's and in the mid  
16 2000's.

17  
18 109. In accordance with her witness statement the Plaintiff has indicated that she  
19 obtained an annual salary increase of two percent. Accordingly, the projected salary  
20 is as follows:



Period	Projected Salary US\$, inflating @ 2% p. a.
2002-2003	50,000
2003-2004	51,000
2004-2005	52,020
2005-2006	53,060
2006-2007	54,121
2007-2008	55,203
2008-2009	56,307



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110. However, the Defendant had put the Plaintiff on its Group Disability Scheme which was entirely maintained and contributed to by the Defendant with Zurich Insurance (“Zurich Disability Scheme”). To the Defendant’s credit, this benefit was not initially applied for by the Plaintiff. Nevertheless, following her application the benefit was backdated to the date of her accident and the Plaintiff has received and will continue to receive a regular income as a result of the Defendant placing her on the Disability Scheme and for paying all other contributions to the Zurich Disability Scheme.

111. The Defendant maintains that these payments would quite clearly not have been received by the Plaintiff, had she not been injured, and had the Defendant not taken out and paid for the Zurich Disability Scheme. The evidence is that the Plaintiff did not contribute to the premiums and therefore the payments under the Zurich Disability Scheme fall to be deducted when calculating her net loss of earnings.

1 112. The Defendant relies upon the English Court of Appeal decision of *Pirelli General*  
2 *PLC v. Jan Gaca*<sup>8</sup> (“*Pirelli*”). The principles upon which the Courts rely are that  
3 damages are always compensatory and the Plaintiff is not entitled to be put in a  
4 position better than that which would have been the case, had the accident never  
5 occurred. In *Pirelli* the Plaintiff was injured and rendered unfit to work in the same  
6 manner as the Plaintiff in this case, and was also entitled to a substantial payout  
7 under the terms of a Group Personal Accident policy maintained by his employers.

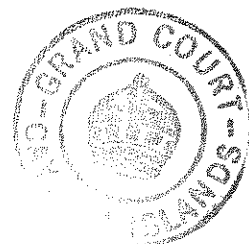
8  
9 113. It was argued in *Pirelli* that there was no need to give credit for payouts under this  
10 policy when calculating his damages. This argument was rejected by the Court of  
11 Appeal on the following grounds:

- 12  
13 i. A payment of this sort under an insurance policy was not equivalent or  
14 analogous to a benevolent payment as sympathy. See Dyson LJ at  
15 paragraph 39.
- 16 ii. The essential consideration in determining whether the “insurance  
17 exception” in the *Parry v. Cleaver*<sup>9</sup> case, was whether the premium had  
18 been paid by the claimant. See paragraph 50.
- 19 iii. The Plaintiff was not to be treated as having paid or contributed to the  
20 cost of insurance merely because the insurance had been arranged by  
21 his employer for the benefit of employees. Payment or contribution will  
22 not be inferred simply from the fact that the claimant is an employee  
23 for whose benefit the insurance has been arranged.
- 24

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<sup>8</sup> [2004] EWCA Civ. 373

<sup>9</sup> [1970] A.C.1



1 114. Counsel for the Plaintiff accepted in the course of submissions that the premiums  
2 had been paid by the Defendant. Accordingly, it is this Court's view that the  
3 Plaintiff has to be treated in the same way as the employee in the *Pirelli* case, and  
4 accordingly the benefits paid to the Plaintiff fall to be deducted.

5  
6 115. The benefits the Plaintiff has received from the date of the accident to the date of  
7 trial are as follows:

Period	Projected Benefit US\$ inflating @ 5%
2001-2002	33,335
2002-2003	35,001
2003-2004	36,751
2004-2005	38,589
2005-2006	40,519
2006-2007	42,544
2007-2008	44,672
2008-2009	46,905

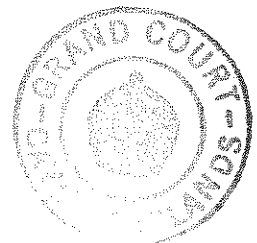
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11 116. Accordingly, the Court finds that the Plaintiff's net loss of earnings to the date of  
12 trial can be calculated as US\$371,711 less US\$318,316 bringing a total loss of  
13 earnings to US\$53,395. Accordingly, I award US\$53,395 to the Plaintiff for loss of  
14 earnings.

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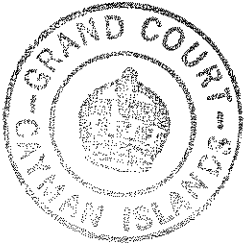
***FUTURE LOSS OF EARNINGS***

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117. It is accepted by the Defendant that, assuming liability is not an issue, the Plaintiff is entitled to compensation for future loss of earnings. Both parties refer to and rely upon the Ogden Tables. The Plaintiff submits that an appropriate multiplier is 13.35, the Defendant, on the other hand, argues for a multiplier of 10.22. The Ogden Tables have been accepted by the English Courts for many years and indeed, the Cayman Islands Courts have recognized them and have adopted them. The former Chief Justice Harre in *Allen v Ebanks*<sup>10</sup> states:

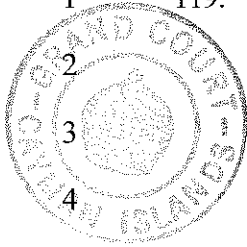
*“It is clear that the English Courts accepted the use of the statistical average taken from the Ogden Tables, not as the ultimate and only test, but taking into account also factors found to exist in particular cases and the manifold contingencies of any individuals’ lives. That is the approach which I shall adopt. In the present case the plaintiff submits that the Ogden Tables, and what may be called the conventional method of calculation, produce a very similar result.”*

118. As counsel for the Defendant submits, in the absence of a set of actuarial tables compiled with specific reference to the demographics of the Cayman Islands, the Courts here have wisely relied upon the Ogden Tables as a reasonable source of actuarial data. In *Allen v Ebanks* and in other cases the Courts in the Cayman Islands have prayed in aid the Ogden Tables which I find to be extremely helpful and, I adopt in this case.



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<sup>10</sup> 1998 CILR 190 at page 197



1 119. The Plaintiff is 48 years of age and I think it is reasonable to adopt a pension age of  
2 60. Accordingly, table 8 of the Ogden Tables provides for multipliers for loss of  
3 earnings to pension age 60 for females. Adopting Table 8 as a starting point with a  
4 rate or return of 2.5% produces a basic multiplier of 10.22 and not the multiplier of  
5 13.35 which was suggested by the Plaintiff's counsel.

6  
7 120. In 2009 the Plaintiff's net loss of earnings equates to her projected salary minus the  
8 payments received in lieu of salary from the Zurich Disability Scheme. That is,  
9 US\$56,307-US\$46,905 = US\$9,402.

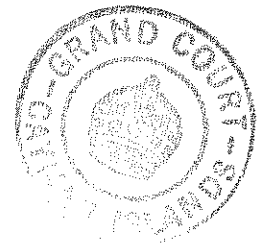
10  
11 121. Accordingly, using Ogden Table C – loss of earnings to pension age 60, Females  
12 Not Disabled produces a factor of .85 in this respect. Therefore to calculate her  
13 gross future loss it is US\$9,402 x 10.22 x 0.85 which results in a figure of  
14 US\$81,676.

15  
16 122. The Defendant relies upon the *Pirelli* decision in order to support their argument  
17 that there should be two further deductions in relation to the Plaintiff's loss of  
18 future earnings. The Defendant submits that under the provisions of the National  
19 Pensions Law the Plaintiff was legally obliged to contribute 5% of earnings up to  
20 CI\$60,000.00 (US\$71,428.00) into a Pension Plan. The Defendant submits that  
21 given that the Plaintiff's projected earnings at UBS never exceeded this level, this  
22 should be accounted for by a simple 5% deduction from the gross figure in order to  
23 reflect money that would have ordinarily have been paid into such a Plan.  
24 Accordingly, this can be reflected by US\$81,676 x 0.95 = US\$77,593.00.

25

1       123.    In addition the Defendant submits that the effect of the Zurich Disability Scheme in  
2            respect of pension contributions is that the Plaintiff will receive more in respect of  
3            pension contributions than would in fact have been paid into her pension, had she  
4            continued to work. The Defendant submits that this sum would have been paid in  
5            cash and is therefore liquid. Accordingly, the Defendant argues that a sum of  
6            US\$58,726.00 should be deducted from the Plaintiff's overall claim for loss of  
7            earnings, to reflect the additional payment. This can be shown by  $US\$77,593.00 -$   
8             $US\$58,726.00 = US\$18,867.00$ .

9  
10       124.   I accept the Defendant's submission that in accordance with the *Pirelli* decision the  
11            Plaintiff is not entitled to be put in a position better than that which would have  
12            been the case, had the accident never occurred. Accordingly, I make the above  
13            deductions and award the figure of US\$18,867.00 for future loss of earnings.



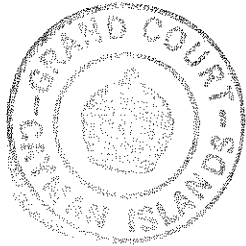
*LOSS OF PENSION CONTRIBUTIONS*

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125. The Plaintiff's counsel have made a claim for an award for loss of pension contributions. Although this has never been particularized, either in the Statement of Claim or in the Plaintiff's evidence.

126. The Defendant argues that the Zurich Disability Scheme pays 50% of full salary in lieu of pension contributions. The Defendant argues that Section 47(2) of the National Pensions Law (2000 Revision) stipulates that an employee and an employer must each contribute a pension plan 5% of earnings up to a maximum pensionable level of US\$60,000. The Defendant submits that in the Plaintiff's case this level of earnings was never exceeded and, accordingly, an aggregate sum equivalent to ten percent of her total salary would have been paid into her pension each year.

127. However, the Defendant also submits that by reason of the benefits under the Zurich Disability Scheme the Plaintiff in fact received 5% more of her total salary in lieu of pension, than would have in fact been paid into her scheme had she continued to work, and therefore her loss of pension is 0. I accept the Defendant's submissions on this point and make no award for any loss of pension contributions.



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2  
3 *HOME CARE*

4 128. The Plaintiff maintains that she is unable to attend to her housekeeping due to her  
5 injuries and since July 2003 she has been incapable of paying for home care and has  
6 to resort to paying a domestic for one day per week at the rate of CI\$50.00 per day,  
7 making a total to the date of trial of CI\$15,600.00. Whilst the Defendant complains  
8 about the Plaintiff's lack of particularity in relation to this head of claim, it does  
9 accept that such a claim for home care may be allowed. In addition it is highly  
10 likely that the Plaintiff will continue to require this home care and, accordingly, I  
11 make an award for future home care in the sum of CI\$50.00 per day, for one day  
12 per week, for one year, which comes to a subtotal sum of \$2600.00. Using the  
13 multiplier of 10.22, I allow the sum of CI\$26,572.00 for future home care.  
14 Accordingly, I award a total of CI\$42,172.00 under this heading.

15 *MEDICAL EXPENSES*

16  
17 129. Again the Defendant has not sought to challenge the Plaintiff's claim under this  
18 heading and accordingly I award the sum of US\$90,861.84.  
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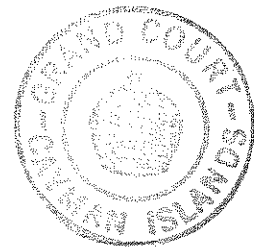
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*FUTURE MEDICAL EXPENSES*

130. The Plaintiff in her Statement of Claim claimed for future medical expenses but they were not particularized, in the claim or in any of the witness statements or the evidence put before the Court. However the Court received a letter dated the 17<sup>th</sup> of June 2009 in which Dr Kantrowitz stated that the Plaintiff may need an additional lumbar spar fusion to “extend” the extending fusion to embrace adjacent levels.

131. Dr Kantrowitz estimates that the total cost of such hospitalization would be US\$250,000. He also adds a figure of US\$25,000 per annum for pain management and a figure of approximately US\$75,000.00 for pain management surgical procedures.

132. As against that, the Defendant has produced a detailed spinal fusion estimate from the Cayman Orthopaedic Group as follows:



1

<b>Item</b>	<b>CIS</b>
Lumbar Laminectomy CPT Code 63047	\$6,197.40
Spinal Fusion CPT Code	\$4,961.70
Auto Graft for Spine CPT Code	\$1,545.40
Posterior Instrumentation CPT Code 22840	\$5,926.5
Arthrodesis Interbody CPT Code 22630	\$4,412.70
Surgical Assistant CPT Code 80	\$3,760.00
Spinal Instrumentation CPT Code L8699	\$7,870.00
Hospital	\$400 per day x 5: \$2,000
Operating Room	\$2,500.00
Anaesthetist	\$3,000
<b>Total</b>	<b>\$42,173.70</b>

2

3

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133. There is an absence of evidence and no explanation has been given as to why the second fusion would cost five times more than the first fusion Dr Kantrowitz performed. The Defendant submits that in the event recovery for future medical costs is allowed, it should be limited to a proportion of the cost of a Cayman Orthopaedic Operation – at most, where a competent surgeon is available at a lesser cost, and therefore the Plaintiff will also be discharging her duty to mitigate her loss.

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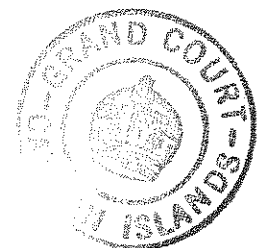
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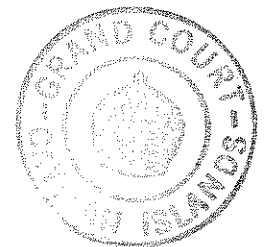
1 134. As there only exists a possibility that this second lumbar spine fusion operation  
2 should be performed, I do not think it is reasonable to award a figure in accordance  
3 with Dr Kantrowitz's very high estimate. At the same time it is uncertain what  
4 further treatment the Plaintiff will need, although there is a high likelihood that she  
5 will need some physiotherapy and associated pain management.

6  
7 135. I accept Cayman Orthopaedic Group's estimate for the cost of a possible future  
8 spinal fusion operation. In addition I think it is fair and reasonable to award the sum  
9 of CI\$15,000 to cover the cost of further physiotherapy and associated pain  
10 management treatment. Accordingly I award the sum of CI\$57,173.70 for future  
11 medical expenses.

12  
13 *MISCELLANEOUS EXPENSES*

14  
15 136. The Plaintiff has made a claim for US\$69,336.20 for out-of-pocket medical and  
16 travel expenses. It is clear that item 1 relates to home care expenses in the sum of  
17 US\$14,158.54 and accordingly the Defendant does not dispute the figure of  
18 US\$55,177.66, which I consequently award under this heading.

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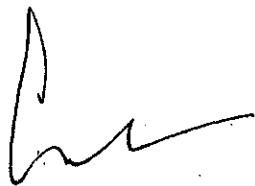
1 *CONCLUSION*

2  
3 137. Accordingly the Plaintiff is awarded the following sums:

Item		US\$	CIS	CIS	CIS
<b>General Damages</b>			\$ <b>65,000.00</b>		
<b>Special Damages (SD)</b>					
	SD Loss of Earnings	\$53,395.00		\$ 44,851.80	
	SD Future Loss of Earnings	\$18,867.00		\$ 15,848.28	
	SD Loss of Pension	No award		No award	
	SD Home Care			\$ 42,172.00	
	SD Medical Expenses	\$90,861.84		\$ 76,323.95	
	SD Future Medical Expenses			\$ 57,173.70	
	SD Miscellaneous Expenses	\$55,177.66		\$ 46,349.23	
Sub Total for SD				<b>\$282,718.96</b>	
<b>Grand Total</b>					<b>\$347,718.96</b>

4  
5 138. Accordingly, I award the Plaintiff the sum of CI\$65,000.00 for General Damages  
6 and CI\$282,718.96 for Special Damages, making an overall total of CI\$347,718.96  
7 and interest thereon to be included in the final Order. In addition, in light of the fact  
8 that costs follow the event I order that the Plaintiff is to have her costs paid for by  
9 the Defendant and to be taxed if not agreed.

10  
11 **Dated this the 23<sup>rd</sup> day of September 2009**

12 

13 **The Honourable Justice Charles Quin Q.C.**  
14 **Judge of the Grand Court**

