

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV.2009-00301

BETWEEN

SAMANTHA FAWZIYYAH HOSEIN
(Formerly known as Samantha Lutchmansingh) **CLAIMANT**

AND

(1) CENTRAL EQUIPMENT RENTALS
(2) CARLYLE DAVIS **DEFENDANTS**

AND

TRINRE REINSURANCE COMPANY
OF TRINIDAD AND TOBAGO LIMITED **CO-DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. S. Parsad and Mr. S.V.C. Parsad instructed by Ms. K. Subero for the Claimant.

Mr. S. De La Bastide instructed by Ms. A. Dass for the Defendants and the Co-Defendant.

JUDGMENT

1. The claimant, 30 years old at the time, was injured in an accident on the 27th day of July 2004. By their defence the defendant and co-defendant, hereinafter referred to collectively as the defendants, admit liability for the accident. At issue here is the quantum of damages to which the claimant is entitled.

GENERAL DAMAGES.

The nature and extent of injuries sustained and the nature and the gravity of the resulting disability.

2. The evidence in this regard is obtained from the medical report of Dr. Krishna Maharaj dated 21st October 2005 and the answers given by him to written questions put by the defendants. According to Dr. Maharaj the claimant was first seen by him on 4th August 2004, some eight days after the accident. Upon examination Dr. Maharaj found that the claimant's gait and monopodal stance were normal. There was restriction of extension of her lumbar vertebrae and sensation was diminished over the distribution of the right fifth cervical nerve root. The power and tone in her muscle groups were normal. There was no muscle group wasting nor fasciculation and her deep tendon reflexes and plantar responses were normal.

3. A subsequent MRI scan of her lumbar vertebral revealed no abnormality. But an MRI scan of the cervical vertebrae revealed a loss of normal cervical lordosis and a moderately severe right posterolateral disc herniation with foraminal stenosis on the right at the C5-6 level. He says that on review on 19th August 2005, approximately one year later, the claimant complained of pain in the neck radiating to the right upper limb, swelling of the neck and pain in the lower back. His examination confirmed a restriction of neck movements in all planes and that sensation was diminished over the right cervical nerve distribution. A later MRI revealed a right paramedian disc herniation at the C5-6 level. He advised surgery and assessed her permanent partial disability to be 35% at that time. According to him adequate surgery would most probably lessen her disability.

4. In answer to the questions put by the defendants he says he saw the claimant on 20 occasions. The last occasion was 28th April 2010. He says that he has no reason to believe that the claimant was exaggerating her symptoms. With respect to her resulting disability according to Dr. Maharaj, although other physical conditions can develop as a result of the cervical disc herniation, the claimant has not developed any other physical conditions. He says that he attempted conservative management of the claimant from 4th August 2004 to 21st September 2005. On the 21st September 2005 he advised surgery. The claimant has not consented to surgery and conservative management continues. He continues however to recommend surgery. According to him, if the claimant did the surgery as advised she would have a 95% chance of making a very good recovery and should be able to resume normal office duties; former household chores; engage in sexual activities; take care of a baby; and play pool. These activities were specifically put to him by the defendants and reflect the loss of amenities claimed by the claimant. According to him, had she done the surgery as recommended earlier she would have had a 95% chance of total pain relief now 10 years afterwards she has an 85% chance of total pain relief.

5. As a result of the accident therefore I find that the claimant sustained a loss of normal cervical lordosis and a moderately severe right posterolateral disc herniation with foraminal stenosis on the right C5-6 level. This has resulted in a right paramedian disc herniation at the C5-6 level. This resulting physical disability, according to her doctor, is correctable by surgery with a 95% chance of success and the claimant being able to resume a normal life. In addition according to Dr. Maharaj had the claimant taken the surgery when initially advised to do so she would have had a 95% chance of total pain relief. As it is some 10 years after the accident she

now has an 85% chance of total pain relief. As I understand it the doctor attributes this difference to possible degenerative changes over the years.

6. The question here is the effect of the failure of the claimant to do surgery as advised by the doctor. While we know that some six years after being advised to undergo the surgery the claimant has not done the surgery the claimant gives absolutely no evidence as to the reason. The suggestion, by way of attorney's submissions, that her failure to undergo surgery was as a result of impecuniosity is not supported by any evidence.

7. The only reference to the advice to have the surgery in the evidence of the claimant is that she says that on 25th November 2009, Dr. Maharaj recommended that she undergo anterior cervical decompression which, she says, is one which should improve the condition. It would seem to me that it is open to me to infer from that statement; the fact that by her statement of case she claims the cost of surgery and the submissions made in this regard by their attorneys that the claimant is now prepared to undergo the surgery. My conclusion is somewhat fortified by the statement of Dr. Maharaj that while sometimes many patients do not consent to surgery initially they may do so years later, when the degenerative process increases.

8. The question for my determination at this stage is whether her refusal to undergo the surgery prior to this time has any effect on the damages which she is entitled to recover. The defendants submit that, where such surgery would not be regarded as risky by reasonable men, the failure of the claimants to undergo surgery for the purpose of alleviating her pain and lessening her disability arising from such injuries constitutes a failure to mitigate her loss. In

this regard the defendants rely on the case of **Marscroft v Scruttons Ltd (1954) 1 Lloyd's Rep. 395**. While not challenging the principle established in the case some attempt has been made by the claimant to distinguish the case on the ground that what was required was evidence that surgery would definitely cure the claimant or render her in a much better state in every way. According to the submission there is no such evidence in the instant case.

9. I do not accept the submission. From the judgment of the Court of Appeal in Marscroft it is clear that Court of Appeal accepted the determination of the trial judge that the refusal of the plaintiff in that case to undergo all the recommended treatment was unreasonable. Indeed, in his judgment Lord Justice Singleton recites and accepts the following passage from the first instance judgment:

“To a certain extent it is a matter of speculation as to whether the treatment would have been successful, but it is notorious that it has been successful in many cases. The medical witnesses who have given evidence before me all seem to think it probably would have been successful in his case, and I do not feel very much doubt that there is a strong probability that it would have been successful. Of course, one cannot be completely certain about it, but I think it is reasonable to take the view that it would have been successful.”: **at page 400.**

10. It is clear therefore that in the Marscroft case there was not any definitive evidence that the recommended treatment would cure the plaintiff. Indeed, it is difficult for me to conceive of any situation where a medical doctor would guarantee a 100% success for any treatment, particularly where the treatment involves surgery. In the instant case it is the claimant's doctor

himself who indicates a 95% chance of success, which he says will result in at least an 85% chance of a total pain free existence for the claimant. This is in my view, are very good odds. On the evidence before me therefore I do not feel very much doubt that had the surgery been done there was a strong probability that it would have been successful.

11. It seems to me therefore that on the evidence before me the defendants have discharged the onus placed upon them to prove that by refusing to undergo the recommended surgery the claimant has failed to mitigate her loss. For the purpose of the assessment of the claimant's damages therefore I find that had the claimant acted reasonably in mitigating her loss it is reasonable to assume that by October 2006 and in accordance with the evidence of Dr. Maharaj she would have been 95% pain free. Accordingly the claimant's damages falls to be assessed as though the claimant had undergone the surgery and secured the degree of recovery to be expected from it: **McAuley v London Transport Executive[1957] 2 Lloyds Reports 500.**

Pain and suffering endured

12. According to the claimant at the time of and immediately subsequent to the accident she was in extreme pain. Subsequently, she began to experience difficulty in sitting because of intense pain along the back and neck. She was prescribed and continues to use painkillers. According to her she is in constant pain and as a result is depressed. For the past year and a half she has had hip pains which radiate to her toes and shooting back pains and spasms at night with the occasional twitching and loss of sensation on her left hand.

13. A word on the claimant's depression, there is no evidence that the claimant suffers from clinical depression. In my opinion the claimant's use of the word "depressed" is to be interpreted in the context of a non-technical use of the word i.e. feeling sad. It is in these circumstances that I am prepared to consider the claimant's "depression" under the head of pain and suffering rather than resulting disability.

14. In his medical report of October 2005 Dr. Maharaj states that the claimant complained of severe pain and swelling in her neck and upper back five days after the accident with the pain radiating to the right shoulder. He says she also complained of lower back pain. During the period 2004 to 2005 he states that her complaints of pains in the neck radiating to the right upper limb had been constant. On review on 19th August 2005 he says her complaints were pain in the neck radiating to the upper right limb, swelling of the neck and pain in the lower back.

15. In answer to the defendant's questions Dr. Maharaj says that the claimant would have had very severe pain the four weeks following the accident. He says that the pain is now moderately severe and is aggravated by extension, rotation and bending to the left. According to him, he is a bit surprised that the claimant has tolerated the pain for such a long period of time and not consented to the surgery.

16. I accept the medical evidence in this regard, to my mind this more or less accords with the claimant's evidence. However given my finding with respect to the claimant's failure to undergo the surgery recommended, had the claimant taken the surgery there would have been

severe pain up to the date of surgery and most likely intense pain during surgery and the recovery period. In my opinion, thereafter the claimant would only suffer slight pain in accordance with Dr. Maharaj's prognosis of 95% total relief from pain.

17. With respect to the claimant's feelings of depression, according to the claimant this is as a result of being in constant pain and her inability to perform her normal tasks and hobbies. In these circumstances it seems to me that had the claimant done the surgery these feelings would cease.

The extent to which the claimant's pecuniary prospects have been affected.

18. In her witness statement the claimant indicates that prior to the accident she had been promoted to the position of accounts clerk at a salary of \$3,525.00. The letter informing her of the promotion however is dated 1st December 2004, some four months after the accident. She says that on 22nd August 2005 she was forced to resign from her employment as a result of the unbearable pain. While the resignation letter refers to her difficulty at work as a result of chronic back pains in it the claimant merely indicates that the resignation is necessary so that she may be able to seek medical attention abroad.

19. On the evidence it is clear that the claimant was promoted after the accident. In cross-examination she attempts to justify her position by stating that because of the pain she was forced to work harder and as a result her efficiency increased. According to her in cross-examination she resigned "because of the pain basically and her aunt told her to come up and see about it".

20. At the time she resigned from her employment the claimant was an accounts clerk. According to her, her job was a desk job and her duties involved sitting at a desk doing data entry and accounts payable.

21. In his answer to the following question:

“during the period that you attempted to manage in the lesion conservatively, did you advise the claimant to take sick leave from her employment or stop working for temporary period? If during that period the claimant continued to attend were carrying out office duties, could such attendance at work have adversely affected the conservative management of the lesion/her condition/injuries? Could such attendance at work have adversely affected the lesion/medical condition/injuries”?

The use of the word lesion here refers to the injury at C5-6.

22. Dr. Maharaj states:

“I advised the patient to refrain from lifting more than 10lbs and to restrict heavy and moderately heavy physical activity to date. If a patient indulges in heavy or moderately heavy physical activity with a herniated disc lesion such activity may aggravate the pain. Attendance on work, performing light duties, e.g. typing most probably will not increase the disc herniation but bending the neck and lifting objects would precipitate pain.”

23. At the end of the day, therefore, not only does the medical evidence not support the

claimant's allegation that she is unable to work because of the injury the evidence is that for the first year after the accident, she continued to work at her job and was in fact promoted during that period. It seems to me, however that had the claimant mitigated her loss, as she ought to have done it is reasonable to assume that she would have been unable to work for sometime while undergoing and recovering from the surgery.

Conclusion on general damages

24. In the circumstances I will assess the claimants general damages on the basis that she, as she ought to have done, mitigated her loss by undergoing the surgery recommended by her doctor. The surgery was recommended in late September 2005. Bearing in mind that there would be some pain and suffering and loss of amenities up to and attendant on the surgery I will assess the claimant's total disability as continuing for 12 months from October 2005. Thereafter, in accordance with Dr. Maharaj's assessment, I accept that the claimant would have some slight disability as a result of being only 95% pain-free.

25. Bearing in mind my duty, to consider awards made by other courts with respect to similar injuries but recognising that "it is an inexact science and one which should be exercised some caution" I have considered the awards made in the cases of **Reshma Choon v Industrial Plant Services and methanol Holdings (Trinidad) Ltd. CV 2006 - 00574**; **Wayne Willis v Unilever Carribbean Limited CV 2007-04748**; **Gerard Jadoobirsingh v Bristow Caribbean Limited and Lewis Suarez CV 2005-00784**; **Evans Moreau v The Port Authority of Trinidad and Tobago CV 2006-03958**. I also bear in mind the fact that had the claimant done the surgery as advised by October 2006 she would have made an almost

complete recovery. In the circumstances I award the sum of \$130,000.00 representing the claimant's general damages.

26. The fact that this award may be a little on the high side takes into consideration my acknowledgement of the fact that had the Claimant done the surgery there would most likely have been some loss of earnings during the period of the surgery and her recovery from it. Given the fact that the evidence is that the claimant only have been approximately 95% pain-free had the surgery been done I award the sum of \$10,000.00 for future medical expenses and in particular pain-killers. For completeness let me say that I make no award for loss of future earnings.

SPECIAL DAMAGES.

27. By her statement of case filed on 29th January 2009 the claimant seeks special damages in the sum of \$95,251.20. These damages include the cost of future surgery, \$43,700 and medical expenses already incurred amounting to \$4,225. The quotation for future surgery attached to the statement of case is dated the 12th April 2006 and includes an estimate all the charges to be incurred for that surgery including the assessment for surgery by a physician, nursing home charges and post operative visits. The balance of the \$95,251.20 claimed relates to the purchase of medicine for the period October 2005 to July 2008.

28. The defendants admit that the claimant has suffered loss and damage but, by the defence filed, deny the extent of the damage and put the claimant to the strict proof. Insofar as the defence is concerned the defendants have not satisfied the requirements of **Part 10 Civil**

Proceedings Rules 1998, as amended, (“the CPR”). The effect of this is that I am entitled to treat the allegations with respect to special damages made in the statement of case as undisputed: **M.I.5 Investigations Ltd v Centurion Protective Agencies Ltd. Civil Appeal No. 244 of 2008.**

29. The defendants submit however that the claimant is only entitled to such of her special damages that have been pleaded and proved. The difficulty posed arises from the fact that by her witness statement the claimant (i) refers to and tenders into evidence only some of the receipts annexed to her statement of case, amounting to \$33,176.00 and (ii) seeks to tender into evidence additional receipts not annexed to the statement of case. In this regard it must be noted that these additional expenses are similar in the nature to the expenses already pleaded as special damages. In other words, these additional expenses refer either to medical fees or the purchase of medicine.

30. These additional receipts are for periods both before and after the filing of the statement of case. Insofar as the receipts refer to expenses incurred before the filing of the statement of case these receipts amount to \$16,461.73 up to 20th October 2005 and the sum of \$24,087.20 for the period 25th April 2009 to 28th April 2010. In accordance with my finding that the claimant’s damages fall to be assessed up to October 2006 therefore the latter sum \$24,087.20 ought not to trouble us.

31. The defendants object to these additional receipts being tendered into evidence on the grounds that as special damages they are required to be pleaded and, in accordance with the

CPR, the documents annexed. The claimant on the other hand, submits that there is no requirement by the CPR that any or all of the receipts in support of a claim for special damages be attached to the statement of case. The claimant further submits that the only requirement under the rules is that the remedy sought be pleaded. In this regard it is submitted that her statement of case pleads that she seeks special and general damages for the loss suffered by her. This, the claimant submits, is sufficient to allow her to lead evidence as to the special damages incurred by her. According to the submission any particularization of such a remedy only serves as a guide for the court and the defendants.

32. **Part 8.6 of the CPR** requires a claimant to include on the claim form or statement of case (i) a short statement of all the facts on which he relies and (ii) the claim form or statement of case must identify or annex a copy of any document which the claimant considers it necessary to his case. In addition **Part 8.10** requires the claimant in a personal injury claim to include in or attach to the claim form or statement of case a schedule of any special damages claimed. In this regard therefore the claimant is specifically required by the CPR to (a) include in the statement of case any fact upon which he relies in order to obtain the relief sought;(b) identify or annex any documents necessary to the case; and (c) include in or attach to the claim form or statement of case a schedule of any special damages claimed. In this regard, save that a claimant is now also required to identify or annex documents, the requirement of the CPR is not unlike the requirement under the old rules that special damages be specifically pleaded.

33. Insofar as special damages are concerned the fact that these damages are required to be strictly proven suggests to me that documents such as bills and receipts would as a general rule,

be necessary to prove the expenditure. These therefore will be documents necessary to the case, and in accordance with Part 8.6 of the CPR have to be identified or annexed to the statement of case. This in my opinion is in addition to the requirement that the facts entitling the claimant to special damages be pleaded as required by Part 8.6 or included in a schedule as required by Part 8.10.

34. In this regard therefore it would seem that this is a necessary flipside to **Part 10 of the CPR** which requires a defendant to particularise its defence. Just as the defendant is required to deal comprehensively with every allegation made by the claimant in the statement of case the claimant is required as comprehensively to place all the facts and disclose all the documents in support of those facts in the statement of case. This in my view accords, with the requirement in the overriding objective that matters are dealt with justly and in particular so as to save expense and be dealt with expeditiously. The effect of these rules is to allow the court and the parties to eliminate those matters upon which there is no dispute and concentrate only on the matters on which there is a valid dispute. The difficulty here is that, unlike Part 10, no penalty is provided for a failure to comply with Parts 8.6 or 8. 10.

35. With respect to special damages the rationale behind the rule of law that special damage must be pleaded is to ensure that a defendant is not taken by surprise by matters solely within the claimant's knowledge. In my opinion, that rationale has not been affected by the advent of the CPR. What the CPR has done however is, further to the objective referred to above, require both parties to disclose their hands early in the day. A defendant is no longer entitled to merely sit back and demand that the claimant prove its case. A failure by the

defendant to identify what and why it disputes a claim has dire consequences on a defendant. Similarly, it would seem to me that insofar as expenses are known to the claimant beforehand the consequence of failing to plead that expense in accordance with Part 8.6 must have similar consequences. It is only fair.

36. That said, it seems to me that where the receipts are not in existence or the expenditure not incurred prior to the filing of the statement of case, a claimant cannot be expected to include that expense or identify those documents in the statement of case. Neither, in my view, can it be reasonable to expect a claimant in all cases to amend the statement of case periodically to include or refer to expenses incurred or documents obtained after the filing of the statement of case. While I accept that in some cases it will be open to the claimant to seek an amendment pursuant to Part 20 of the CPR this may not be available to the claimant in all cases. In the absence of any amendment the benefit to be derived from Part 10 of the rules is lost to the claimant.

37. In these circumstances it seems to me that at the end of the day what is called for is a dose of common sense. With respect to expenses unknown at the time of filing the statement of case, but which are expenses of a similar type as have already been pleaded and for which documents similar in nature have been annexed to or identified in the statement of case it seems to me that there ought to be no need to amend the statement of case and, subject to the admissibility of the documents or the evidence in support, the claim ought to be entertained. Indeed, it would seem to me that in these particular circumstances Part 20.1(3) may in fact not apply. Of course the claimant's position could be made simpler by inclusion of the words “and

continuing” with respect to the particular expense. This in my view would have the effect of putting the defendant on notice that the likelihood is that the expense will continue after the date of the statement of case. This will however not resolve the whole problem posed.

38. With respect to expenses of a completely different nature to those identified in the statement of case it would seem to me that in accordance with the CPR and the requirements that special damages be specifically pleaded the claimant will be required to amend the statement of case so as to give the defendant's notice of this additional set of facts. In this regard it seems to me that once these are in the nature of expenses not incurred prior to the first case management **Part 20 of the CPR** should apply.

39. In the instant case the expenses claimed are either fees for medical services or monies expended on medicine. They all fall within the same category of expenses claimed in the statement of case. The difficulty is that some \$16,461.63 relate to expenses incurred before the filing of the statement of case. These in my opinion ought to have been contained in the schedule of special damages in the statement of case and the documents either identified or annexed to the pleading. The claimant has not provided any explanation as to their omission. In the circumstances in the absence of any agreement by the defendants in my opinion these sums ought not to be allowed.

40. That said, in her statement of case, the claimant has in accordance with the rules properly claimed the sum of \$95,251.20. The defendants on the other hand have not themselves complied with the rules with respect to a challenge to these sums. In accordance with the MI5

case therefore I am entitled to treat these expenses as undisputed. However, in accordance with my finding in respect of the failure of the claimant to mitigate her loss the claimant will only be entitled to the cost of medication and medical expenses prior to 31st October 2006. Accordingly the sum of \$34,440.00 representing the claimant's expenditure on medication after 31st October 2006 will be deducted from the sum of \$95,051.20.

41. Unfortunately for the claimant however the matter does not end here. Among the documents relied on and sought to put into evidence through the claimant is a document dated 25th November 2009 by Dr. Maharaj purporting to be a revised estimate of the cost of surgery. This document estimates the cost of surgery to be \$52,600.00 rather than the \$43,700 pleaded in the statement of case. The situation is further complicated by the fact that no reference is made to this document in the claimants witness statement. The document is in fact included in a bundle of documents referred to by the claimant in her witness statement as receipts for drugs purchased by her.

42. Insofar as the expense is contained in a document created after the filing of the statement of case and is similar in nature to expenses actually contained in the statement of case in accordance with my ruling there is no need to amend the statement of case to include that particular expense. However at issue here is whether the document is in fact admissible. There is no other evidence of the revised cost of the surgery.

43. As I understand the claimant's submission it is that to allow the defendants' evidential objection to the document to succeed in circumstances where the document had been disclosed

to the defendants prior to the date of trial and where the defendants themselves did not comply with the rules with respect to disclosure would be contrary to the interests of justice and the overriding objective. In this regard it must be noted that although no order for disclosure was made pursuant to **Part 28 of the CPR**, the claimant filed a list of documents on 15th March 2011. An examination of the list of documents filed by the claimant reveals that it refers to two documents dated 25th November 2009 from Dr. Maharaj. These documents are referred to as “Medical Consultation dated 25th November 2009” and “Receipt dated 25th November 2009.” It is clear that the document in question is not in a receipt. Whether it can be considered a medical consultation is debatable. In my view the description “medical consultation” does not describe the document. It would seem to me therefore that insofar that it may be suggested that the document is disclosed by the list of documents filed on the 15th March 2011 that cannot be.

44. The claimant says that in any event the document was disclosed to the defendant when it was served as an annexure to the claimant’s witness statement. The difficulty here is that the document is to be found in an exhibit which is described by the claimant in her witness statement as “receipts for drugs purchased from Wazir’s pharmacy”. In these circumstances I do not think that it can really be said that the document has been disclosed to the defendants. It seems to me that attaching a document to a bundle of documents of a completely different nature without identifying that document cannot be considered a disclosure of the document.

45. Looking at it from another angle, assuming for a moment that the claimant had been ordered to give evidence in these proceedings orally, the document could not have gone into evidence as a receipt from Wazir’s pharmacy. It would seem to me in these circumstances the

document is not admissible. In any event had the claimant done the surgery as recommended in 2005 the revised estimate, dated 2009, would not have applied.

46. In the circumstances, so far as the statement of case seeks the sum of \$95,051.20 in special damages this has not been disputed by the defendants in accordance with Part 10 of the CPR and the MI5 case. This sum includes the sum of \$43,700.00, representing the cost of the surgery. That said, however, in accordance with my finding in respect of the failure of the claimants to mitigate her loss the claimant will only be entitled to the cost of medication and medical expenses prior to 31st October 2006 accordingly the sum of \$37,100.00 representing the claimant expenditure on medication after 31st October 2006 will be deducted from the sum of \$95,051.20. Insofar as the claimant would have incurred some expense for medication after surgery I have taken this fact into consideration in my award for future medical expenses in the general damages awarded. The claimant is entitled, therefore, to the sum of \$57,951.20 as special damages.

47. With respect to interest the claimant seeks interest at the rate of 12% from 29th January 2009 on general damages and at a rate of 6% from 27th July 2004 on special damages. The defendants however submit that the claimant, not having complied with part 8.5(3) of the CPR is not entitled to an award of interest.

48. **Part 8.5 (3)** requires that, if the claimant is seeking interest the claimant must:

- “ (a) say so expressly on the claim form, and
- (b) include details of:

- (i) the basis of entitlement; and
- (ii) the rate; and
- (iii) the period for which it is claimed; and
- (iv) where the claim is for a specified amount of money the total amount of interest claimed to the date of the claim; and
- (v) the daily rate at which interest will accrue after the date of the claim on the claim form or his statement of case.”

The claimant while claiming interest in both the claim form and the statement of case has not particularised her claim for interest as required by the rule.

49. The power to award interest is vested in the court by **section 25 of the Supreme Court of Judicature Act Chap 4:01**, which provides:

“in any proceedings tried in any Court of Record for recovery of any debt or damages, the Court may, if it thinks fit, order that the shall be included in the sum for which judgment is given interest at such a rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose at the date of judgment.....”

50. In this regard some assistance as to the exercise of its discretion in this regard can be obtained from the case of **Carlton Greer v Alstons Engineering Sales and Services Ltd. Privy Council Appeal No. 61 of 2001**. Although the decision arose prior to the CPR in my opinion it is still applicable with respect the award of interest. At the Privy Council it was

submitted by counsel for the respondent that in the absence of a specific plea for interest the successful appellant was not entitled to an award of interest in his favour.

51. According to Sir Andrew Leggatt who delivered the judgment the argument that interest is not to be awarded unless specifically pleaded disregards the decision of Mr. Justice Hassanali in **De Souza v Trinidad Transport Enterprises Ltd and Nanani (no.2) (1971) WIR 150** in which Justice Hassanali said at **page 152A-**

“a claim for interest need not be pleaded. The discretionary power of the court under the provisions of **section 26 of the Supreme Court of Judicature Act 1962** is exercisable whether or not there is a claim for interest in the pleadings (**Riches v Westminster Bank Ltd [1943] 2 All ER 725**). Further, as Lord Denning, MR said in **Jefford v Gee ([1970] 1 All ER 1211)**:

“A claim for interest is not itself a cause of action. It is no part of the debt or damages claimed but something apart on its own. It is more like an award of costs than anything else. It is an added benefit awarded to a plaintiff when he wins a case.....”

Section 26 referred to in De Souza is in the exact same terms as **section 25 of the Supreme Court of Judicature Act Chap 4:01** quoted above.

52. Despite the fact that these were cases under the rules applicable before the CPR the discretion to award interest emanates from **section 25 of the Supreme Court of Judicature Act**. It seems to me that whereas a court in exercising its discretion, may take into consideration the fact that interest has not been properly pleaded in accordance with Part 8.5(3)

this, as with all matters of the award of interest including the rate, is a matter for the court's discretion. In all the circumstances of the case therefore and in accordance with the general principle I am of the opinion that the claimant is entitled to an award of interest on her special damages, excluding the cost of surgery, and on her general damages, excluding the award for future medical expenses.

53. I am of the view however that giving the prevailing economic climate and in particular the low rates of interest being paid by financial institutions at present that with respect to the special damages the claimant will be entitled to interest at the rate of 3% and with respect to the general damages interest at a rate of 6%.

54. Accordingly, I award the claimant 1. general damages in the sum of (a) \$130,000.00 with interest at a rate of 6% per annum from 29th of January 2009 and (b) the sum of \$10,000.00 representing future medical expenses; and 2. special damages in the sum of (a) \$14,251.20 with interest as agreed of 3% per annum from 27th July 2004 and (b) the sum of \$43,700.00, representing the cost of the surgery.

Dated this 17th day of June, 2011.

Judith Jones
Judge