

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO CV 2008-02942

BETWEEN

CLAUDIA SAMUEL

Claimant

AND

RETROFIT (TRINIDAD) LIMITED

Defendant

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Before: Master Alexander

Appearances:

For the Claimant: Ms Leandra Ramcharan

For the Defendant: Mr Shawn Roopnarine, instructed by Ms Alana Bissessar

DECISION

**Background**

1. The claimant who resides at Pope Avenue, Tumpuna Road, in the Borough of Arima was employed with the defendant as a factory production worker when she was injured in an accident on its premises. At the time of the accident, she was 2 months pregnant and the chair on which she was sitting collapsed, causing her to fall to the floor whereby she sustained injuries. From the outset, it is to be noted that there is no claim that the accident negatively impacted on her pregnancy. This accident occurred on 29<sup>th</sup> July, 2004 and judgment was entered by consent for the claimant against the defendant on 7<sup>th</sup> December, 2011 and the matter sent to the master for the damages to be assessed.
2. The claimant has particularized her injuries as:
  - loss of function of the left knee;

- medial meniscal tear in the left knee joint;
- calcification of the soft tissues adjacent to the medial femoral condyle in or near to the medial collateral ligament of the left knee;
- Pellegrini Stiede Disease;
- a permanent limp on the left side when walking.

Consequent on these injuries, she has pleaded that she suffers with severe and continuous lower back pains and pain and swelling in the left knee.

### **Evidence on Assessment**

3. There are several areas of contention in this assessment including: a lower leg injury (raised belatedly); the loss of earnings and future surgery claims. The pleadings as well as the evidence will be examined to determine whether the claimant is entitled to compensation for these claims. Only the claimant was called to give evidence and was cross-examined; several medical reports of Dr Araujo were adduced into evidence with the defendant's consent – 2<sup>nd</sup> July, 2010; 2<sup>nd</sup> February, 2011; 10<sup>th</sup> October, 2011 and 5<sup>th</sup> December, 2011; 17<sup>th</sup> November, 2011; 3<sup>rd</sup> January, 2012 and 6<sup>th</sup> July, 2012. The doctor was not called as the defendant did not wish to cross-examine him.

#### *The Claimant's Evidence -*

4. The claimant testified that she was employed with the defendant, dealing with lights assembly in the AA Line Department, located at Red Hill, D'Abadie, Arima. She was paid fortnightly a salary of \$8.00 per hour and worked from 7 am to 3 pm, with ½ hour lunch and two 10 minutes break. She also worked overtime at time and a half and double time. Her functions included: assembling light fixtures by testing cells on a machine via their electrical wires; welding wires onto the base of electrical fixtures; sealing the cap onto fixtures; testing for reject light fixtures; riveting the housing of the fixture and operating the rivet machine. She avers that to perform her functions, she worked seated around a large wooden table about 10 feet long and 6 feet wide and about 4 feet high, with 6 other workers. It is her evidence that around this table, she sat on a 4 legged, silver metal chair with wooden backrest and seat.

5. She testified that on 29<sup>th</sup> July, 2004 she arrived at work around 7 am and commenced working, taking a break around 10:00 am to go to the washroom. She returned 10 minutes later and resumed housing electrical wires when she felt her body pull to the right and she fell to the ground. She described this fall as being one, “with force from a height of almost 4 feet, my head barely missing a wooden table at my right rear. As I landed my body was twisted to the right and I sustained the full impact on my left knee but my right shoulder and lower back were also affected.” She felt excruciating pain in her left knee and she remained in that twisted position for 10 minutes. She was helped onto her back by a co-worker but could not straighten her left knee so remained there holding up her bended leg and screaming in pain. Subsequently, one of the supervisors took her to the Arima Health Facility and then later her husband took her to Mt Hope Maternity Hospital for a pregnancy test before returning to the Arima health Facility, where she was prescribed Panadol and sent home.
  
6. On 7<sup>th</sup> August, 2004 she saw Dr Akal (the doctor the defendant referred her to) who gave her an injection in the knee (which she claimed relieved the pain for about 3 days) and 7 days sick leave. On 23<sup>rd</sup> August, 2004 and 6<sup>th</sup> September, 2004, she saw Dr Akal again. It is her evidence that the defendant paid for these 3 visits but after that she had to pay. She applied for injury benefit on 9<sup>th</sup> August, 2004 and began receiving \$400.00. She subsequently returned to work on 17<sup>th</sup> August, 2004, with the use of a knee brace and walking stick, and was placed on light duties in the Packaging Department. She was placed around a table with 4 other workers, where her functions included labeling boxes and putting bar codes on light fixtures. She was not given a chair to sit on that first day by management but a co-worker offered the claimant her chair and thereafter different workers rotated their chairs, opting to stand all day so she could have the use of a chair.
  
7. Some 3 days after she returned to work, a new worker was placed at her station to clean smudged and dirty fixtures. The chemical he was using began to affect her and she began having blackouts so she returned to Dr Akal. He placed her on bed rest from 6<sup>th</sup> October, 2004 until the birth of her baby on 4<sup>th</sup> March, 2005. She received no salary from the defendant during that period.

8. She also testified that after the birth of her baby, she returned to the defendant's HR department in May, 2005 to make arrangements to go back to work, despite being in pain and walking with a limp. She did this 4 times every 2 weeks but did not return after the end of June, 2005. Her employment was never terminated orally or in writing. She testified further that as a result of having tested during her pregnancy for diabetes, she received a referral to the Arima Health Centre's Diabetic Clinic and on her first visit (no date provided) she informed them of the pain in her knee and the history. Consequently, she was referred to the POS General Hospital Orthopaedic Clinic by written undated referral. She was treated with injections, painkillers and therapy and later advised of the need for surgery viz Arthroscopy Meniscal Resection in a report dated 17<sup>th</sup> September, 2007. Subsequently, in 2010 she saw Dr Godfrey Araujo who issued several reports on her case (discussed below) both pre and post surgery.
9. Despite surgery and therapy, the pains have continued and she now requires further surgery, with associated cost. She is in arrears in her payments to Dr Araujo in the sum of \$6,590.00. Since the accident she remains in "*extreme and unending pain*" in her knee, "*I am in constant pain. It hurts when I stand, when I walk and if I sit down too long. Further it is virtually impossible for me to climb stairs. I am unable to participate in the activities in which I participated prior to the injury. At this time, I do not have the financial resources to pay for the surgery. Given the pain I am in, it is difficult for me to undertake any sort of employment and I have been unable to find regular employment since the accident.*" (emphasis mine)

*Dr Araujo's Evidence*

10. Dr Araujo filed a witness statement but was not called to give evidence at the assessment. His several reports went into evidence without objections. It is to these reports that this court now turns for the evidence in support of the claimant's claim.

**1<sup>st</sup> Report**

11. Dr Araujo first saw the claimant on 2<sup>nd</sup> July, 2010 for an assessment of her left knee. In a report of that date, he expressed the opinion that she had sustained a "medial and lateral tear; an ACL rupture and a lateral ligament laxity of the right knee". He indicated that she required an arthroscopy and an ACL reconstruction procedure.

## **2<sup>nd</sup> Report**

12. In a report dated 2<sup>nd</sup> February, 2011 Dr Araujo indicated that the claimant was taken to theatre on 15<sup>th</sup> December, 2011 where the following was discovered:

- some retropatellar and trochlear damage to the femoral intercondylar region, which was debrided.
- Deep Vein Thrombosis, which was treated successfully.

He noted that there were no abnormalities or tears in the menisci and anterior and posterior cruciate ligaments in the knee but that the ongoing osteochondral damage to the retropatellar surface and the intercondylar area of the left femoral intercondylar notch would continue to cause the claimant some problems. She was ascribed an 18% permanent partial disability.

## **3<sup>rd</sup> Report**

13. The next report from Dr Araujo dated 10<sup>th</sup> October, 2011 is first to mention that the claimant had a 1 day history of acute pain and swelling of the left leg, including the calf and ankle area. Of note is that prior to this, the claimant complaint related to her knee (not lower leg). It was specified in this report that she did not have any swelling of the knee but continued with pain in the osteochondral lesion of her retropatellar area intercondylar groove, as reported previously.

## **4<sup>th</sup> Report**

14. Another report from Dr Araujo dated 5<sup>th</sup> December, 2011 dealt exclusively with the left leg condition, remaining silent about the knee. He noted that the claimant had been referred to a Vascular Surgeon, Dr Dale Maharaj, who diagnosed her with “vascular problems in her left lower limb.” To date no medical report on this disorder has been furnished by Dr Maharaj. Several observations are to be made at this point including that this new injury was now being advanced more than 7 years after the accident; no such injury was pleaded and no amendment to the pleadings sought; and no proper link was made between this lower leg injury and the accident. I concluded that there appears to be 2 separate medical issues (knee and lower leg) the

latter being linked to “circulatory insufficiency of her left leg”<sup>1</sup> with its root cause/source being unclear.

### **5<sup>th</sup> Report**

15. In another report from Dr Araujo dated 3<sup>rd</sup> January, 2012 he noted that a repeated MRI Scan of the left knee showed “minimal change in the articular cartilage of the patella – femoral joint which is the area of most concern.” He also observed that the Scan did not support his previous diagnosis of an osteochondral lesion.

### **6<sup>th</sup> Report**

16. The final report from Dr Araujo dated 6<sup>th</sup> July, 2012 deals solely with the knee injury and records the claimant’s complaints of pain in climbing and descending stairs. He also considers the future management of the knee problem by first doing a radionuclide scan (no cost provided); followed by a course of Synvisc injections to alleviate some of the pain at a cost of \$3,500.00; then upon reassessment in 2 to 3 months thereafter arthroscopy, but only if she needs it; and finally, depending on the results, possible patellofemoral resurfacing procedure.

### **General Damages**

17. The usual principles emanating from *Cornilliac v St Louis*<sup>2</sup> were considered to assess the claimant’s damages namely the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering which had to be endured; the loss of amenities suffered; and the extent to which the plaintiff’s pecuniary prospects have been materially affected.
18. The evidence as to the nature and extent of the injury to the claimant’s knee as provided in the several medical reports of Dr Araujo was accepted. As noted above, with respect to the lower left leg problem, there was no proper foundation laid for this claim. In fact, based on evidence it appears to be delinked from the accident. Unfortunately, the claimant chose not to have Dr

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<sup>1</sup> As diagnosed by Dr Maharaj and referenced in a referral letter from Dr Araujo dated 17<sup>th</sup> December, 2011 admitted into evidence

<sup>2</sup> *Cornilliac v St Louis* (1965) 7 WIR 491

Araujo present to assess this court and even the report of Dr Maharaj, which was allegedly in the pipeline, was never furnished. This court was, therefore, not prepared to speculate on whether this medical condition first mentioned some 7 years after the accident was related or not to it. Consequently, I find that on a balance of probabilities the evidence did not support that this injury was caused by or linked to the accident.

19. As for the nature and gravity of the resulting physical disability faced by the claimant, it is accepted that she remained with some ambulation challenges in negotiating up and down stairs and some pains. She also claims to walk with a limp. Judicial notice was taken of Dr Araujo's admission that his diagnosis of an osteochondral lesion was not supported by a MRI Scan.
20. In terms of her pain and suffering and loss of amenities, the evidence both medically and from the claimant was accepted as advanced to the court. According to her, since the accident, she has suffered with, "extreme and unending pain in my knee." It is clear that this knee pain has been constant and ongoing since the fall, with it being initially worse (when she was unable to take strong medication because of her pregnancy). Her various procedures have not eradicated the pain, though it may have reduced its intensity over the years. Of note is that her evidence in chief speaks also to her knee not showing long term improvement despite surgery and therapy and that the leg pain continues. Given that her leg condition could be related to a medical condition other than the fall and her failure to supply evidence linking it to the 2004 injury, I paid little, if any, regard to that aspect of the evidence in assessing her pain and suffering. I also bore in mind that it was not an injury that was pleaded.
21. As regards her loss of amenities, the medical reports did not speak to how this ongoing pain and suffering have affected her normal daily activities. I find also that her evidence in chief was thin and provided no assistance. She merely testified, "I am unable to participate in the activities in which I participated prior to the injury." What were those activities? What was the extent of her previous participation in these 'activities'? Did she participate as a social pastime, for pleasure, health reasons or remuneration. Did her injury and inability to stand, walk or sit for too long affect her performance of domestic chores or her family life in any material way. I had no such evidence before me to come to any firm conclusion. In a bid to be fair, balanced and reasonable in arriving at a quantum, however, I considered that this claimant did not ask to be provided

with a defective chair. She did not ask to suffer injuries at work. Having sustained the injuries, whilst in the conduct of her daily functions at work, she is entitled to be compensated fairly. I also considered that when she fell, she was pregnant so had to endure the physical pain as she could not be given strong pain medication. No doubt, there would have been some mental and emotional distress initially as to the threat (if any) to the foetus upon that fall. Pain is subjective and I accept her claim that to her it was “extreme and unending” especially given that it persisted even after surgery and therapy. Nevertheless, this exercise does not promise or guarantee perfect compensation but aims to recompense her for her injuries in as fair and adequate a manner as possible. Finally, the extent to which her pecuniary prospects have been materially affected, if at all, is examined below.

### **Authorities**

22. Only the defendant has provided authorities and suggested an award between \$28,000.00 to \$89,000.00:

- *Selwyn Tinto v Wendell Bennett and Debra Small*<sup>3</sup> where the plaintiff who was sitting in a pub was knocked to the ground by the 2<sup>nd</sup> defendant who drove a vehicle, mounted the pavement and crashed into the pub. The plaintiff was diagnosed with bilateral genu varum or bowing of both knees more marked on the left side; swelling of the left knee with loss of appearance of the parapatella fossae; both right and left knee flexion below the expected 130 degrees; moderate spasm of the left paraspinal muscle mass with all movements of the lumbro sacral spine diminished at full range; limitation of abduction and flexion of the right shoulder; limitation of abduction and flexion of the left shoulder. He was ascribed a permanent partial disability of 32%. There were degenerative changes caused by the mal-alignment or bowing of the knee joints, age/stage of life but some were in existence prior to the accident. The master found the medical evidence unsatisfactory and did not establish on a balance of probabilities that the ailments affecting the plaintiff were caused solely by the accident. An award for general damages was made in the sum of \$15,000.00; updated to December, 2010 to

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<sup>3</sup> *Selwyn Tinto v Wendell Bennett and Debra Small* HCA No 2133 of 2001



**\$27,283.00.** I am of the view that these injuries are more extensive and severe than those of the present claimant.

- ***Harripersad v Minimax***<sup>4</sup> where for cartilage injury of the right knee cap; likely osteo-arthritis; permanent knee pains; squatting, bending and walking burdensome an award as updated to December, 2010 was **\$64,008.00.**
- ***Harewood v Trading and Distribution Limited***<sup>5</sup> where a claimant who had slipped and fell on a piece of cloth left on the ground in the Hi-Lo supermarket owned by the defendant suffered a torn and disrupted posterior cruciate ligament of the right knee; osteo-arthritis changes in the right knee with Balcercyst; and Grade 1 intrasubstance changes in the posterior horn of medial meniscus joint effusion. He had persistent pain in the injury area and got 25% permanent partial disability. The claimant claimed she could no longer remain in her current job and function effectively and Dr Toby stated she may need future surgery. The judge found there was no evidence to support the claim that she could no longer continue working in her current job or for the future surgery and awarded \$75,000.00 on 30<sup>th</sup> September, 2009; as adjusted to December, 2010 to **\$82,205.60.**
- ***Padmore v Jameson***<sup>6</sup> where a plaintiff who did not claim general damages was awarded none. He was awarded \$4,500.00 for traumatic arthritis to the knee; intermittent pain and discomfort in the hip; updated to December, 2010 to **\$75,724.00.**
- ***Robert Rampersad v Mahabir Adjoda***<sup>7</sup> where the plaintiff suffered a fracture which healed with some bowing of the leg; there was clinical evidence of chondromalecia patellae (a degenerative condition of the knee); right lower limb was 1 inch shorter than the other; there was 15% varus angulation at the fractured site. The plaintiff was given a 20% disability. The judge was satisfied that the plaintiff's capability at the work place was

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<sup>4</sup> *Harripersad v Minimax* HCA S-564 of 1971

<sup>5</sup> *Harewood v Trading and Distribution Limited* CV2007-02359

<sup>6</sup> *Padmore v Jameson* HCA 581 of 1977

<sup>7</sup> *Robert Rampersad v Mahabir Adjoda* HCA 160/ of 1976

impaired and awarded \$15,000.00 for general damages on 29<sup>th</sup> June, 1984; as updated to December, 2010 to **\$88,576.00**. The injuries in this case were of greater severity than in the one at bar.

23. The above cases present a range of awards involving cases of lesser and of greater severity than the one at hand. I could find none that was exactly on par with the present facts. In arriving at an appropriate quantum, I took into account the injuries sustained by the claimant and the pain and suffering she would have undergone, particularly as a pregnant woman falling off a chair. I find that whilst her injury was not severely debilitating or life threatening, she has been subjected to persistent pain and initially it would have been both emotional and physical. I also had regard to the evidence before the court inclusive of the deficiencies therewith; the age of the authorities and the adjustments needed to take account of the reducing value of the dollar. I concluded that for pain and suffering and loss of amenities, **\$80,000.00** would meet the justice of this case.

### **Special Damages**

24. It is accepted that a claimant must plead, particularize and “strictly” prove her special damages.<sup>8</sup> The claimant has claimed she has suffered loss and damage as follows:

#### Transportation

25. She claims transportation cost to and from various hospital and health facilities for assessment and treatment, which she described as “significant expense in travelling” in her evidence in chief and for which she claims to have numerous receipts. There was no specific sum pleaded and no bill or receipt or other document tendered into evidence. No sum is allowed for this claim as I am unable to determine the amount.

#### Cost of medication; payment of private medical services

26. These damages were listed but no cost for same provided. In her evidence she states she has incurred cost for purchasing medication, paying for medical reports and consultation and has numerous receipts for these transactions to prove her loss. These receipts were not annexed to

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<sup>8</sup> *Grant v Motilal Moonan Ltd* (1988) 43 WIR 372 per Bernard CJ

her witness statement or tendered into evidence. She also claims that she is in arrears in her payments to Dr Araujo in the sum of \$6,590.00 and refers to an invoice from the Fracture and Orthopaedic clinic dated 5<sup>th</sup> January, 2012. She has given evidence of the specific sum claimed in her witness statement. I considered that this viva voce evidence of special damages should not necessarily work to her detriment as I did not find her to be a witness prone to untruths. I also considered that the medical reports had gone in by consent. In the circumstances, I was minded to allow this claim in the sum of \$6,590.00.

Payment of baby-sitter; husband's loss of earnings while being the primary caregiver to the claimant

27. These losses were pleaded but no sums provided and no evidence led to substantiate same. It was taken to have been abandoned.

Loss of earnings

28. The claimant has pleaded loss of earnings at the rate of \$1,280.00 per fortnight from 1<sup>st</sup> October, 2004. Of note is that this claim is not for loss of earnings from the date of the injury but from some 2 months post-injury. A look at her evidence in chief shows that shortly following the accident, the claimant did in fact return to work on 17<sup>th</sup> August, 2004. Subsequently, on 6<sup>th</sup> October, 2004 she was placed on bed rest by Dr Araujo due to her pregnancy (not knee injury). She also testified of attempts made to return to work in May, 2005 and June, 2005. The claimant has testified that currently she finds it difficult to undertake any sort of employment and "I have been unable to find regular employment since the accident." Of note is that the medical evidence does not corroborate this stance taken by the claimant. Her claim that she has been unable to find "regular employment" does not equate with her claim of an inability to do any type of work.
29. To my mind, this is a claimant who is still capable of working but cannot find "regular employment" and who has brought no medical to substantiate her claim that she cannot work permanently. I, therefore, could not accept counsel for the claimant's contention that the claimant had lost her job because of the disability she has suffered since it is against the weight of evidence. It must be borne in mind that to succeed in a claim for loss of pecuniary prospects,

there should be evidence that the injury was of such a nature that it made the claimant incapable of performing her previous job and/or any other form of work whatsoever. This is not the case here. The medical evidence as to any residual effects of her injury on her ability to work was missing and her word alone as to her inability to work was not accepted. Of note also is she has not specifically pleaded any figure for loss of earnings or given a period for such a claim. The evidence as provided being wholly unsatisfactory, I am constrained to deny this claim.

### **Future Surgery and Future Medical Care**

30. The claimant has neither pleaded future surgery nor sought to amend or file a supplemental witness statement in this regard. There is no evidence that she even desires to have future surgery. The medical report of Dr Araujo, however, refers to the need for further procedures such as a bone scan (no cost provided) and Synvisc injection in the sum of \$3,500.00 and if these do not work then she would be reassessed and other procedures including re-scoping of the knee at the approximate cost of \$26,000.00 and then, possibly patellofemoral resurfacing at the approximate cost of \$65,000.00. The evidence did not convince me that the latter 2 procedures would be guaranteed to be performed as they were contingent on the failure of other procedures. I also bear in mind that she would require a bone scan but was unable to estimate the cost of this scan and none was provided. I also considered that she may require post-operative care or physiotherapy but note that these were not pleaded. Given all the evidentiary uncertainties, I was minded to award a lump sum to cover those eventualities if they were to arise. Following the learning in the *Peter Seepersad case*<sup>9</sup> that the appropriate solution, in matters where it is not possible to determine an accurate and verifiable estimate of the future costs of medical treatment and medication (since it is dependant on the claimant's future progress) is to allow a figure which reflected the possibility of the claimant incurring future expense of that type, on similar lines to the well-established approach to valuing loss of employment capacity. In *Peter Seepersad* the Privy Council awarded \$100,000.00 under this head. In the instant matter, I find that an appropriate lump sum award for any future medical care required would be \$90,000.00.

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<sup>9</sup> *Peter Seepersad v Persad and another* (2004) All ER (D) 24

### **Loss of Future Earnings**

31. She has pleaded loss of future earnings and generally such an award can be granted where there is evidence of a loss of earnings linked to the accident.<sup>10</sup> In the instant case, it is not in dispute that the claimant was unemployed at the date of the assessment. What is in dispute is whether this was linked to the accident or not. Her evidence is that she did return to work but was eventually placed on bed rest because of her pregnancy. There was no clear link made with this occurrence and the accident although the acts were in close proximity. What is clear is that subsequently, she attempted to return to work unsuccessfully and that she has admitted she was not formally fired. I could find no credible medical evidence to suggest that she is incapable of working or that her injuries will affect her future earnings or that her condition will continue for the rest of her life. I do accept, however, that consequent on the accident, she has some mobility challenges and that her pains are ongoing. Given the evidentiary difficulties, I am minded to award her a lump sum of \$40,000.00.

### **CONCLUSION**

32. It is therefore ordered that the defendant do pay to the claimant:

- a) General damages for pain and suffering and loss of amenities in the sum of **\$80,000.00** with interest at the rate of 9% per annum from 30<sup>th</sup> July, 2008 to 17<sup>th</sup> September, 2013;
- b) Special damages of **\$6,590.00** with interest at the rate of 6% per annum from 29<sup>th</sup> July, 2004 to 17<sup>th</sup> September, 2013;
- c) Future medical cost in the lump sum of **\$90,000.00**;
- d) Loss of future earnings in the lump sum of **\$40,000.00**;
- e) Costs assessed on the prescribed basis in the sum of **\$25,965.40**
- f) Stay of execution of 28 days.

Dated 17<sup>th</sup> September, 2013

**Martha Alexander**

**Master**

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<sup>10</sup> *Munroe Thomas v Malachi Forde & Ors* Civ Appeal No 25 of 2007