IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2008-03048

BETWEEN

NICHOLA RODRIGUEZ

Claimant

AND

ANSA FINANCE MERCHANT BANK LIMITED **First Defendant**
ASHRAF ALI **Second Defendant**
TRINIDAD AND TOBAGO INSURANCE LIMITED **Third Defendant**
GREGORY MORRIS **Fourth Defendant**
THE GREAT NORTHERN INSURANCE COMPANY LIMITED **Fifth Defendant**
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Before: Master Alexander

Appearances:
For the Claimant: **Mr Sanguinette, instructed by Mr Azeem Mohammed**
For the 1st & 3rd Defendants: **Mr Nanga, instructed by Ms Alana Bissessar**
For the 4th & 5th Defendants: **Mr Dassyne**

DECISION

I. INTRODUCTION

1. This claim arose out of an accident which occurred on August 10, 2004 along the intersection of Kathleen Street and Bournes Road, St James, where a vehicle driven by the 2nd defendant collided with the taxi of the 4th defendant in which the claimant was a passenger. By claim form and statement of case dated August 8, 2008 the claimant sought *inter alia* damages for personal injuries, including cerebral concussion, whiplash injury, mal tracking of the patella of the right knee, difficulty walking (with pain radiating down the right calf), pain in the right knee cap and intermittent back pain. Her permanent disability was assessed at 15%.

2. The amended defences of the 1st and 3rd defendants and 4th and 5th defendants were filed on July 13, 2009 and December 5, 2008 respectively. Stollmeyer J (as he then was) entered judgment by consent

against the defendants on April 30, 2009 whereby liability was apportioned as to 90% against the 1st and 3rd defendants and 10% as to the 4th and 5th defendants. The claim against the 2nd defendant was discontinued.

3. Pursuant to the above order, this court was charged with the assessment of the claimant's damages which came up for hearing on May 24, 2011 and June 1, 2011. At this assessment, viva voce evidence was given by the claimant and four witnesses namely Dr David Santana, Mervyn Campbell, Samoa Reyes and Annette Gittens. The defendants called no evidence.

4. In support of the claim for damages, the following pieces of documentary evidence were filed:
   i. Medical report of Dr Enweluzor POS General Hospital dated October 5, 2006;
   ii. Medical report of Dr Ian B. Pierre FRCS dated June 17, 2007;
   iii. Witness statements of the claimant, Annette Gittens and Samoa Reyes filed on July 1, 2010;
   iv. Witness summary of Mervyn Campbell filed July 1, 2010 and supplemental on May 26, 2011;
   v. Witness Summary of Dr David Santana MBBS FRCS filed on July 1, 2010 and the medical report dated July 31, 2008.

II. GENERAL DAMAGES

5. In assessing the quantum of general damages, this court was guided by the principles outlined by Wooding CJ in ***Cornilliac v. St. Louis*** (1965) 7 WIR 491:
   i. The nature and extent of the injuries sustained;
   ii. The nature and gravity of the resulting physical disability;
   iii. The pain and suffering which had to be endured;
   iv. The loss of amenities suffered; and
   v. The extent to which the plaintiff's pecuniary prospects have been materially affected.

Nature and extent of the injuries sustained

6. Evidence as to the nature and extent of the claimant's injuries was provided via medical reports (Dr Pierre, Dr Enweluzor and Dr Santana) as well as the oral evidence of Dr Santana. The contemporaneous medical report of Dr Enweluzor diagnosed the claimant with cerebral concussion

and soft tissue injuries. It was noted therein that she had suffered a loss of consciousness; pain and bleeding from parietal scalp and tenderness on the right knee and both hips but no fractures. The wounds were sutured and she was placed on the ward for observation. Dr Pierre's report showed swelling; tenderness on the patella articular surface; weak and slowly contracting vastus medalis; no significant cartilage injury and all ligaments were intact.

The Medical Report of Dr David Santana dated July 31, 2008

7. This report referred to tenderness along the lateral border of the right patella and an MRI scan showing a maltracking right patella. He recommended arthroscopic surgery to the right knee at a cost of $35,000.00. Reference was made also to intermittent back pain; pain in the right knee cap; and difficulty walking, with pain radiating down the right calf. A subsequent medical by Dr Santana dated November 08, 2011 set out injuries to the lumbar spine and recommended spinal surgery but the application to amend the statement of case to include these changes was not allowed.

8. In his oral evidence, Dr Santana explained the nature of the claimant's injury to the right patella (knee cap) thus, "*there is a groove in which the knee cap runs, it is supposed to run down the middle of that groove, in her case it was not running down the middle of the groove it is running down to one side of the groove and that causes pain."* This he described as the "***major injury***" in that area, as there was no injury to the cartilages, ligaments or swelling of the bone marrow. For the maltracking patella, he recommended arthroscopic or "key hole" surgery; though given the length of time between the accident and surgery, the prognosis cannot be full recovery, "*she has more than a 50% chance of having pain and more than a 50% chance of developing osteoarthritis of the knee in 10 to 15 years.*" Under cross examination, he stated that her major complaints were the maltracking patella and the intermittent back pain.

9. Counsel for the 1st and 3rd defendants (hereinafter "the defendants") submitted that while Dr Santana had found injury to the back, there was no evidence linking this to the accident. Further, he was the only doctor to have recommended surgery. It was submitted also that given that full recovery is no longer possible, the claimant's damages ought to be assessed "on the basis that there will be no lasting effect." The court was asked to note that before the Dr Santana's visit the only complaints were of a cerebral concussion and tenderness of the right knee, and not as severe as stated in her witness statement.

10. On the other hand, counsel for the claimant submitted that she has suffered severe injuries, as pleaded and supported by the medical evidence. In particular, the court was asked to note that the intermittent back pain had been pleaded and proven. In support thereto was the initial report by Dr Enweluzor confirming her admittance to the hospital on August 10, 2004 with tenderness on the right knee and both hips, which suggested that there was some problem with her back region. Thus, whilst Dr Santana's evidence confirmed the existence of two major problems, there was also injury to the lumbar spine. If the court was not minded to accept this injury, on the basis that this was not pleaded, then the law is that you have to take a victim as you find him.

11. With respect to the claimant's submissions on the lumbar spine and the reference "to take a victim as you find him", I refer to and stand by my previous decision given on April 13, 2011 and as such wish to add nothing thereto.

12. As to the nature and extent of the injuries suffered, I accept the claimant's evidence as to the maltracking patella; intermittent back pain and cerebral concussion. I note that on the date of the accident, the claimant had suffered soft tissue injuries, exhibited tenderness to the knee and both hips; was in "*painful distress*" and bleeding from her scalp and her wounds were sutured upon arrival at the hospital (Dr Enweluzor's report). The defendants' attempts to minimize her injuries as mere "tenderness of the right knee" and of "no lasting effect" are, therefore, not accepted.

The nature and gravity of the reulting physical disability

13. In her witness statement, the claimant states that she still experiences painful swelling of her feet; constant headaches; intolerance to bright lights, direct sunlight and loud noises; difficulty sleeping; dizziness; forgetfulness and poor concentration, which have all impacted negatively on her ability to obtain or keep a job.

14. The defendants' counsel has asked this court to accept that the injuries were not grave or of any lasting effect as outlined in the reports of Dr Pierre and Dr Enweluzor. Thus, she is entitled to "fair compensation" only as "this is not a road to riches where the claimant should be allowed to benefit through exaggeration." On the other hand, the claimant's counsel submitted that she now has a permanent disability arising from her "severe injuries."

15. Having had the opportunity to hear the evidence and observe the witness, I found that she gave her evidence in a forthright manner and concluded that she was a truthful witness who was not attempting to magnify the gravity of her injuries. Thus, I accept her evidence that at the time of the accident, she was a 31 year old woman in the prime of her life and "perfectly healthy" but she now suffers restrictions and pains due to her injuries.

Pain and suffering endured

16. It is the claimant's evidence that immediately upon the accident; she had pains in her right knee, both hips and a cut on her head which was hurting badly. On impact, she suffered a loss of consciousness for at least two minutes. Dr Enweluzor's report in 2006 stated that she was "in painful distress with bleeding from the left parietal scalp". She complained of pain in the right knee, hips, neck and lower back. On discharge from the hospital, she received physiotherapy treatment and even tried aqua-therapy, but was still in a lot of pain. Her evidence is that she still experiences pain in her right calf which makes it difficult to walk; neck pain which sometimes escalates to a stiff neck; pain in the right knee cap and intermittent back pain.

17. In her witness statement, the claimant states that she has constant headaches about 2-3 times per week lasting for more than 2 hours, problems sleeping, dizziness, forgetfulness and poor concentration. Whilst working as a legal secretary following the accident, she had difficulties bending to open cabinet drawers and most times had to sit with her legs straight, outside her desk, because her knee was hurting badly. Further, she cannot tolerate bright lights, direct sunlight and loud noises. Also, she is easily agitated and fatigued. She described her pain as moderate to, on some days, severe but that she obtains temporary relief with the use of pain killer tablets. On cross examination, she maintained that she still experiences moderate to severe pains for which pain killers provide some relief.

Loss of amenities suffered

18. In her witness statement, the claimant gave evidence as to the continuing effects of the injuries on her relationship with her family and boyfriend. Before the accident, she enjoyed swimming, dancing, socializing at family events, jumping and "rough playing" with her children. Now, she can no longer partake in these activities and her sex life is now painful, uncomfortable and frustrating.

Extent to which pecuniary prospects have been materially affected

19. The claimant's evidence is that after the accident, she had to stop catering and has lost her means of livelihood. Further, sometime in April, 2009 she sought and obtained a job as a legal secretary but could not keep it because of her injuries and pain. Under cross examination as to why it took her almost five years after the accident to get a job, she stated, "*because most of the times when I go to the interview and I tell them about the accident and explain to them … for example I can't sit for very long, I can't stand for very long, I can't bend, I can't do excessive walking; actually when lying down is a problem for me to be quite honest, so they tend to not want to take me. I have tried. I have passes and certificates and I even tried KFC and I can't get a job there.*"

20. This claimant's evidence was substantiated by the oral evidence of her employer, Mervyn Campbell, who in his evidence in chief stated that she performed well when she worked but they parted ways due to her physical disabilities, which were getting into the way of her work. According to him, the claimant had problems walking, straightening or bending her legs and sitting properly and would stay away from work because of the pain. Under cross examination, he stated that the problems with her physical condition were there from the inception of her employment with him but got progressively worse and became "more of an encumbrance" coming down to the end. Additionally, the evidence in chief of Dr Santana was that given the claimant's injuries, she would not be able to work as a caterer or for more than 4 hours at a desk job per day, because of the necessity to bend the knees.

21. Based on the evidence before me, the claimant did seek to mitigate her damages, by finding alternative employment. I accept the employer's evidence that it eventually resulted in the parting of ways because of the continuing challenges of her injuries. In assessing her pecuniary prospects, I considered the nature of the work involved as a caterer and the claimant's evidence as to her current inability to work. Having had the opportunity to observe the witness under cross examination, it is my view that she was not trying to embellish her injuries or mislead the court. Nevertheless, there is no sufficient proof showing that her injuries rendered her unable to work for the rest of her life. In fact, the doctor's evidence is that she could at least do a 4 hour job. This is accepted.

22. In ***Parahoo* v *SM Jaleel*[1],** Hamel-Smith JA stated that for loss of pecuniary prospects, it must be shown that the injury was of such a nature that it rendered the claimant incapable of performing his previous job or, for that matter, any other form of work whatsoever. If he was incapable of performing the prior job but it did not prevent him from doing other work, it was necessary to show that in order to mitigate his loss. In discharging this onus, medical evidence as to the nature of the injury and any residual effect on the claimant's ability to work is imperative. The only such evidence was provided by Dr Santana, who saw the claimant for the purpose of assessing her injuries.

III.OTHER GUIDING PRINCIPLES

23. While ***Cornilliac*** is the seminal authority on assessing damages, other principles considered were:

a. The words of Kangaloo JA in ***Munroe Thomas* v *Malachi Ford*[2]** that, "*[T]he assessment of damages for a personal injuries claim should be a straightforward arithmetical exercise …. [but] far too often sight is lost of two fundamental principles: first, that a personal injury claim must never be viewed as a road to riches and secondly, that a claimant is entitled to fair, not perfect compensation*. [emphasis mine]

b. The caution of Lord Carswell in ***Seepersad* v *Theophilus Persad and Or*[3]** that, " *It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for personal injuries is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more that demonstrate a trend in very rough and general terms.*"

c. The dicta of M A de la Bastide in ***Harrinanan v Pariag & ors*[4]**, "*I would recommend that the more traditional method of using cases that are relatively recent as the benchmarks by which to determine what is a proper award of general damages in a particular case. Whether those awards have been arrived at as a result of factorization of earlier awards is really immaterial. Awards, once made, must unless, they are upset, be regarded as providing some guidance in any new case.*"

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1 *Parahoo* v *SM Jaleel Company Ltd* Civ App No 110/2001
2 *Munroe Thomas* v *Malachi Ford* Civ App 25 of 2007
3 *Seepersad* v *Theophilus Persad and Capital Ins* [2004] UKPC 19
4 *Harrinanan* v *Pariag & ors* CA No 239 of 1998 at page 6

d. The words of Lord Jauncey in ***Ruxley Electronics and Construction Ltd v Forsyth***[5] that,"*[D]amages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party, from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained."*

e. The principles that "*perfect compensation is hardly possible*" and compensation for injuries is a once and for all award. It was also borne in mind that the claimant has suffered a wrong at the hands of the defendants and should be fully and fairly compensated for her injuries.[6]

IV. AUTHORITIES ON GENERAL DAMAGES

24. Both parties provided several authorities to assist in assessing quantum in this matter. In addition, I was cognizant in its exercise of the general practice of comparison and adjustment that this approach is an imperfect one so was careful to assess the instant case on its own unique facts.

Authorities Relied on by the Claimant

25. The claimant's attorneys submitted that in light of the injuries suffered by the claimant, a reasonable sum to award for general damages is $350,000.00. In support of this, they relied on the following:

- ***Angel Baldeo* v *Prestige Car Rental***[7] where the award for a serious knee injury sustained by an 18 year old as adjusted to December, 2010 was **$308,507.00**. The main injuries suffered included ruptured anterior cruciate ligament of the knee; ruptured posterior ligament of the knee; severe damage to the lateral peroneal nerve of the knee; rupture of the medial collateral ligament of the knee; severe pain; major scarring; almost complete instability and non-weight bearing by the knee. Three further surgical operations and rehabilitation periods were needed. Further, the Orthopaedic Surgeon stated that she will probably always require a walking stick on the unaffected side and her ambulation will always be limited. These injuries are clearly more severe than those of the present claimant.

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5 *Ruxley Electronics and Construction Ltd* v *Forsyth; Laddingford Enclosures Ltd* v *Forsyth* [1995] 3 All ER 268
6 *Lim Poh Choo* v *Camden and Islington Area Health Authority* (1979) 2 AER 910 HL
7 *Angel Baldeo* v *Prestige Car Rental and ors* HCA 442 of 2000

- ***Lawrence* v *Vernon***[8] where the award for an injured knee as adjusted to December, 2010 was **$192,055.00**.

- ***Mohan* v *Jagat*** where the claimant suffered a fracture proximal shaft of right humerus, an abrasion left side forehead, deformity, swelling, bleeding from wound on upper arm, a class 3 strain of medial collateral ligament of the right knee, tissue injury to chest, effusion within the right elbow, lateral tibial plateau fracture and defect of the right knee. The award as adjusted to December, 2010 was **$285,385.00**.

- ***Trinidad Transport Enterprises Ltd* v *Layne***[9] where the award for injuries sustained to the spine and left leg as adjusted to December, 2010 was **$350,970.00**. That case provided no comparative assistance as the instant claimant's injury related to intermittent back pain.

- ***Dayalsingh* v *The Mayor of POS***[10] where the award for a wedge compression fracture of the 12th thoracic vertebra as adjusted to December, 2010 was **$232,102.00**.

- ***Ali* v *Hansranah***[11] where the award as adjusted to December, 2010 was **$223,592.00** for a plaintiff who had suffered a laceration to the forehead and bruises to the left knee and ankle and X-rays showed a dislocation between the 5th and 6th cervical vertebra. There was no movement of his left lower limb and deficiency to pin prick sensation on his right side.

- ***Ramdoolar* v *Boodoo***[12] where the award as adjusted to December, 2010 was **$214,154.00**. In that case, the claimant had sustained two compression fractures of the spine and had suffered permanent partial disability of 40%.

- ***Pemberton* v *HiLo***[13] where the plaintiff had hit his head, back and shoulders and, on discharge from the hospital, he fell again. He was put in a plaster of paris cast from his neck

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8 *Lawrence* v *Vernon* HCA 1170 of 1973
9 *Trinidad Transport Enterprises Ltd* v *Layne* CA 10/71
10 *Dayalsingh* v *The Mayor of POS* HCA 2341/79
11 *Ali* v *Hansranah* HCA 1483/76
12 *Ramdoolar* v *Boodoo* HCA S710/73

to lower waist for about 5 months. The doctor's report stated that the symptoms of headache and dizziness were related to the post concussion syndrome; that the underlying presence of cervical spondylosis was aggravated by the jarring effects of the fall and the spasmodic attacks of his neck muscles. Despite repeated physiotherapy and medication, he is liable to experience these recurring attacks of headaches; shoulder and back pains and discomfort. His lower limb symptoms were part of early degenerative disc disease initiated by trauma as from a fall. The award as adjusted to December, 2010 was **$209,828.00**.

26. I note that several of the cases referred to by counsel for the claimant were dated and, in some cases, the injuries suffered more severe than those of the present claimant. Whilst I was informed by the quantum awarded above, I note they were not squarely representative of the present facts.

Authorities Relied on by the Defendants

27. Counsel for the defendants recommended two recent local cases:

- ***St Rose*** **v** ***The Attorney General*** [14] where in January, 2011 Jones J awarded $25,000.00 in general damages inclusive of aggravation for a tender mildly swollen right knee; a tender swollen right and left forearms, and left arm.

- ***Harewood*** **v** ***Trading and Distribution Limited***[15] where an MRI scan revealed a torn post-cruciate ligament of the right knee and the claimant was assessed as suffering a 25% permanent partial disability. In that case, the claimant was administered 4 steroid injections on different occasions to alleviate the pain and advised of the possibility of future surgery to correct the cruciate ligament. The award in respect of general damages was **$75,000.00**.

28. Counsel for the defendants submitted that the injuries in ***Harewood*** were more severe than those suffered by the present claimant and suggested as suitable an award in the amount in **St Rose case**.

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13 *Pemberton* v *HiLo* HCA 6039/88
14 *St Rose* v *The Attorney General* CV 2009-004757
15 *Harewood* v *Trading and Distribution Limited* CV 2007-02359

29. Apart from the authorities cited by the parties, I also considered the case of ***George Cadogan*** **v** ***Godwyn James***[16] where the plaintiff suffered a laceration to his scalp, dizziness, headaches, neck pain and a fractured leg. He was diagnosed as suffering from scalp neuralgia, post concussion syndrome and neck strain. His permanent partial disability was assessed as 30%. In 2005 Narine J (as he then was) awarded $80,000.00; as adjusted to December, 2010 to **$139,555.00**.

30. To determine an appropriate quantum in the case at bar, I took into account: the cases cited above; the injuries sustained by the claimant; the pain and suffering endured; the evidence before the court; the age of the authorities and the adjustments needed to accommodate the declining value of the dollar. I also had regard to the dicta in ***Elisha Sohan*** **v** ***Henry Hackett***[17] that, "*The injury itself is not a serious injury in that it is not dangerous to life but it is serious enough to cause the Plaintiff persistent pain and the injury will be permanent; it will affect the Plaintiff's living."* In the circumstances, I find as adequate for non-pecuniary loss an award of **$185,000.00**.

FUTURE EARNINGS

31. An award for loss of future earnings can be granted where a claimant shows that there is continuing loss of earnings linked to the accident. See ***Munroe Thomas*** **v** ***Malachi Forde***[18]. In the instant case, it is not in dispute that the claimant was unemployed at the date of the assessment.

32. Counsel for the defendants submitted that there should be no award for loss of future earnings as there was no credible medical evidence provided to suggest that the claimant is incapable of working or that her injuries will affect her earning capacity or that her condition will continue for the rest of her life. The latest medical is over 3 years old and not from a doctor who actually treated the claimant. In addition, with the recommended treatment, the claimant's condition may improve.

33. On the other hand, counsel for the claimant submitted that there is sufficient evidence from a registered and respected Orthopaedic Surgeon that the claimant is 100% permanently disabled as a

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16 *George Cadogan* v *Godwyn James* H. C. A. 172 of 2004
17 *Elisha Sohan* v *Henry Hackett* HCA 513 of 1978 *per* Master Basdeo Persad Maharaj
18 *Munroe Thomas* v *Malachi Forde & Ors* Civ Appeal No 25 of 2007

caterer and can only do a sedentary or desk job for 4 hours per day. Further, the claimant gave viva voce evidence as to her lack of ability to properly function as a legal secretary. Her evidence was supported by her previous employer, Mervyn Campbell, who confirmed her mobility challenges and that the pains affected the regularity of her attendance at work and led to their parting of ways in November, 2010. Further, the claimant's evidence is that she could not obtain alternative employment, due to these disabilities. Given the severity of the injuries and the medical evidence, the claimant was effectively a total handicap on the labour market, as a caterer. The multiplier x multiplicand approach was thus recommended.

34. I accept the doctor's evidence that the claimant is wholly incapable of doing her pre-accident job of a self-employed caterer; though he is hopeful knee surgery would show some improvement. This is a reasonable position to accept given her injuries and the fact that catering food involves standing and a lot of movement on one's feet. However, I am not prepared to accept that the claimant is a total handicap on the labour market as regards alternative employment. In fact, there is no sufficient evidence before me to determine conclusively if any sedentary or desk job is available locally, at which the claimant may be employed for 4 hours per day. It was borne in mind that under cross examination, the claimant indicated that she has "*passes and certificates*" and that finding a job was difficult. Difficult does not equate with impossible in today's global labour market where more and more employees are availing themselves of opportunities provided by technological advancements to work from home and/or on flexible schedules. It is no different in this jurisdiction.

35. Based on the evidence before me, the claimant's injuries have affected her ability to earn a living as a caterer. The defendants have sought to convince me otherwise and to accept Dr Pierre's recommended treatment of physiotherapy as the appropriate course of treatment for the claimant's condition to improve. Whilst there was no updated medical report from a doctor who actually treated the claimant, I do not accept the "no lasting effect" argument advanced by the defendants, with respect to the claimant's injuries. There is simply no sufficient evidence before me to support this. In these circumstances, I am minded to allow an award for loss of future earnings.

36. Is the appropriate approach in determining the award for loss of future earnings the multiplier x multiplicand method? If this approach is applied in the instant case, the claimant in proving that she has suffered a loss of pecuniary prospects must show that the nature of her injuries are such that she

has been rendered incapable of performing her duties as a caterer or any other form of work. See ***Seudath Parahoo*** **v** ***SM Jaleel & Co*** (supra). On the other hand, where evidential uncertainties exist which hinder a court from applying the multiplier x multiplicand method to assess damages for loss of future earnings, the courts have disregarded this conventional approach and adopted a lump sum figure to compensate the claimant. See ***Blamire*** **v** ***South Cumbria Health Authority***.[19] Generally, a court will require clear evidence that the uncertainties of the case are of sufficient magnitude before it will depart from the conventional method of assessing future loss. See ***Meah*** **v** ***McCreamer***.[20] In my view, any evidential uncertainties in the instant case do not require a departure from the conventional method (discussed below).

37. As stated above, I accept that whilst she may be able to find another job it would be a challenge, given the 4 hour window. It is, however, not an impossible feat, as the claimant and her attorneys would like this court to believe. Given her qualifications, experience and training in the food industry, I do not see how these will work to totally handicap her on the open labour market. I have also considered the possibility that even if she were to obtain employment for 4 hours, she may still be seriously disadvantaged in terms of her earnings or might lose it as happened with her job as a legal secretary.

38. To my mind, the claimant now faces a considerable disability in the competitive labour market in seeking an alternative job. Bearing in mind the challenge of the 4 hour cap, it is clear that she cannot just walk out into the open labour market, with all its competition, and have anything like the same chance of fresh and competitive employment as she would have had before the accident. Her chances of getting comparable employment now (whether in the food industry or in any other position, for which she may be qualified) whilst competing with women and men who are physically fully able are severely diminished. Thus, whilst the medical evidence is that the injury will not impact on the claimant's life expectancy; there is a serious weakening of her competitive position in the open labour market. I accept, therefore, that there is an existing and permanent reduction in her ability to earn a living; a reality that this claimant is going to have to live with for the rest of her working life.

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19 *Blamire* v *South Cumbria Health Authority* (1993) P.I.Q.R.Q1, C.A

20 *Meah* v *McCreamer* [1985] 1 AER 367, 135 NLJ 80

39. In ***Eric Roy* v *Tappex Thread Inserts Limited***[21] there were several imponderables and uncertainties yet the judge adopted the conventional approached. These imponderables included the plaintiff's ability to work at all after November 1996; his ability to work a full week as opposed to part time; his ability to find suitable light employment; the possibility, if he obtained suitable light work, that he might lose it and the difficulties he would have in finding other work where he was now living; and the possibility as he approached the age of 65 he would not have been able to work at all. On appeal, Lord Justice Roch stated, "*[A]lthough there were clearly imponderables in this case …, they were not such as in my judgment obliged the judge to depart from the conventional method of assessing future loss of* earnings."[22] In the circumstances, I am prepared in the case at bar to apply the conventional multiplier x multiplicand approach in determining the appropriate award under this head.

40. The Privy Council in ***Peter Seepersad* v *T Francis and Or***[23] applied a multiplier of 16 with respect to a 37 year old appellant. In the instant case, bearing in mind the medical evidence that the claimant is able to work for 4 hours per day, I find as appropriate and do apply a multiplier of 14.

41. I accept the claimant's evidence that while catering, she made a monthly profit of $6,000.00 (see loss of earnings discussion below), resulting in an annual sum of $72,000.00. Based on the authority of ***Mooniram Heru* v *Indarjit Singh and Or***,[24] I am prepared to allow a multiplicand of $72,000.00 with a deduction of 25% for taxes and other statutory deductions, and a further deduction of one-third for living expenses. The multiplicand to be used in this calculation is $36,000.00 per annum. I find it reasonable to allow as future loss of earnings the sum of $504,000.00 ($36,000.00 x 14).

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21 *Eric Roy* v *Tappex Thread Inserts Limited* 18 June 1998 (unreported)

22 Ibid, where it was noted that the judge in rightly applying the conventional approach had evidence which he accepted of the average earnings of the plaintiff; his age and that but for the accident he would have been capable of performing light work until 65 years.

23 *Seepersad v T Francis and Capital Insurance Ltd* No 83 of 2002

24 *Mooniram Heru (as Administrator of the estate of Curtis Bhaan Heru) and Ors* v *Indarjit Singh & Ranjit Singh* CV2005-000129

V. SPECIAL DAMAGES

42. It is settled law that special damages must be pleaded, particularized and "strictly" proved.[25]

Medical bills

43. The documentary evidence provided by the claimant establishes that the amount of $6,361.16 was spent on doctors' visits and medication. This sum is allowed.

Travelling

44. The sum of $500.00 was claimed as travelling expenses but no documentary evidence was provided in support of this claim. The court notes the dictum of Archie J (as he then was) in ***Willies Ice Cream*** (supra) that, "*As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry*." Whilst this sum is not unreasonable, no explanation was provided as to why the necessary proof was not made available. The claimant having failed to discharge her burden of proving this loss, the sum is disallowed.

Police Report

45. The claimant did not provide any evidence in support of her claim of $125.00 for a police report and the defendant's counsel submitted it must be rejected. This sum is also disallowed.

Loss of earnings

46. The claimant gave evidence that as at the date of the accident she catered 30 lunches at $15.00 per box per day from Monday to Friday, which she sold to staff of Republic Bank Limited and walk-in customers. During the weekend, she sold about 75 meals at $15.00 per box earning an additional $1,125.00 per weekend. Her expenses were minimal as she paid her husband $400.00 weekly, purchased groceries at wholesale supermarkets and paid no rent, making a profit of 60% of sales.

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25 *Grant* v *Motilal Moonan Ltd* (1988) 43 WIR 372 per Bernard CJ

47. The claimant's counsel submitted that her loss of earnings should be awarded up to the date of the assessment of damages on the basis of the unshaken evidence of the witnesses Annette Gittens and Samoa Reyes that they bought lunches from the claimant at $15.00 per small box and $20.00 per large box and not the claimant's calculation of her profit as being $6,000.00 per month as she kept apologizing for her math calculation.

48. On the other hand, counsel for the defendants submitted that under cross examination, the claimant gave her average monthly earning as $6,000.00 and stated that she never paid taxes. The court was asked to accept the claimant's evidence in this regard, despite the contradictory evidence of the 2 other witnesses, as she is in the best position to know what her income was. Further, monthly income in excess of $5,000.00 will attract liability for tax at the rate of 25%. It was also submitted that the claimant cannot claim loss of earnings in excess of 4 weeks for which she was granted sick leave and that none of her medicals suggested she was unfit to resume duties after that period. Also, there is cogent evidence from Mervyn Campbell that the claimant worked with him in excess of 2 years after her sick leave expired. Thus, she ought to be allowed 1 month loss of earnings in the sum of $5,750.00, based on her salary of $6,000.00, taking into account her liability for tax as seen in ***British Transport Commission*** **v** ***Gourley***.[26] This position of 1 month loss of earnings is not accepted, especially as her salary as a legal secretary was less than that earned as a caterer.

49. I accept the claimant's evidence under cross examination that she earned a profit of $6,000.00 per month as a caterer and that she worked for $5,000.00 as a legal secretary from April 2009 to November 2010 (i.e. 19 months). The evidence of Mervyn Campbell that she worked for him in excess of 2 years was not accepted as he did not have a firm recollection of the exact period of employment except to say that she did have 1 year's annual leave. The time span between the accident and assessment is 6 years and 9 months. Loss of earnings is allowed for this period, taking into account the mitigating factors and ***Persad*** **v** ***Seepersad*** (supra) which noted that the earnings of self-employed persons should be reduced by 25% to take into account taxes, holidays, sickness and other contingencies of life. The loss of earnings is allowed at **$269,500.00** calculated as follows:

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26 *British Transport Commission* v *Gourley* [1956] AC 185

Claimant's annual income ($6,000 x 12 months)	$72,000
Less 25%	$18,000
	$54,000
x Period of unemployment (years)	x 6.75
	$364,500
Less mitigation ($5,000 x 19 months)	$95,000
	$269,500

FUTURE SURGERY AND FUTURE MEDICAL CARE

50. The claimant has already been awarded an interim payment of $45,000.00 for future surgery. The claimant's counsel submitted that in addition to the interim payment, the claimant should be awarded a sum for post-operative care of physiotherapy 3 times per week at $150.00 per session for 6 months in the sum of $10,800.00. It was also submitted that the medical evidence shows that the claimant has osteoarthritis, which is highly likely to get worst, and would require the pain killers, arcoxia and omeprazole, for the rest of her life so she should be awarded $164,250.00 under this head on the basis of ***Peter Seepersad*** where $100,000.00 was awarded for future medical treatment.

51. The defendants' counsel submitted that there is no claim for cost of future therapy, which should have been pleaded as set out in ***Mario's Pizzeria Ltd v Ramjit***[27] so it should be disallowed.

52. As to the claim for future medical expenses in respect of the high-end pain killers (arcoxia and losec), it was submitted that there is no proof that the claimant has purchased or will continue to take these medications. The receipts tendered into evidence establish that she had bought cheaper pain killers. Further, the last receipt on medication is dated May 2006. On this basis the claimant has failed to prove she would require medication in the future.

53. I accept the defendants' submission that the cost for future therapy ought to have been pleaded by the claimant. This was not done. The claim is thus disallowed. I also accept that the claimant has neither provided the requisite proof that she has purchased the high-end pain killers nor convinced

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27 *Mario's Pizzeria Ltd* v *Ramjit* Civ App 146 of 2003 per Kangaloo JA

me in her oral evidence that she would specifically require these high-end brands. Her last purchase was of a cheaper pain killer and the evidence tendered dated back to 2006 (and not 2008, when the claim was filed). The claim for future medical care is also disallowed.

VI. CONCLUSION

54. It is therefore ordered that the defendants do pay to the claimant the following sums apportioned 90% as to the 1st and 3rd defendants and 10% as to the 4th and 5th defendants:

    a) General damages for non-pecuniary loss of $185,000.00 with interest at the rate of 9% per annum from August 8, 2008 to March 28, 2012;
    b) Special damages of $275,861.16 with interest at the rate of 6% per annum from August 4, 2004 to March 28, 2012;
    c) Loss of future earnings of $504,000.00 which said sum does not attract any interest;
    d) Future surgery of $45,000.00, which has already been allowed by way of an interim award;
    e) Costs assessed on the prescribed basis in the sum of $106,364.59.
    f) Stay of execution of 28 days.

Dated 28th March, 2012

Martha Alexander

Master of the High Court (Ag)

Judicial Research Assistant: Kimberly Romany