IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2011-04315

BETWEEN

RAQUEL BURROUGHS

Claimant

AND

GUARDIAN LIFE OF THE CARIBBEAN LIMITED

Defendant

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Before: Master Alexander

Appearances:
For the Claimant: **Mr Richard Arjoon Jagai instructed by Mr Kent Samlal**
For the Defendant: **Mr Simon de la Bastide instructed by Ms Elena Araujo**

DECISION

INTRODUCTION

1. The claimant ("Raquel") filed a claim for compensation for the personal injuries she suffered from falling off her chair while at work on the defendant's premises ("Guardian Life"). Liability was accepted by Guardian Life, but the issue of the quantum of damages, to which Raquel is entitled, was heavily contested. Raquel pleaded that her injuries were tenderness and stiffness to the neck; tenderness left and right sacro-iliac joints and lumbar paraspinal muscles; cervical tenderness C4 to C7; mild L2/L3 and L5/S1 disc bulge. The main continuing effect was patella pain. This court will now proceed to examine the evidence against the backdrop of the ***Cornilliac***[1] guidelines and other general principles of assessments.

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[1] *Cornilliac* v *St Louis* (1965) 7 WIR 491

THE EVIDENCE

Raquel's Medical Evidence

2. Raquel's evidence was adduced through her witness statement, the medical reports[2] of Dr Ian Pierre (together referred to as "the Pierre Reports") and several other medical reports for which hearsay notices were filed and not objected to by Guardian Life. Dr Pierre's evidence came via 3 reports, the first in time (the July, 2008 Pierre Report) diagnosed Raquel with restriction of all neck movements, cervical tenderness C4 to C7, tenderness to the left and right sacro-iliac joints and lumbar paraspinal muscles and persistent patella pain. The second report (the July, 2009 Pierre Report) reiterated his prognosis but assigned a 50% permanent partial disability. The third report (the April, 2013 Pierre Report) maintained that her neck and back pain persisted and detailed her resultant restrictions in ambulation and social activities.

3. There were several other medical reports[3] relied on by Raquel; with the most relevant being that of Dr David Toby, Orthopaedic Surgeon, dated 16th October, 2008. Dr Toby diagnosed her with tenderness along the whole spine and neck along with some restriction of neck movement and ascribed a 25% permanent partial disability. He also noted that 10 months post the injury, Raquel, who was still experiencing pain, may be approaching maximum medical improvement and was now in a chronic state. By large, the medical evidence relied on by Raquel in support of her case came through the Pierre Reports.

4. It would appear from a reading of the Pierre Reports as a whole that Raquel's persistent pain was linked in the main to soft tissue injuries to the neck, back and knees, and not the more serious compression of any nerve. Under cross examination, Dr Pierre explained that the term soft tissue injury covers a spectrum of injuries ranging from a "slight disruption" to a complete separation of tissue. In Raquel's case, her soft tissue injuries did not involve a complete disruption (or a complete

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2 Reports dated 11th July, 2008, 28th July, 2009 and 15th April, 2013

3 Report of Dr Curtis Young Pong (Fracture and Orthopaedic Clinic) dated 19th March, 2008 which, diagnosed her with mechanical pain arising from injuries namely tenderness over L2-L5 dorsal spinal vertebrae and paraspinal area; mild L2/L3 and L5/S1 disc bulge. Another report was that of Dr Paramanand Maharaj, MRI of Trinidad and Tobago dated 21st December, 2007 who pointed to focal anterior bulge at the L5/S1 level with ill-defined areas of high T2 signal suggesting mild anterior disc herniation. This latter report was not admitted by Guardian Life.

tear of the tissue/ligament) so was not a grade 3 injury (most severe). Dr Pierre explained the condition of a posterior herniated disc and how such a condition may involve compression of the nerves running along the spinal column by a herniated disc. He confirmed that symptoms of such compression include pain running in and through the buttock area and down the leg and numbness in the buttock and leg areas. There was a notable absence in the Pierre Reports of any complaints of such symptoms.

Guardian Life's Medical Evidence

5. The medical evidence relied on by Guardian Life came through reports from Dr Pooran, Dr Mencia, Dr Toby, Dr Thomas and Dr Hoford. Oral evidence of Dr Hoford was provided also at this assessment. The crux of these reports focused largely on the issue as to whether Raquel's symptoms were caused by nerve compression or irritation. In the initial reports by doctors[4] who saw Raquel shortly after the fall, mention was made of her experiencing pain in the lower back that radiated down her left buttocks to her left leg. The reports of Dr Toby, Dr Mencia, Dr Hoford and Dr Thomas all agreed that her symptoms were consistent with nerve root compression or irritation. The medical experts[5] seemed to be in disagreement as to whether the symptoms of nerve compression were being caused by compression of nerves along the spinal column by a herniated disc or nerves in a different location namely the sciatic nerve as it exits the greater sciatic notch.

6. Dr Hoford agreed with the initial diagnosis of nerve compression and with Dr Thomas' report (based on a 2008 MRI) that the MRI showed no nerve compression by way of posterior disc herniation. It is his evidence that nerve compression or irritation of the sciatic nerve usually resolves itself over a period of time. Mr de la Bastide, counsel for Guardian Life, advanced that this would explain why Raquel initially reported symptoms consistent with nerve compression or irritation shortly after the fall but not when Dr Pierre examined her in March, 2008 some 3 months afterwards, suggesting that by that time the nerve irritation had resolved itself or been healed. It is

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4 Dr Pooran (Guardian Life's doctor) and Dr Young Pong (Raquel's doctor)

5 Dr Thomas felt it was being caused by the sciatic nerve based on an MRI that excluded compression of nerves by herniated disc.

also Dr Hoford's evidence that nerve compression causes 'wasting' of the lower limb but, from his examination, there was no evidence of Raquel suffering from this over the 8 years since the fall and, in fact, the Pierre Reports did not mention this.

DISCUSSION

Nature, extent, and continuing gravity of injuries

7. Based on the findings of the medical experts, it would appear that while there may have been nerve compression upon the fall, this may have resolved itself by the time this matter came for assessment. There remains a divergence of views between Dr Hoford's reports ("the Hoford Reports") and the Pierre Reports, as to the cause of the continuing symptoms. The Pierre Reports diagnosed Raquel with soft tissue injuries which have not healed since 2008 and is the basis for the continuing pains in her lower back, neck and 'pins and needles' in her fingers. On the other hand, the Hoford Reports sought to make a distinction between acute pain (caused by an injury) and chronic pain (has no physical basis or cause). Chronic pain which may follow acute pain is associated with the brain and spinal cord but not the 'periphery' and, in fact, is like 'phantom pain'. Dr Hoford's opinion is that Raquel's pain is chronic; becoming so some 2-3 years after the fall. In essence, she has chronic pain syndrome.

8. In issue also is that under cross examination, Dr Pierre admitted that Raquel has experienced **a significant reduction in pain**, over the last 4 years, which is indicative that her injuries are healing. This evidence contradicts Raquel's evidence of only experiencing 'little improvement' in her condition. While the Pierre Reports did not mention significant pain reduction in Raquel's condition or any improvement, this court accepts as truth his evidence under cross examination. Mr de la Bastide, however, sought to make heavy weather of this omission in the Pierre Reports, asking this court to view this oversight as deliberate or, at the very least, grossly negligent and as undermining of his credibility and reliability as a witness. Mr de la Bastide further pointed to the failure of Dr Pierre to mention that Raquel underwent nerve conduction tests or to produce the results. He asked that Dr Pierre's actions be viewed as suspect and to infer that his findings may not have been clinically based. This court was asked also to find the contradiction in the evidence of Dr Pierre and Raquel, as to the reducing intensity of her pain, as an attempt on her part to grossly exaggerate

her symptoms and so be less than truthful to the court. It was advanced further, and against the evidence of its own doctor as to chronic pain, that Raquel was simply not being honest about her symptoms and so little weight should be attached to the chronic pain syndrome argument, as Dr Hoford was not aware of Raquel being less than truthful about the reduction in her pain. This court was careful to weigh all the evidence in arriving at its conclusion on the nature and extent of Raquel's injuries as well as any continuing disability. Based on the medical evidence and upon consideration also of Raquel's testimony, this court concluded that she suffered nerve compression or irritation initially upon her fall but over time, this injury was resolved.

Pain and suffering and loss of amenity

9. Upon falling off her chair and shortly thereafter, Raquel claims that she experienced excruciating pain, particularly in the lower back, neck, and later, knee, which grew in intensity. This pain prevented her from sleeping on the night of the fall and since then she has been waking up every day in pain. She averred that she has been using medication to cope with the pain and that there has been little improvement over the years. In fact, she continues to experience numbness to her body and pins and needles sensations from her neck to fingers, which prevent her from sitting to type on a computer. She is also unable to drive for long periods, unless she uses a lumbar support car seat, as it is painful. She also claims that she has to wear a cervical collar whenever she sits for long periods or is travelling in a vehicle. She can no longer sit or stand for extended periods. Sitting on benches, hammocks or lounge chairs increases her pains so she is forced to take her cervical collar, lumbar support roll cushion and pain management pills always with her. This court did in fact observe Raquel's use of this roll cushion in court.

10. As to her loss of amenity, she averred to having to now live a very restrictive lifestyle as she can no longer go on hikes, play sports, cook and go fishing. She is also unable to dance for hours, wear high heel shoes, attend amusement parks, use swings or lead a spontaneous and active lifestyle. She averred that she has been robbed of the opportunity to travel, detailing how she used to visit the Caribbean islands and European countries and now has been denied this social pleasure. Her injuries and the persistent pains forced her to give up her apartment in Port of Spain and to move back in with her parents, effectively eroding her former independence. Under cross examination, she was unshaken, steadfast and resolute in her answers. Mr de la Bastide has asked this court,

however, to treat Raquel's evidence as lacking in credibility, manifestly unreliable and of carrying little or no weight on the basis that she has failed to reveal improvements in her condition.

11. In assessing the evidence in support of these two limbs, it was noted that both Dr Hoford and Dr Pierre have documented her complaints of pains as persisting to present. Further, Dr Hoford concluded that there has been no significant change in her condition, unlike Dr Pierre who admitted to significant improvements in her pain symptoms. Bearing in mind that Raquel has admitted only to slight improvements in her pain, and in the face of her own doctor's admission of significant improvements, this court formed the view that she was magnifying the intensity of her pain, to attract a higher award. On the other hand, this court has no concrete evidence that her pains were completely eradicated and so was not prepared to entertain the suggestion of Mr de la Bastide that it was not chronic but actually non-existent, having abated since June, 2008. It was also not minded to find rest in the submission of counsel for Raquel ("Mr Jagai") that because Dr Hoford was not a specialist in chronic pain management, had only examined her once and did no scientific test as to muscle wasting, that his opinion must be discounted. In fact, Dr Hoford's evidence was balanced as against Dr Pierre's, Raquel's and the totality of medical reports to reach a proper and fair determination in this matter.

12. This court also had the benefit of observing Raquel during these proceedings and she evinced a clear discomfort throughout. It was, therefore, accepted that she still has some pain. Accepted also is that her pain has been on the reducing scale, as confirmed by Dr Pierre. As to whether the source of this pain was acute or chronic, this court relied on the evidence of the medical experts that the pain may now be chronic. This court, thus, rejected the argument of Mr de la Bastide that she is not suffering from chronic pain (as suggested by Dr Hoford) because of her leaning towards exaggeration. It concluded that she is still in the throes of chronic pain syndrome and accepted, further, the medical evidence of Dr Toby that she has reached maximum improvement. This court was, also, not prepared to find that Dr Pierre was engaged purposefully in an attempt to mislead this court or he intentionally prepared a biased report to influence its award. In fact, as a witness, Dr Pierre was found to be forthright, clear, upfront and helpful in giving his evidence. In fact, his admission under cross examination that Raquel's pains were significantly diminished was made readily and without hesitation. The failure to document the significant reduction of pains in the

Pierre Reports was not held against him as being capable of blemishing his overall credibility. Thus, the suggestion of Mr de la Bastide of some untoward intentions by Dr Pierre is rejected outright as unsupportable on the facts and evidence before this court. Also rejected is the submission that Raquel's pains are non-existent or completely resolved. In fact, the totality of medical evidence supports the view that her pains are manageable with painkillers; may have morphed into a chronic condition; are significantly reduced; and that she is at the maximum level of recoverability.

13. To inform its views on her level, intensity and continuation of pain, this court looked at her purchases of pain medication which does not substantiate her claim as to little improvement. In fact, there were no receipts evincing such purchases from 2009-2011, only 2 receipts for 2012 and 1 for 2013 without any explanation being given for the 4 years when she did not require medication. From this, it could be inferred that her pain may not have been as intense or debilitating as she sought to portray and was manageable without medication. In effect, the absence of evidence of purchases of medication points squarely to and is supportive of her pains being 'significantly reduced' and now manageable. This alone sufficed to ground the conclusion that Raquel was misrepresenting the intensity of her pain and that it was considerably reduced.

14. The evidence also supports the conclusion that Raquel has exaggerated the extent of her loss of amenity. In fact, it is clear that she can still drive, though she claims she is excluded from doing so for long periods; or that she still wears heels, though she described them as the unattractive wedge heels. In this regard, this court accepted Mr de la Bastide's argument that as Raquel's pains improved, her range of movement and activities would have increased gradually. It is accepted, on a balance of probabilities, that initially she had suffered nerve compression or irritation and that the pain would have been excruciating and proved a challenge to her engagement in the routine activities of life. It is also accepted that her injury was resolved at some point during the 8 years given that there was no evidence of muscle wasting in the lower limbs or any mention in the Pierre Reports of the distinctive symptoms of this condition. It is accepted that she now suffers with chronic pain, and so has continued to suffer some erosion of her normal enjoyment of life, but that its reach has been on a progressively reducing scale.

Cases

15. Raquel is seeking an award of $200,000.00 for her injuries. In support, 5 cases were suggested, spanning both ends of the pendulum of awards. The first high end award is ***Evans Moreau*** v ***Port Authority of Trinidad and Tobago***[6] delivered in April, 2010 where following a lash to the head a 43 year old claimant suffered pains in the neck, radicular symptoms in both arms, cord and nerve compression of C4/5 and C5/6, cervical spondylosis, back pains, weakness in both arms, inability to stand and sit for short periods, and difficulty in climbing stairs. For these injuries, an award was made of $200,000.00; adjusted to December, 2010 to $212,487.00. Secondly, in ***Wayne Wills*** v ***Unilever Caribbean Limited***[7] delivered on 26th February, 2010 a claimant suffered an acute lumbar strain, and a L4/L5 disc herniation that necessitated surgery 2½ months after injury. Immediately following the injury, the claimant suffered pain in the neck and along the left side of his body, which intensified over the next few days. After surgery, the claimant progressed well but had some episodes of pain including one severe spasm. His prognosis was continued intermittent pain. The claimant experienced an inability to play football and hockey, to have regular sexual intercourse or sweep and was in pain up to the date of hearing. He was initially awarded $75,000.00; which was upgraded by the Court of Appeal to $200,000.00.

16. Thirdly, in ***Kester Hernandez*** v ***The Attorney General of Trinidad and Tobago***[8] delivered on 15th February, 2013 a 19 year old claimant, who sustained severe injuries to the spine sustained at his workplace and was ascribed an 80% permanent disability to perform his job, was awarded $300,000.00 for general damages. There was comprehensive medical evidence led on the resulting disability and its serious and debilitating effects. It pointed to a need for restrictions, accommodations and medical assistive devices to help that claimant perform his basic ordinary and/or usual but now restricted personal and social activities. The level of severity and incapacitation in that case is not reflected in the present case with Raquel, which relates to nerve compression that was resolved and soft tissue injuries. It is clear that the injuries in ***Hernandez*** were more severe and extensive than those of Raquel, sufficient to exclude her from attracting an award in this ban.

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6 *Evans Moreau* v *Port Authority of Trinidad and Tobago* CV2006-03958
7 *Wayne Wills* v *Unilever Caribbean Limited* CV2007-04748; Civil Appeal No 56 of 2009
8 *Kester Hernandez* v *The Attorney General of Trinidad and Tobago* CV2011-01821

17. At the lower end of the spectrum of awards was ***Dexter Sobers*** v ***The Attorney General***[9] delivered on 27th May, 2011 where a claimant suffered loss of lumbar lordosis, disc desiccation and an annular tear at L4/5 and L5/S1 levels, diffuse disc bulge with posterior central propensity indenting thecal sac with no neural compression, diffuse disc bulge with propensity to left and posterior left paracentral small disc protrusion impinging on the left S1 traversing nerve root. The claimant experienced back pains radiating down the left leg, his straight leg raising was greater than 90 degrees bilaterally, with negative sciatic stretch test, power sensation and reflexes were within normal limits and 20% permanent partial disability. The claimant was awarded general damages for pain and suffering in the sum of $80,000.00. Then there was ***Lennard Garcia*** v ***Point Lisas Industrial Port Development Corporation Limited***[10] delivered on 19th September, 2013 where a 60 year old claimant sustained injuries twice; initially from a fall after slipping on some oil at the defendant's workplace and then at the hospital when he was dropped from a stretcher. His injuries were to his upper right shoulder, left palm, soft tissue injuries to his back and right knee; persistent right-sided sciatica; degenerative spinal stenosis at L4-5 and L5-S1 levels. He experienced daily lower back pain which was radiating down his left leg to his knee posteriorly; his left palm was having triggering of the left middle finger; mild prolapses of the L3-4, L4-L5 and L5-S1 discs; mild spinal canal stenosis at L3-L4, L4-L5 and L5-S1 areas of the discs; some nerve root entrapment on the left side; pain when sitting, standing and walking; weakness in his left leg and wasting of his left quadriceps muscle from the nerve being pinched by the prolapsed disc. Medical evidence pointed to him getting moderate to severe lower back pain for the rest of his life with the only means of relief being analgesia and if he loses weight. He was awarded $80,000.00, in 2013. The injuries in ***Garcia*** also appears to be of greater severity than those in the present case. This court, therefore, turned to the case advanced by Guardian Life.

18. Mr de la Bastide submitted that the award being sought by Raquel is inflated and neither reflective of the authorities advanced by her counsel nor justified on the basis of the injuries she sustained. The court was reminded that in awarding adequate compensation for the injuries sustained by

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9 *Dexter Sobers* v *The Attorney General* CV2008-04393

10 *Lennard Garcia* v *Point Lisas Industrial Port Development Corporation Limited* CV2010-03061

Raquel, it must consider that the measure to be applied is a sum of money that would put her back in the same position that she would have been in had she not sustained the wrong for which she is being compensated. Further, that the court in awarding compensation for pain and suffering and loss of amenity should only award a single sum for the pre and post-trial losses. Finally, the court was asked to bear in mind that its award should be in keeping with the trend of relatively recent local awards for similar injuries. With these submissions as the backdrop, de la Bastide suggested that appropriate guidance can be found in a number of other cases.

19. The first relevant case is ***Ferosa Harold*** v ***ADM Import and Export Distributors Limited***[11], delivered on 17th April, 2015, where a claimant after slipping on some substance and falling in the defendant's business place was diagnosed by Dr Pierre with soft tissue injury to the neck, lumbar spine and left shoulder and was awarded $60,000.00 in general damages. The claimant in ***Ferosa Harold*** gave evidence that during the 7 year period from injuries to trial, there was no improvement in her pain (similar to the claim by Raquel). Remarkably similar claims to Raquel's were also made by the claimant in ***Ferosa Harold*** as to her suffering daily pains that affected every facet of her life; she could not sit in one position for too long, walk up stairs or perform domestic duties of cooking and washing wares. That claimant was awarded general damages in the sum of $60,000.00.

20. In the case of ***Ferosa Harold,*** the court was not satisfied on the medical evidence that she was disabled to the extent claimed and actually found Dr Pierre's evidence was not an independent, objective and scientific assessment of her disability but read as if it were a repetition of the claimant's complaint made to him. The court also expressed concerns about that claimant's credibility. In similar fashion, this court must harbor concerns with Raquel's credibility, especially as Dr Pierre's admission of significant improvement in pain over the 4 years following the fall conflicts with Raquel's evidence. This court notes also that the evidence of Dr Hoford is that Raquel's pain from her soft tissue injuries should have ceased after at most, 2-3 years from the fall. Further, it was borne in mind that there was an absence of evidence from Dr Pierre that Raquel was still experiencing pain as at the time of trial or would continue to have pain for the rest of her life.

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11 *Ferosa Harold* v *ADM Import and Export Distributors Limited* CV2009-03728

21. In ***Selwyn Charles*** v ***The Attorney General***[12], delivered on 25th June, 2008, a claimant suffered injuries to his left wrist, neck, chest and 'spinal damages'. The claimant underwent surgery for the spinal injury approximately 5 months after the injury was sustained. The court found that although after surgery there appeared to be some limitation of movement, there was little evidence of pain and suffering and no evidence that at the time of trial the claimant was suffering from pain. Judgment was delivered some 7 years after the injuries were sustained in the sum of $50,000.00; updated to December, 2010 to $61,924.00. The injuries of the claimant in ***Selwyn Charles*** were more severe than those of Raquel, who did not have spinal injury or require surgery. Raquel's injuries could best be described as soft tissue injuries. Further, there is no reliable evidence that Raquel continued to experience pain at the time of the trial, which is some 8 years after the fall. Finally, in the case of ***Shahleem Shazim Mohammed*** v ***The Attorney General***[13] delivered on 6th May, 2014, where a claimant suffered swelling of the neck and an injury to the knee, the court found there was exaggeration of the continuing effects of his injuries and awarded $25,000.00 as damages.

22. In deciding on the quantum to give Raquel, I took into account that the injuries, in the cases above, were either more extensive or of lesser severity, but a few were close to par with Raquel's. Thus, Raquel does not deserve a high end award, given that her injuries were basically soft tissue. I also find a measure of exaggeration of the claim that she continues to be plagued by pains of no reducing intensity and weighed her evidence with that of the opposing side's medical professional as well as the evidence of her own doctor. While I accepted any lingering pain to be of a chronic nature, Raquel's evidence of high intensity pain was rejected as it was balanced against the medical evidence. In coming to a conclusion, I also considered that compensation is a one off payment, so must be such that it would fully compensate her for losses sustained, without granting her an undeserving payout. Whilst there was no case above that was exactly on par with the one at hand, I did rely on those specifically where there were soft tissue injuries, which provided a reasonable guide for fixing the quantum. Bearing all these factors in mind as well as other principles on assessment, I find the sum of $78,000.00 to be an appropriate award to meet the justice of this case.

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12 *Selwyn Charles* v *The Attorney General of Trinidad and Tobago* HCA No 2092 of 2002

13 *Shahleem Shazim Mohammed* v *The Attorney General of Trinidad and Tobago* CV2010-04096

SPECIAL DAMAGES

Medical expenses

23. Raquel's pleaded case is that she incurred medical expenses of $23,856.74. She then gave evidence of being entitled to $76,281.57 for medical expenses, filed a hearsay notice and provided receipts. An outline of her medical expenses, as supported by receipts, is as follows:

MEDICAL SERVICES	**COST**
Visits to Dr Pierre, 2008-2013	$4,500.00
Physiotherapy services provided by Surgi-Med Clinic, January, 2008 to July, 2008	$4,470.00
Physiotherapy services provided by Ms Mona McKenzie, June, 2011 to September, 2012	$8,200.00
Physiotherapy services provided by De Coursey Redman, 2013	$4,880.00
Medical and other supplies	$8,838.99
TOTAL	**$30,888.99**

Mr de la Bastide submitted that based on Dr Hoford's evidence, Raquel's injuries should have healed, at least, 3 years after the fall, that is to say December, 2010. On the basis of this, he argues that she is not entitled to claim for medical expenses and/or services purchased after 2010. Counsel submitted that she should only be able to recover medical expenses of $7,400.00 (i.e. $2,650.00 for medical services and $4,750.00 for physiotherapy).

24. This court considered his submissions, the injuries of Raquel and the evidence of both medical experts. What is clear is that Raquel was still seeking medical attention from Dr Pierre up until April, 2013 when his report indicated that she was still experiencing pains. Mr de la Bastide will like this court to dismiss the evidence of Dr Pierre as unreliable, given his non-disclosure prior to the assessment, that her pain was by now significantly reduced and that she had undergone nerve conduction studies. This court was not so quick to dismiss the evidence of Dr Pierre on these bases alone; he was the treating doctor, who, while testifying, did not present as being a stranger to the truth or as wilfully and intentionally setting out to deceive the court. It is accepted that he did not indicate in his report that the pains were significantly diminished but also clear was that under cross examination he readily divulged that information when asked, giving no indication that it was purposefully non-disclosed from his report. He could have tried to maintain the position outlined in his report, but freely admitted that he had neglected to update the position as to Raquel's pain.

His evidence was, therefore, accepted and it guided the award for medical expenses in the sum of **$30,888.99**.

Loss of earnings

25. Raquel averred that she has not been able to work since the accident, in her pre-injury job of an IT End User Support Assistant, earning a net monthly salary of $4,320.83, together with voluntary monthly deductions of Insurance Industry Credit Union and Policy Premium of $344.00 and $472.00. Her earnings were corroborated by Mrs Kathryn Abdulla, legal counsel of Guardian Life, so her net salary, with added on voluntary payments, would be $5,136.84. It is not disputed that Raquel has received salary from the date of the accident that is 3rd December, 2007 to 31st May, 2008 at the prescribed rate of $5,136.84. She now seeks salary for 102 months, in the global sum of $523,957.68. It is her evidence also that she has suffered loss of pecuniary prospects, as she is no longer the beneficiary of end of year bonuses; would not receive full pension benefits when she reaches 60 years and; no longer has dental or medical coverage. She admits that she receives $1,150.00 under the National Insurance Scheme but spends $880.00 per month on physiotherapy. It is also her evidence that Guardian Life determined that she was unable to continue carrying out her duties and terminated her medically unfit to work; without affording her an opportunity to work from home or even part time. As regards this latter piece of evidence, this court notes that these allegations did not form part of her pleaded case; that she was continuously absent from work prior to the notification of termination and no proper evidentiary plank was laid, so these claims are largely unsubstantiated.

25.1 To be successful with a loss of earnings claim, Raquel must prove, *inter alia*, that her injuries rendered her unable to work or earn the income that she did prior to the injury, from the date of the fall to the assessment or any part thereof. Raquel was paid her usual salary up to 31st May, 2008 so if she were to be awarded loss of earnings from 1st June, 2008 to trial or part thereof, she must prove she was unable to work because of her injuries. Based on the evidence, it would appear that her main injury would have healed prior to March, 2010 or at least by December, 2010. She will only be entitled to an award for loss of earnings if she can prove that her soft tissue injuries prevented her from working or earning an income after the fall and up to the trial.

25.2 This court had resort to the Pierre Reports where the only indication of Raquel's inability to work was a statement in the 2008 Pierre Report that she was granted sick leave by Dr Pierre. Unfortunately, the length of the sick leave was not specified. At the time the sick leave was granted, Raquel was still being paid her salary by Guardian Life. In the 2009 Pierre Report, Dr Pierre assessed her as having a 50% permanent partial disability but this does not establish an inability to work by Raquel. In any event, the disability award is an approach that is judicially heavily criticized and condemned, especially as Dr Pierre does not support his assessment by reference to the activities or movements which Raquel is unable to perform. Also in evidence is that Raquel was undergoing physiotherapy but it is noteworthy that she failed to call any of her physiotherapists, to give evidence of her general condition of mobility, over a sustained period of time. Their evidence, no doubt, would have assisted this court in determining Raquel's ability to work or not, leaving this court to infer negatively that this failure to call these professionals as witnesses, without furnishing any reasons, was tactical and designed to influence this award by depriving the court of beneficial evidence[14].

25.3 Nevertheless, this court did not accept wholly Mr de la Bastide's submission that Raquel's claim for loss of earnings must fail, on the basis of medical non-disclosure and/or credible or reliable proof as to whether after 31st May, 2008 her injuries prevented her from working or earning the salary she did prior to the fall. In making its assessment, this court considered the Pierre Reports, particularly the April, 2013 one, that documented her persisting pains as still negatively affecting her ability to work from home but noted that it was a generalized observation. This was weighed against his subsequent admission that her pains were significantly diminished as well as the evidence of Dr Hoford in his 2015 report that based his conclusion of inability to work on what Raquel told him and that her pain would have become chronic in or around December, 2010. The medical evidence was weighed with the absence of any evidence of purchases of medication. It was also considered that she may have been experiencing chronic pains after May, 2008. This court was minded to infer from this that the pains associated with her injuries had substantially abated or were at least

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14 *Wisniewski* v *Central Manchester Health Authority* (1987) PIQR 324 which settled that adverse inferences can be drawn from silence or failure to call a witness with material evidence, once there is a case to answer on the issue, but if there is a credible explanation given, even if not wholly satisfactory, then any potentially detrimental effect of the silence or absence may be reduced or nullified.

manageable without medication. It meant, in the mind of this court, that this combined with the absence of evidence on her ability to work that Raquel may have been able to do some form of work after April, 2013 but failed to discharge her burden of proof to prove or disprove this one way or the other. It is the only fair and reasonable position to settle on as Dr Pierre's evidence was clear that she was still getting some form of pains as at that date. This court is left with an evidentiary lacuna coming out of Dr Pierre's admission under cross examination, which is at variance with Raquel's evidence. The totality of the evidence does not lead this court to conclusively find that Raquel's injuries prevented her from working indefinitely and/or at any fixed period prior to the assessment. It was borne in mind that Dr Hoford said that had her injuries been managed differently, she should have been able to return to work. In all the circumstances of this case, this court would allow loss of earnings up to April, 2013. It was felt that given the many evidentiary uncertainties, a sum should be taken off for contingencies, which is deemed fair and appropriate:

From 1st June, 2008 to 30th April, 2013 (59 months x TT$5,136.84 per month)	=	$303,073.59
Less 35% contingencies	-	$106,075.76
TOTAL LOE	**=**	**$196,997.83**

LOSS OF FUTURE EARNINGS (POST TRIAL)

26. A claim for loss of future earnings was pleaded on the basis that Raquel (38 years as at the time of injury) is no longer able to work at present or in the future. Under this head, Raquel seeks compensation of $924,631.05. Mr Jagai suggested a multiplicand of $61,642.07 ($5,136.84 x 12) and a multiplier of 15. In the view of this court, there is no automatic right to future loss of earnings upon injury. The entitlement to this award is based strictly on the proof furnished to an assessing court. This being said, the evidence establishes that Raquel has exaggerated the continuing effects of her injuries, so the claim that she cannot work now or in the future simply carries no weight and is rejected. This position finds credence in the lack of medical authority for any future inability to work.

27. Based on the evidence before this court, it appears that Dr Pierre simply failed to address comprehensively, properly or at all the issue of Raquel being able to currently or in the future perform her prior duties and/or whether she can do any computer related desk job or any job for

that matter. In the 2013 Pierre Report, it is stated that Raquel's, "*persisting pain produced a significant contraction in her ability to work at home and also social life.*" This conclusion was not grounded on any stated scientific or technical assessment and it was unclear whether this is a mere regurgitation of Raquel's complaint to him or a clinical, objective and independent finding of fact on his part. Then he admitted in court that Raquel's pain was now significantly reduced, without documenting this in the 2013 Pierre Report or saying whether the improvement will continue or she has reached the maximum level of recoverability. There is also no clear indication as to how this 'improvement in condition' and 'significantly reduced pain' translate into increased mobility and allow for more activities and/or if same can facilitate a return to work or some form of work. This court was, therefore, hesitant, without more, to adopt the 2013 Pierre Report as solid scientific and technical evidence of Raquel's ability or inability to work now or in the future. Dr Pierre has simply failed to give any sufficient and proper evidence, as to whether Raquel's condition as at the time of this assessment is such that she is unable to work permanently in any employment or is merely unfit to perform the type of work that she did prior to the accident. The court simply has his evidence of significant improvement in her pain, without that being related to her ability to work or not. Dr Pierre's evidence in this respect was balanced as against that of Dr Hoford that there simply is no hard physical signs 'to confirm or deny a problem'. Of note is Dr Hoford's statement that it is unlikely that Raquel can resume work in the future because of the length of time unemployed since the fall. Given that this may have been based on what Raquel would have told him and not any scientific foundation, little stock was placed on this statement. Then, there is Raquel's evidence that she cannot work or perform desk duties anymore, which carries little weight as she is not qualified to give scientific or technical evidence. It is a mere opinion as to how she feels about the situation. Further her credibility is tainted as she has been shown to exaggerate her pain, based on the evidence.

28. To attract an award for future loss of earnings, it must be shown that Raquel has lost the ability to earn in the same manner that she did prior to her injuries and/or is rendered unemployable. Such a claim for loss of future earnings must be specifically pleaded as a special damage[15]. This award will only be granted where it is demonstrated that "*there is a continuing loss of earnings attributable to the*

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15 McGregor on Damages 18th edition para 35-061

accident"[16]. Raquel has fallen short of adducing any reliable or credible evidence that she is disqualified medically from future employment and indeed her claim for future loss of earnings must nosedive into rejection. Indeed, the very fact that she has not produced any evidence of substantial purchases of medication after April, 2008 operates against her and serves to show that the pain she previously experienced had abated or was on the reducing scale since June, 2008. This leaning of the court is bolstered by another fact that is, that she did not pursue her claim for future medical expenses, which clinches the mind of this court towards concluding that her pain was largely resolved. It caused this court to seriously question whether she is able to perform desk duties or some other form of work. This court was, however, without the hard evidence to find conclusively that she could return to her former work. Based on all the evidence before it, this court was convinced that she may be capable of working or holding some form of employment.

29. Litigants and their attorneys continue to ignore judicial guidance of the need to present accurate, credible, precise and reliable medical and scientific evidence to substantiate their claims, rather than evidence that is vague, exaggerated and unsubstantiated. As it is Raquel's duty to bring the requisite evidence to substantiate her claim and she has fallen short of proving this, her claim for future loss of earnings cannot be sustained and must fail. A claim for future loss of earnings must be buttressed by proper and strong medical and scientific evidence of exclusion from future employment. This is particularly necessary where a claimant presents as having a penchant for giving embroidered evidence, rather than being forthright and candid. In the present case, it is medically cloudy whether Raquel is partially, permanently or at all incapable of working. The quality of medical evidence before it is such that no court would want to ground an award for future loss upon, as it would be hazarding a guess. Raquel simply failed to present as plainspoken and truthful as to her level of continuing pain, if any, so as to get a buy-in by this court to even award a lump sum. Indeed, this court found the evidence advanced by Raquel to be at best inconclusive, mired in embellishment and, at the very least, woefully inadequate to maintain a claim for future loss of earnings. Given the evidentiary insufficiency; lack of scientific concreteness of the medical evidence and Raquel's hyperbolic tendency, this court is constrained to refuse to make an award for future loss of earnings.

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16 *Munroe Thomas* v *Malachai Ford and anor* Civil Appeal No 25 of 2007 delivered on 6th April, 2011 paragraph 8

ORDER

30. It is ordered that the defendant (Guardian Life) do pay the claimant (Raquel) as follows:
    i. General damages in the sum of **$78,000.00** with interest at the rate of 2.5% per annum from 16th November, 2011 to 17th May, 2017;
    ii. Special damages in the sum of **$227,886.82** with interest at the rate of 2.5% per annum from 3rd December, 2007 to 17th May, 2017;
    iii. Costs as assessed in the sum of **$35,130.43**.
    iv. Stay of execution 28 days.

Dated 17th May, 2017

Martha Alexander
Master