

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2013-03270

BETWEEN

AMANDA DUNCAN

Claimant

AND

NEIL MIGUEL

First Defendant

GREAT NORTHERN INSURANCE COMPANY LIMITED

Second Defendant

\*\*\*\*\*

By Ancillary Claim

NEIL MIGUEL

First Ancillary Claimant

GREAT NORTHERN INSURANCE COMPANY LIMITED

Second Ancillary Claimant

AND

JOSHUA CHIN

First Ancillary Defendant

GULF INSURANCE LIMITED

Second Ancillary Defendant

\*\*\*\*\*

Before: Master Alexander

Appearances:

For the Claimant:

Mr Rennie Gosine

For the Defendants/Ancillary Claimants: Mr Asaf Hosein

For the Ancillary Defendants: Mr Keston McQuilkin instructed by Ms Andrea Orie

DECISION

**Background**

1. This was a highly contentious assessment, in circumstances where the totality of the claim amounted to in excess of TT\$1.3 million. It concerned the personal injury claim of the claimant (“Amanda”) filed on 13<sup>th</sup> August, 2013 and amended on 7<sup>th</sup> March, 2018 for damages, and consequential losses against the

defendants. The claim arose from a motor vehicular accident that occurred on 3<sup>rd</sup> September, 2012 along Southern Main Road, Plaisance Park, Pointe-a-Pierre, in the vicinity of the Old Train line (“the Plaisance Park accident”). At the liability stage, a consent order was entered on 10<sup>th</sup> November, 2014 for judgment for Amanda against the first and second defendants and for the ancillary claimants against the ancillary defendants for fifteen percent of the claim.

#### *Facts in brief*

2. When the Plaisance Park accident occurred, Amanda was a lawful passenger in motor vehicle registration number TAE 8997, which was hit by the first defendant’s vehicle. It would appear from Amanda’s pleadings that the first defendant was in the process of overtaking TAE 8997 when the collision occurred, and his negligence caused her to suffer severe personal injuries. At the time of the Plaisance Park accident, Amanda was 24 years old. She was taken to the San Fernando General Hospital (“the public hospital”) for treatment for her injuries.

#### *Injuries*

3. By Amanda’s amended pleaded case, she allegedly suffered the following injuries: fractured maxilla and fractured mandible; fracture of the left medial malleolus of the ankle; fracture of the left tibia; loss of cervical lordosis due to the spasm of her cervical muscles; tenderness over the medial aspect of the left ankle; soft tissue injury to the left hand and lower back; post-concussion syndrome; fluid in both maxillary sinuses, suggestive of blood; teeth numbers 12, 13, 20, 21, 22 were avulsed; loss of bony alveolus; tooth number 4 was decoronated; tooth number 23 had the gingival two thirds exposed by loss of the gingival mucosa; and teeth numbers 24, 25, 26 were non-vital to electric pulp stimulation

#### **General Damages**

4. To determine the quantum of damages payable to Amanda for her injuries, this court utilized the seminal principles set out in the case of *Cornilliac v St Louis*.<sup>1</sup> It was through these legal lenses that this court viewed and assessed the evidence provided by Amanda in support of her case.

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<sup>1</sup> *Cornilliac v St Louis* (1965) 7 WIR 491

*The Nature and Extent of Injuries*

5. The nature and extent of injuries sustained by Amanda were outlined in her medical evidence, specifically as presented by Drs Gentle, Lera and Ashraph, and were as pleaded. The defendants/ancillary claimants and ancillary defendants led no evidence contrary to or supportive of Amanda's medical evidence. It would appear that the parties were not in dispute as to the nature of the injuries suffered by Amanda, contesting only the extent. To this end, several medical reports went into evidence namely: the reports of Dr Gentle dated 28<sup>th</sup> February, 2013 and 26<sup>th</sup> June, 2013; report of Dr AK Ashraph dated 31<sup>st</sup> January, 2014; report of Dr Ravindranath Narine dated 16<sup>th</sup> April, 2013; and reports of Dr Lera of the South-West Regional Health Authority dated 21<sup>st</sup> May, 2013 and 22<sup>nd</sup> January, 2014.

*The Nature and Gravity of the Resulting Disability*

6. As to the gravity and resulting disability, the evidence pointed to Amanda having a 7.4 cm scar over the medial aspect of the left ankle, headaches and dizziness. She was ascribed a permanent partial disability of between 2%-10%, by various doctors. She remained with limited mouth opening M10 30mm; mild tenderness in the chin and loose front teeth. She also had right lower canine lying horizontally in the vestibule and mobility of the lower anterior and upper left incisor alveolar segments. She had pain on hot and cold foods and no sensation in certain regions of her mouth; teeth lost and fractured.
7. Dr Gentle was called as an expert witness. He first saw her on 7<sup>th</sup> February, 2013 some five months after the accident, where he noted in an interim report<sup>2</sup> that she was still limping. In his final medical report dated 26<sup>th</sup> June, 2013 he stated, "I saw her again on the 12<sup>th</sup> June, 2013. At present the pain in her ankle is diminished but she still gets slight pain when she stresses it by walking more than one (1) mile from time to time." Of note was that Amanda failed to produce evidence to show that she had to walk this one mile regularly. Further, it was noted that Dr Gentle stated that this challenge had occurred "from time to time". Relying on this statement, counsel for the defendants/ancillary claimants, Mr Asaf Hosein, asked this court to infer that the pain was not experienced on every walking of one mile or more. This suggestion was not accepted as being supported by the evidence, for it easily could be inferred that the phrase was descriptive of the frequency of such walks rather than the pain experienced by such undertakings. This court, therefore, accepted the evidence that Amanda experienced "slight pain"

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<sup>2</sup> Dr Gentle's report dated 28<sup>th</sup> February, 2013 paragraph 5

whenever she walked more than one mile. Dr Gentle also stated that the pulses, toes and forefoot in the left foot were normal and his review of x-rays showed, “a well healed fracture” of her medial malleolus with an AO screw still in-situ. She had no osteoarthritis of her left ankle. He assessed Amanda with a 10% permanent partial disability. This court accepted the evidence of Dr Gentle.

8. Dr Narine, a neurosurgeon, was not present at the assessment to give evidence, but issued a report dated 16<sup>th</sup> April, 2013, based on an evaluation conducted on 6<sup>th</sup> February, 2013. In his report, Dr Narine ascribed Amanda with a 2% permanent partial disability, and stated that her clinical examination was unremarkable, CT scan was normal and she had a post-concussion syndrome, for which surgical intervention was not required. In his view, this condition tended generally to resolve itself over time. He documented her complaint of intermittent daily occipital headaches, associated with nausea, drowsiness and fatigue with occasional vertigo and difficulty concentrating. He advised Amanda to continue use of paracetamol or Panadol, as necessary to relieve her headaches. She has produced no other medical evidence in contradiction of this prognosis of her condition gradually being resolved over time. Mr Asaf Hosein sought to use this prognosis, and the fact that she produced no other medical report to suggest that her condition was resolved. It was also belying of her evidence of continuing everyday pain and of the accident having completely changed her life. This court was not rushed to so conclude, as it noted that the report spoke to daily headaches and reminded itself that she had suffered blunt head injury and facial fractures in the Plaisance Park accident. Further, Dr Narine did not set a fixed time for this condition to be resolved, and Mr Asaf Hosein was without the medical expertise to so determine.
9. In another medical report, this time by Dr Trevor Seepaul dated 21<sup>st</sup> May, 2013, it was stated that Amanda was able to ambulate with her ankle without great difficulty. Noting that she might have some discomfort and stiffness around the ankle from time to time, but that the fracture was healed with good alignment, Dr Seepaul assessed her with a 5% ppd. He projected that she was expected to recover further, though there might be a small degree of disability associated with the orthopaedic injury. Amanda neither called Dr Narine nor Dr Seepaul to give evidence, so this court was left to infer that their evidence was not supportive of the case she wished to present at assessment.
10. Dr Lera was a witness in this matter having issued a report dated 22<sup>nd</sup> January, 2014. He was her treating doctor at the time of the accident, and made certain findings including that she had fractures of the left

maxilla and anterior mandible. She had extraction of the left lower canine. Notably, Dr Lera made no mention in his report of damage to any other tooth. Under cross-examination, Dr Lera was adamant that if there were problems with other teeth, he would have noted same and the silence in his report meant there was no other damage. In the context of the claim raised by Amanda, involving more extensive damage to her teeth, Dr Lera's evidence was noted by this court and would be addressed below.

11. Dr Ashraph was not Amanda's attending surgeon after the Plaisance Park accident. She attended his office on 9<sup>th</sup> February, 2013 with complaints of loose front teeth, teeth lost and fractured, no sensation in certain parts of her mouth and pain on hot and cold foods. He provided a medical report dated 31<sup>st</sup> January, 2014, which related to visits by Amanda, which commenced some five months after the accident (i.e. 9<sup>th</sup> February, 2013). His findings were detailed and involved a number of teeth including numbers 12, 13, 20, 21, 22 which were avulsed, with loss of boney alveolus; tooth number 4 was decoronated; tooth number 23 had gingival two third exposed by loss of the gingival mucosa; and teeth numbers 24, 25, 26 were non-vital to electric pulp stimulation. She was asked to return with the report of Dr Lera, from the public hospital before he advised her on oral reconstruction. Almost a full year after this initial visit, on 28<sup>th</sup> January, 2014, Amanda presented at the office of Dr Ashraph with Dr Lera's report. The oral reconstruction costs came up to \$287,800.00. It was his findings, and recommendations, that led to the amended pleadings and contention.
12. Mr Asaf Hosein invited this court to disregard Dr Ashraph's evidence, which he described as extraordinary and contrary to the findings of the first specialist (Dr Lera), who indicated that he had seen no such damage. His submissions found support in that of Mr McQuilkin, both vilifying the lack of nexus between the findings and/or proposed treatment of Dr Ashraph and the injuries sustained in the Plaisance Park accident. On these bases, this court was asked to disregard the astronomical oral reconstruction costs sought.

### *Pain and Suffering*

13. Amanda spent twenty-two days at the public hospital, where she had surgeries to her leg, ankle and mouth. These procedures caused her unbearable pain. She was readmitted to the public hospital on 24<sup>th</sup> September, 2012 for another surgery to her ankle, and her left leg was placed in a cast. Amanda averred that, as at the assessment, she was still experiencing swollen and painful ankles if she were to stand for long periods. She also suffered with headaches on a daily basis, nausea, dizziness and fatigue. She has

pain and sensitivity in certain regions of her mouth, which made eating difficult; and toothaches, for which she used painkillers.

14. When the collision occurred, she was in immediate severe pain, and fearful for her life, as she could not move and there was blood all over her body. She gave evidence of crying out in pain, which she described as excruciating, at the accident site and on the journey in the ambulance. The pain was localized in her mouth, head and leg; and it continued while hospitalized, and during recovery from the surgeries. She was immobilized and unable to use the bathroom. She was fitted with a catheter and made to use adult diapers, an experience she described as embarrassing. She was also unable to eat because of the injuries to her mouth, which was outfitted with braces during the surgical procedure. She averred that she was placed initially on a liquid diet, fed through a straw and that after a few weeks, she graduated to soft foods, such as mashed potatoes, but was still unable to chew.
15. On 10<sup>th</sup> September, 2012 some seven days after the accident, she was taken to the Dental Department at the public hospital, as she was suffering from loss of sensation to certain regions in her mouth, her front teeth felt loose, others were broken and her jaw was painful. Following her discharge, she applied for and obtained a medical report issued under the hand of Dr Lera. She was discharged on 22<sup>nd</sup> September, 2012 but readmitted two days later on 24<sup>th</sup> September, 2012, where she underwent another surgery to her ankle. She was then discharged two days later on 26<sup>th</sup> September, 2012. She had a cast on her left leg, which was removed approximately six months after the surgery, and she used crutches to move around during this period. She stopped using the crutches two months after the cast was removed and then used a walking stick for a further two months, before walking unaided. She also underwent physiotherapy at the public hospital for approximately six months. She remained with challenges to walk and climb stairs; and experienced pain in cold or rainy environment.

#### *Loss of Amenities*

16. Amanda averred that the accident has completely changed her life, as she now has to live with pain every day. She used daily two painkillers for her toothache and headaches. She could no longer participate in activities with her children, such as running or football. She has developed a fear for travelling in vehicles and experienced frequent nightmares of the accident. She provided no evidence of continuing challenges with household duties, so it was assumed that, by 2015 when she signed her witness statement, she was

able to perform these duties as before the accident or without much or any disruption. It was also assumed that her non-involvement with her children's activities would have been worse during her period of incapacitation but by 2015, her ambulation having improved, she would have increasingly been able to participate in these activities. In fact, her medical reports have provided no support for her averments of continuing loss of amenities, as regards participating in activities with her children or inability to perform daily personal activities for four months after the accident. Nevertheless, this court accepted that she would initially have faced these challenges, and would have required some assistance while she was incapacitated.

## Cases

17. The three counsel sought awards that ranged from \$280,000.00 to \$150,000.00 to \$70,000.00. Counsel for the parties then supplied a wealth of authorities for consideration by this court. Several of these cases were dated and dealt with injuries that were of greater seriousness and spread than Amanda's. Also while all were considered, there were those that assisted with a sounder and stronger comparative basis for the decision arrived at by this court. However, there was one decision that was overturned by the Court of Appeal and, therefore, could not be considered.<sup>3</sup> This court would look first at vintage cases, or those delivered more than ten years ago, and then at those of a more contemporary nature.

### Vintage cases

- ***Hosein v Cromarty***<sup>4</sup> – delivered on 24<sup>th</sup> April, 1982 where a plaintiff who suffered a broken jaw, facial injuries and a fractured kneecap was awarded general damages of \$30,000.00; as adjusted to December, 2010 to \$236,061.00.
- ***Kimkaran & Ors v Boodoo & Ors***<sup>5</sup> - delivered on 28<sup>th</sup> January, 1998 where a plaintiff sustained a fracture of the right zygomatic molar and injury to the right ankle, which was placed in a cast for 6 weeks. There was also bruising of the left big toe, chest, left knee and a fractured right wrist. The plaintiff was unconscious for 10-15 minutes and diagnosed with diminished hearing, post-concussion syndrome and with neck and upper back pain. On 28<sup>th</sup> January, 1998 Stollmeyer J (as he then was) awarded the sum of \$75,000.00; as adjusted to December, 2010 to \$167,523.91.

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<sup>3</sup> *Seedan v Marchack* HCA S 375 of 1975 overturned by the COA (CA Civ 54 of 1982) and no award for damages made.

<sup>4</sup> *Hosein v Cromarty* HCA 1703 of 1972

<sup>5</sup> *Kimkaran & Ors v Boodoo & Ors* HCA 1493 of 1996

- ***Mario's Pizzeria Ltd v Ramjit***<sup>6</sup> – delivered on 15<sup>th</sup> November, 2006 by the Court of Appeal where a claimant suffered a fractured cheekbone with poor alignment, diplopia (double vision), inability to chew, restricted mouth opening and numbness, leg injury, fractured tibia and right instep and was awarded general damages in the sum of \$95,000.00; as adjusted to December, 2010 to \$135,007.88.

### Contemporary cases

- ***Johnson Ansola v Ramnarine Singh, Ganesh Roopnarine and the Great Northern Insurance Co Ltd***<sup>7</sup> – delivered on 30<sup>th</sup> June, 2008 where a 46 year old plaintiff who was a passenger in a vehicle sustained a severe comminuted compound fracture of the right lower tibia and fibula, a right talar dislocation and a right shoulder dislocation. There was a diminished range of motion of his right ankle and he complained of severe pain in the right ankle and pain in the right tibia and fibula. He was unable to stand for long periods and used a stick to move around because of his injuries. Operation of the right ankle was advised as a requirement to correct these problems and relieve pain. Permanent partial disability was assessed at 30%, which could be reduced by 10% if surgery was performed. He was awarded general damages of \$150,000.00 and future surgery of \$60,000.00, which were unchanged on appeal.
- ***Roger Gangadeen v Helen Reyes and ors***<sup>8</sup> - delivered 29<sup>th</sup> March, 2012, where the claimant sustained fractures of his mandible and deep lacerations of his infra-orbital region. Following emergency surgery (open reduction and internal fixation of his fractures and suturing of his deep lacerations) on the day of the accident, his jaw was wired shut and a tooth removed to insert tablets for pains. He had lost consciousness following the accident and was hospitalized for one week. His injuries included a broken jaw; a deep cut under the eye that created a large hole; lacerations to the right face, causing facial numbness and on review, he was diagnosed with a flattened right zygoma; reduced muscle tone causing a lazy eyelid and upper lip; laceration to the face and permanently damaged maxillary branch of the facial nerve. There were permanent facial scars resulting from the lacerations to his face that left him with an unsightly appearance. There was major deformity given the huge sink in his face (i.e. the flattened right zygoma) that led to emotional scarring. He was awarded general damages in March, 2012 of \$220,000.00.

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<sup>6</sup> *Ramjit v Mario's Pizzeria Ltd* CA 146 of 2003

<sup>7</sup> *Ramnarine Singh, Ganesh Roopnarine and another v Johnson Ansola* Civ App No 169 of 2008; HCA 3487 of 2003

<sup>8</sup> *Roger Gangadeen v Helen Reyes and ors* CV2009-00906 delivered on 29<sup>th</sup> March, 2012

- ***Richard Ramnarace v Vishsam Boodoosingh***<sup>9</sup> - delivered on 6<sup>th</sup> July, 2001 by Bereaux J (as he then was) where the claimant sustained a gunshot wound to the right side of the face and mouth. He sustained compound fractures of the right mandible, dental avulsion and fractures; loss of several teeth; scarring to the right side of the face; deformity of the angle of the mouth and lower lip; narrowing of the aperture of the mouth; and loss of buccal sulcus in the right lower jaw area. There was also evidence that the claimant had developed microstomia (abnormally small mouth) due to the loss of a significant portion of the right mandible and soft tissue in the area of the lips. His facial appearance led to the premature end of his romantic life. He was awarded \$150,000.00 in general damages inclusive of aggravated damages; as updated to December, 2010 to \$286,211.00.
- ***Dexter Jeffers v Andy Williams, Maritime General Insurance Company Limited and Adrian Gabriel***<sup>10</sup> - delivered on 20<sup>th</sup> July, 2017 by Mohammed J, where for a fracture dislocation of the right ankle an award was made of \$40,000.00.
- ***Shamshudeen Haitula v Chris Mahabir and Capital Insurance Limited***<sup>11</sup> - delivered on 16<sup>th</sup> March, 2012 by Alexander M, where a claimant suffered cerebral concussion, right calcaneum fracture, left medial malleolus, left talar body fracture, fracture of left 2nd, 3rd, 4th and 5th metatarsals and was awarded \$150,000.00.
- ***Dotsy Walker, Omari Flanders (a minor by next friend Dotsy Walker) v Ashton Williams***<sup>12</sup> - delivered on 8<sup>th</sup> March, 2017 by Alexander M, where the 2<sup>nd</sup> claimant, with injuries to his buttocks, mouth, including the loss of teeth, and who required oral reconstructive surgery was awarded \$70,000.00.

18. These contemporary cases were mainly reflective of more serious injuries than Amanda's. Amanda was not entitled to any award that would unfairly enrich her. In its bid to return Amanda to the position that she would have occupied but for the accident, this court considered her evidence, particularly the medical evidence, which did not convince it that her injuries were of the level of severity as the claimant in ***Roger Gangadeen supra*** or even the claimant in ***Richard Ramnarace supra***. The level of deformity in those cases lifted them above the sphere of quantum that could be recovered by her. Amanda, therefore, could

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<sup>9</sup> *Richard Ramnarace v Vishsam Boodoosingh* HCA No. S-503 of 1999 delivered on 6<sup>th</sup> July, 2001 by Bereaux J

<sup>10</sup> *Dexter Jeffers v Andy Williams, Maritime General Insurance Company Limited and Adrian Gabriel* CV2014-00224

<sup>11</sup> *Shamshudeen Haitula v Chris Mahabir and Capital Insurance Limited* CV2009-04776

<sup>12</sup> *Dotsy Walker, Omari Flanders (a minor by next friend Dotsy Walker) v Ashton Williams* CV2015-04057

not get an award of the magnitude in those cases. On the other extreme, a few of the contemporary cases involved injuries that were not as serious or extensive as Amanda's.

19. In pegging a quantum, consideration was given to her evidence of the pain she endured and the very thin, near hollow, evidence of its impact on her life or loss of amenities. In the view of this court, experiencing pain upon injuries was not unusual, so a claimant must present the evidence to influence the award. In this regard, an assessing court would look to clear and compelling evidence as to how such pain and suffering impacted a claimant's life. It would be insufficient to merely present the injuries and expect the court to extrapolate from those as to the extent of pain and/or how a claimant's life was affected by it. Where the medical reports spoke directly to or were descriptive of a claimant's pain and suffering by linking the same to the injuries sustain, such evidence would always be more compelling. Similarly, if the medical evidence were silent or unresponsive of such conclusions, an assessing court would be so guided. In the instant case, Amanda was placed on paracetamol and Panadol for her pain, which left this court to infer that the pain was minimal, or at its worst manageable. It was further considered that Amanda was not a very forthcoming witness, and truth was not the anchor for her testimony. In fact, under cross-examination she kept expanding on her evidence, which led to revelations of cracks and contradictions in her witness statement. This was clear from her evidence, as she gave a changing story as to her mother in law not taking care of the children before the accident, then admitted that she did. This and other instances of untruths led this court to conclude that Amanda was seeking to attract a larger award for her injuries than she deserved. At the end of the day, Amanda had a fractured ankle that had healed well as at the date of the assessment, fractures to the leg and jaw; post-concussion syndrome for which medical treatment was no longer sought, lingering headaches and dizziness, and certain unresolved dental issues. Thus, this court settled a quantum of \$150,000.00, as being fair and appropriate for her injuries.

### Special damages

20. Amanda claimed \$717,850.00 as special damages as follows:

1.	Medical expenses	\$1,500.00
2.	Domestic assistance for 4 months @ \$2,000.00 per month	\$8,000.00
3.	Transportation cost	\$1,500.00
4.	Police report	\$50.00
5.	Loss of earnings as a fish vendor @ \$400.00 per day from 3.09.12 to present	\$706,800.00

She pleaded and particularized her claim, as obligated by law. The law also required that Amanda should strictly prove her claim for special damages<sup>13</sup>. This requirement for strict proof placed the burden squarely on a claimant's shoulders to show on a balance of probabilities that he or she has suffered the consequential losses pleaded. In the present case, Amanda's claim was massive, and clearly itemized. This court expected, therefore, that she would come armed with the requisite proof in support thereof. A claimant's proof might come in the form of documentary evidence only, or she may utilize other forms of non-paper evidence or a combination of both. Whether papered or paperless, the burden would rest on a claimant to prepare for and bring the proof of his or her claims to an assessing court. While legal minds have pontificated *ad nauseam* on this issue and the authorities clearly spelt out that the degree of strictness of proof would vary according to the circumstances and the particular item of special damages<sup>14</sup>, the law as to strict proof of special damages has really not been altered. Bearing the learning on special damages in mind, including that viva voce evidence has been at times, in certain circumstances, deemed capable of corroborating special damages<sup>15</sup>, this court turned to assessing Amanda's claim for special damages.

*i. Medical expenses*

21. Amanda's claim for medical expenses of \$1,500.00 was supported by receipts of \$1,000.00 for services rendered, and not as claimed. There was no claim for purchases of medication and, she was permitted to recover \$1,000.00.

*ii. Domestic assistance*

22. Amanda claimed \$8,000.00 for domestic assistance. She provided no objective evidence in support of this claim. The basis of this claim was that her injuries rendered her unable to take care of herself or her children, so she hired her mother-in-law ("Ms Chin") who lived upstairs to assist her with her personal hygiene and household duties and to take care of the children. Under cross-examination, she was adamant that she had an agreement with Ms Chin to pay her in parts, as the money became available. She did not call Ms Chin to confirm this claim. Her medical evidence was silent as to this need for

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<sup>13</sup> *Mario Pizzeria Limited v Hardeo Ramjit* Civ App No 146 of 2003

<sup>14</sup> *Anand Rampersad v Willies Ice Cream* CA Civ 20 of 2002

<sup>15</sup> *Roderick Williams v Amoy Sieunarine and another* HCA No 1574 of 1984, pg 12 per Master Gopeesingh

domestic assistance. This court considered *Munroe Thomas v Malachai Ford & ors*<sup>16</sup> where the Court of Appeal clarified that where there was a claim for domestic assistance, some fifteen months after the accident, but unsubstantiated by the medical evidence, and that none of the disabilities necessitated this assistance, it would not be allowed. In the case at bar, Amanda's claim was limited to four months after the accident, so was not unreasonable in the circumstances. An injury to an ankle, as was the case with Amanda would have necessitated some domestic assistance. There was no explanation provided for her failure to call Ms Chin to corroborate this evidence and this court was challenged with accepting that Amanda would have paid \$2,000.00 per month for the assistance she received from Ms Chin, who lived upstairs in the same property and was her family. In the circumstances, it was prepared to allow her to recover \$4,000.00 for domestic assistance.

*iii. Transportation cost and police report*

23. Amanda claimed that she incurred \$1,500.00 in transportation cost and \$50.00 for police report. She provided no documentary evidence, so these claims were denied for lack of proof.

*iv. Loss of earnings (pre-trial)*

24. In her evidence in chief, Amanda averred that she was employed as a fish vendor, earning \$2,000.00 per week for approximately three years before the accident. She was hired by Joshua Chin to clean and sell fish. Under cross-examination, she admitted to being in business with Joshua Chin, as his partner, and that he was in fact her husband.

A. Well, I worked for him; we do it together. I would clean and cut up fish and stuff, we would get a variety of fish on a day.

Q. Right, well this is what I have the problem with you see. You said you were in partnership with him, you and he do the business together?

A. Well exactly that, I would come and help. The two of us doing the business, he going and buying the fish, and I coming and I am cutting up the fish and selling.

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<sup>16</sup> *Munroe Thomas v Malachai Ford, RBTT Bank Limited and NEM (West Indies) Insurance Limited Civ App No 25 of 2007*

25. Amanda's claim for loss of earnings approximated to \$8,000.00 per month from 3<sup>rd</sup> September, 2012 to the date of assessment. She provided thirteen receipts, immediately pre-dating the accident, which covered a period of 3 months, from June to August, 2012. Under cross-examination, she admitted that after the accident, she went and secured an NIS number, on advisement. Her testimony left this court to infer that Amanda was building a case for loss of earnings post-accident. First, it noted that receipts were provided for a truncated period of three months, leaving this court to wonder why not for a longer period, and why no explanation was advanced for failure to corroborate this evidence. It left this court to assume if these thirteen receipts were manufactured for the assessment, and for the purpose of supporting this claim. Opposing counsel submitted that she was not entitled to recover any sum under this head, as it was not satisfactorily proved. This court was not impressed with this submission.
26. In the view of this court, Amanda might have assisted her husband in their business for a salary. This aspect of her evidence was found credible, though her functional capacity in that business (employee or business partner) was unclear. Her evidence as to the amount of salary she received was uncorroborated, and her medical evidence failed to substantiate her earnings incapacitation. It was considered that this was a claim that could have been corroborated, and that Amanda simply refused to produce the available evidence in substantiation of her case. She did not call her employer/partner to give evidence of her salary or inability to perform her pre-accident duties. Then, under cross-examination, she gave conflicting evidence, at one point stating that she and her husband were partners in the business and on another occasion stating that she was paid a salary, by her husband. In the view of this court, this failure to substantiate or corroborate this claim was untenable. This court could accept that she might have assisted her husband at the fish stall, but it could not accept that she was unable to prove this claim. There was no evidence, save hers, that spoke to her being an employee or a partner in the business, and no explanation as to why this evidence was not forthcoming. Amanda, herself, was not the most steadfast truth teller nor was she a convincing witness. Given the nature of the fishing industry, this court viewed with suspicion Amanda's evidence that she worked from Sunday to Sunday, selling fish, starting at 7 am each day. Amanda could have brought her husband/employer or partner. She could have brought customers to whom she sold the fish. She could have brought other fishermen or fisherwomen in the area who might have been able to speak to fish sales or fish prices for stocks sold in the area. She could have brought bank records. Instead, she failed to justify the fact of having suffered this damage and its amount. This was a claim that was capable of proof but for which Amanda failed to bring the necessary

proof. It was inexplicable to this court as to why a claimant with available evidence in support of his or her case would willfully opt not to produce same to an assessing court.

27. She testified also that since the accident, she has not been able to work, as standing for long periods was painful. She suffered with a swollen ankle and from regular headaches and dizzy spells, for which she took daily painkillers. She averred also to having to take Ansaid daily, a painkiller for toothache, which was self-prescribed. It would appear that Amanda would have this court believe that she has continued to suffer with unbearable pain in the ankle and mouth after the accident, for which she purchased painkillers; a fact that was not borne out or supported by the claim for medical expenses.
28. Where strict proof of an item of damages was mandatory by law, and where this proof was available to a claimant, it would be unacceptable to stroll empty handed into a court and claim entitlement to the award without the necessary evidence. This situation would be made worse where the empty hand was accompanied by a silent tongue; as to why the claimant failed to furnish or was hampered in providing the proof. This would leave any assessing court to assume that Amanda was incapable of proving this claim and so was not entitled to recover for a pleaded claim that she could not prove. Nevertheless, it was felt that given her injury, the fact that she would have been in a cast for approximately six months, then used a crutch and a walking stick for another couple of months, she would have faced certain challenges to earn as she did before. While this was not buffered by her medical evidence, reasonableness dictated that she be allowed to recover at least one year loss of earnings. There was no sufficient evidence to support a continuing loss of earnings linked to her injuries beyond this timeframe, and, in fact, her medical evidence pointed to improvement in her condition. In the circumstances, she might recover loss of pre-trial earnings, less contingencies of 35%, as follows:

From 3 <sup>rd</sup> September, 2012 x 12 months (\$8,000.00 x 12) =	\$96,000.00
Less statutory deductions of 35%	= \$33,600.00
Total	= \$62,400.00

### **Future loss of earnings**

29. The medical report does not support any permanent or even partial inability to work on the part of Amanda. To recover under this head, Amanda needed to bring the requisite medical evidence to demonstrate she was suffering a continuing loss of earnings attributable to the accident. She has not

done this. She could not recover loss of future earnings, as this claim to such continuing loss was not proved.

### **Future medical expenses**

30. Amanda sought \$287,800.00 for oral reconstructive surgery, based on Dr Ashraph's evidence. This medical evidence was neither reflected in nor found support in the evidence of Dr Lera. In fact, Dr Ashraph's evidence as to extensive damage to teeth and for reconstructive surgery differed substantially from the evidence of the contemporaneous examination and identification of damage to teeth as done by Dr Lera. Under cross-examination, Dr Lera was adamant that he was correct in his contemporaneous prognosis.
  
31. At the assessment, the need for future surgery was not contested, in that opposing counsel never cross-examined Dr Lera on this issue. What was clearly in contention was the exorbitant cost of the procedures and the extensive reconstruction work required, as set out by Dr Ashraph. This legal conundrum was placed for determination by this court and in moving towards a fair determination, it was felt that Amanda was not entitled to recover more than her losses. At the same time, where a tort resulted in damage, a defendant should not be absolved from his responsibility to reinstate the claimant to the position that she was in prior to the visitation of the tort upon her person. In the circumstances of conflicting medical evidence, this court was careful to consider the facial and oral injuries sustained by Amanda, as against the findings of Dr Lera, on initial examination, and as contrasted to those of Dr Ashraph, five months after the accident. It was hard to digest and move towards the high-end award sought by Amanda, given that Dr Ashraph, who examined her several months after the accident, found damage to 8 additional teeth for which surgical procedures were required. In the opinion of this court, the spread of such damage to Amanda's teeth must have been observed by Dr Lera, when he examined her soon after the accident. The fact that such extensive damage was neither documented nor referred for treatment by Dr Lera left this court to infer that the damage to Amanda's teeth might not have been as extensive. Nevertheless, this court found on the evidence that Amanda, given her facial and oral injuries, might require future reconstructive procedures but, it could not, on what was before it rest easily in granting the high-end award sought. Dr Lera was a particularly convincing witness, whose testimony could not be set aside easily, given that he was the treating doctor, and so sufficient weight was ascribed to it. It was felt that Amanda should recover some money for future surgery, although this court was not

convinced that the award should be in the magnitude, as sought. The evidence simply did not convince this court to make that award. Amanda failed to prove that such extensive reconstructive surgery flowed exclusively from the accident. In the circumstances, and bearing in mind the guidance provided in past cases, it felt fair to award a lump sum for future oral surgery. To this end, the sum of \$120,000.00 was settled upon as reasonable and fair in all the circumstances of this case.

32. It is ordered that the defendants do pay to the claimant:
- a. General damages in the sum of **\$150,000.00** with interest at the rate of 2% per annum from 11<sup>th</sup> September, 2013 (date of service) to 13<sup>th</sup> April, 2018.
  - b. Special damages in the sum of **\$67,400.00** with interest at the rate of 2% per annum from 3<sup>rd</sup> September, 2012 to 13<sup>th</sup> April, 2018.
  - c. Future surgery in the sum of **\$120,000.00**.
  - d. Costs as assessed in the sum of **\$31,555.18**.
  - e. Stay of execution of 28 days.

Dated 13<sup>th</sup> April, 2018

**Martha Alexander**  
**Master**