THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO CV2015-03429

BETWEEN

DONNA DIAZ

CLAIMANT

AND

BURGER BOYS LIMITED

DEFENDANT

****

BEFORE MASTER ALEXANDER

Date of delivery: **07 September 2021**

Appearances:

For the Claimant: **Mr Ronald Simon instructed by Ms Kia Baptiste & Ms Lindianne Marshall**

For the Defendant: **Mr Faarees F. Hosein and Ms Clair M. Sinanan**

DECISION

INTRODUCTION

1. The claimant went to Rituals Coffeehouse Outlet located at Nos 91-93 St Vincent Street, Port of Spain, Trinidad on or about 05 June 2014 where she fell on the floor ("Rituals' Premises"). At the material time, she was a customer at Rituals' Premises; and she was attempting to lift herself off a chair, when her right foot became stuck in a hole under the table. It would appear that the hole was inconspicuous and was neither properly secured nor was it safely covered. When her foot was stuck in the

hole, the claimant lost her balance and fell to the floor, injuring the right side of her head, right foot and back ("the fall").

THE CLAIM

2. Following the fall, the claimant brought a claim[1] for compensation in 2015 seeking monies under various heads of damages including general damages, for her pain and suffering and loss of amenities, special damages and future losses. She pleaded that she was 51 years of age at the time of the accident and was an Insurance Agent, employed with Pan American Insurance, trading as Apostolos Business and Insurance Services Limited ("Apostolos"). She pleaded that the defendant's tort had caused the fall and it resulted in the injuries to her cervical and lumbar spine, shown on the MRI scans done two days later ("the MRIs"). It was not part of her pleaded case that there was an aggravation of a pre-existing condition. Her case simpliciter was that the fall on Rituals Premises caused her injuries.

3. A big part of her case was that after the fall, there was a significant diminishing of her ability to continue to work; and she found herself being severely disadvantaged on the labour market. By her claim, therefore, she was seeking to be returned to the position that she was in before the unfortunate event at Rituals' Premises. She methodically and clearly pleaded her injuries as being to her cervical and lumbar spine and provided full particulars of her losses. Her pleaded case aligned with the usual way matters like these are set out and cannot be faulted, however, a claimant in this jurisdiction must also show the causative link between the pleaded injuries and the tort to justify the compensation being sought. Further, the issue of mitigation once raised would result in an adjustment to a claimant's compensation package. I will discuss later the nature and extent of her injuries, continuing disabilities and consequential losses in the context of the evidence provided.

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[1] Claim form and statement of case filed on 15 October 2015

THE DEFENCE

4. The defendant consented to liability but challenged the case on quantum, putting her to strict proof of her pleaded physical injuries and losses that flowed therefrom. From upfront, the defendant challenged the medical reports attached to the statement of case and raised the issue of nexus and causation respecting the findings in these reports and the accident. Further, the defendant put the claimant to strict proof of her special damages, rigorously contesting her loss of earnings claim and/or diminution in earning capacity. By its amended defence, the defendant advanced a strong case in opposition to the claimant's with mitigation and causation as central issues. By its case, therefore, the defendant delinked her injuries from the trauma and stated that she was suffering from a chronic degenerative process in her cervical and lumbar spine, which existed before the fall. It was also its pleaded case that the claimant had undergone previous surgical treatment for an old injury. In effect, the defence was built around denials of injuries linked to any fresh trauma, a challenge to the nexus and causation, a claim of previously existing injuries, prior surgical intervention and an allegation that the claimant's case was contrived, spurious and exaggerated.

THE INJURIES

5. Given that the defendant had raised the issues of nexus and causation, it meant that the injuries were central to the case so I felt it important to set out the injuries as pleaded by the claimant. The claimant pleaded that she had sustained injuries[2] to her cervical spine including: disc dessication at all levels with decrease in disc height and posterior annular tear at C5/6 level. At C3/4 level there was mild disc bulge causing mild narrowing of the spinal canal and left neural foramen and at C4/5 level mild diffuse disc bulge causing mild narrowing of spinal canal and bilateral neural foramina. At C5/6 level, there was diffuse disc bulge with posterior disc herniation centered slightly to the left of midline and mild uncovertebral hypertrophy causing mild to

[2] MRI report dated 7 June 2014 by Ms Ameeta Varma, radiologist

moderate narrowing of the spinal canal with indentation on the cord and mild narrowing of bilateral neural foramina. At C6/7 level, there was mild disc bulge causing mild narrowing of spinal canal and bilateral neural foramina; at C7/T1 level mild disc bulge with right facet arthropathy and mild ligamentum flavum hypertrophy causing mild narrowing of spinal canal and right neural foramen. Her pleadings reflected the findings of the MRIs, done two days after the fall, which showed reversal of cervical curvature with mild end plate osteophyte formation (compatible with muscle spasms). It also showed mild scoliotic curvature of the cervical spine with convexity to the right. There were unremarkable findings of vertebral height alignment and marrow signal intensity; cervical cord signal intensity and of the atlantoaxial joint. In addition, she pleaded injuries to the lumbar spine namely: L4/5 level mild diffuse disc bulge causing mild narrowing of spinal canal and bilateral neural foramina; and mild disc bulge causing mild narrowing of spinal canal. The MRIs showed increased marrow signal in S4 segment sacrum on STIR images.

THE LAW

6. At an assessment of damages that follows a judgment on liability, whether issued from a trial, default judgment, consent or otherwise, a defendant can raise all issues relevant to the award of compensation and its quantification, once they are not inconsistent with the judgment on liability. It is implied in a defendant's admission of liability for a tort that some form of injury and loss occurred from that wrong. It means that once liability is settled, a defendant would not succeed in arguing that there was no loss or injury sustained. The crystallization of liability, however, does not mean that the defendant is necessarily liable for every loss that a claimant claims occurred[3]. The extent of the damage caused by the defendant's wrong would be open to probing at the assessment hearing. During the assessment, the claimant who alleged injury

[3] *Turner* v *Toleman* [1999] Lexis Citation 1773 per Brown LJ who stated, "*No doubt defendants must acknowledge some injury to a plaintiff before judgment could properly be entered against them … That is a far cry from saying that they are necessarily liable for each and every aspect of loss and injury which the plaintiff in his pleaded claim asserts he suffered.*"

and loss from the defendant's breach of duty must show that the said breach was the proximate cause of the injury[4]. Not only does the burden of proving the required link between wrongdoing and damage rests on the claimant but he or she cannot recover damages for the alleged injury and loss without establishing the causal link. The standard of proof is on a balance of probabilities, whereby the claimant must demonstrate by adducing sufficient evidence that it is more likely than not that the defendant's negligence caused him or her to suffer injury and consequential losses.

7. The courts are clear that in the bid to return the claimant to the position that he or she was in before the injury, an assessor can only make fair compensation, as perfect compensation is not attainable[5]. In the present matter, the defendant holds the position that the claimant did not discharge the burden of proof respecting causation, as the adduced evidence fell way below the standard required to discharge this burden. As the assessor, it falls to me to decide whether the claimant has proved that her pleaded injuries arose from the fall and what would be fair compensation for that wrong. The assessor, therefore, works to achieve *restitutio in integrum*. It will be wholly unfair for me to have a defendant pay compensation for injuries and special damages that are unconnected to the breach of its duty of care. Likewise, it will be wholly unfair to undercompensate a claimant for her injuries or to balloon her into inappropriate financial wealth simply because a tort was committed against her. What she deserves is fair and appropriate compensation for her injuries, which she must connect to the defendant's negligence. I will explore below whether the claimant has established the nexus or prima facie connection between the wrong and the loss.

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[4] Clerk and Lindsell on Torts 17th edition at paragraph 2-03 page 40 states that, "*[T]he plaintiff must adduce evidence that it is more likely than not that the wrongful conduct of the defendants in fact resulted in the damage of which he complains. He must establish a link, a prima facie connection, between the wrongdoing and the relevant damage.*"

[5] *Thomas* v *Ford and Ors* Civil App 25 of 2007 where it is stated that, "*a personal injury claim may never be viewed as a road to riches and secondly, that a claimant is entitled to fair, not perfect compensation*."

GENERAL DAMAGES

8. The standard analysis used by assessors to determine compensation for personal injuries begins with the ***Cornilliac***[6] framework. These criteria are: (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering endured; (iv) the loss of amenities suffered; and (v) the effect on pecuniary prospects. The ***Cornilliac*** heads remain in the assessor's contemplation throughout, as he or she examines the evidence adduced.

9. A claimant who suffers personal injuries would be entitled to recover general damages but these are not precisely quantifiable. To arrive at a fair quantum, the assessor will conduct an exercise using comparators to make the award for pain and suffering. Central to this exercise will be the evidence produced, which must show the nexus to the wrong, the nature, gravity and ongoing disability, pain endured and loss of amenity suffered. For personal injuries matters, medical evidence would be critical in resolving the issues of nexus, nature and extent of the injury and of the pain suffered and other losses. Where the evidence is non-existent or falls short, the award will reflect such evidentiary insufficiencies. It is understood that in this exercise, the first in time medical report(s) that diagnosed the injury and any tests done will play a pivotal role in making the link between the tort and the injury. There are always exceptions and in each case, the assessor will be guided by the facts and evidence.

EVIDENCE

10. The claimant and four doctors namely Dr Samhasivan Kattamanchi, Dr Steve Mahadeo, Dr Ian Pierre and the defendant's expert, Dr Devindra Ramnarine, gave evidence in this matter. Other witnesses who gave evidence were Mr Gabriel Smith from Pan American Life Insurance Limited, Ms Camille Alexander from North Central

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6 *Cornilliac* v *St Louis* (1965) 7 WIR 491 by Wooding CJ (as he then was) at page 492

Regional Health Authority and Ms Marina Whiteman from Guardian Life. The claimant filed her witness statement on 29 September 2017 where she stated that following the fall, she was plunged into a world of ongoing pain that caused her to visit a series of doctors. She averred therein to having suffered a previous neck injury in 2006 for which she had laser surgery. This old injury was not pleaded and there was no claim before me for aggravation of it. It was her evidence, however, that after that 2006 old injury and surgery, she led a normal life at home and work, even becoming the "top producer" on her job in 2008. Two days after the fall, specifically on 7 June 2014, she began visiting a series of doctors who engaged in a process of investigations, testing, referrals and prescriptions of pain medication and recommendations for physiotherapy and surgery[7]. The reports of the doctors who did not attend the assessment were subjected to Part 28.18 notices to prove so not given any weight.

WAS THERE A NEXUS BETWEEN THE SPINAL INJURIES AND THE FALL?

11. At the time of the assessment, it was clear that the claimant was suffering from injuries of the cervical and lumbar spine, as shown on the MRIs dated 07 June 2014. The radiologist who performed the MRIs, Ms Ameeta Varma, was not a witness but ample medical evidence was produced before the court that referenced the MRIs. At the crux of this case was whether the cervical and lumbar spine injuries, captured in the MRIs and used in other medical reports, were caused by the accident or predated them. Counsel for the parties held polarized positions on the issue of nexus, with the defendant's counsel being adamant that there was no link between the claimant's injuries and the accident. Indeed, the defendant insisted that the claimant did not discharge the burden of proof respecting causation and the evidence she adduced fell far below the standard required to discharge this burden. Counsel for the claimant

[7] Medical doctors visited included: Dr Samhasivan Kattamanchi on 7 June 2014 who referred her for an MRI on that same day; Dr Tomancock on 12 June 2015, 07 September 2014, 08 October 2014; Dr Ian Mahase who referred her for physical therapy 18 December 2014. She visited Dr Ian Pierre on 24 June 2014; Dr Spann, a neurologist, on 25 June 2014 and six other occasions; Dr Mahadeo on 08 January 2015, 10 June 2015 and 20 March 2017; Dr Brian Phelps 18 January 2016; and Dr Devindra Ramnarine on 18 March 2016 on request by the defendant's attorney

insisted otherwise, arguing that the defendant's expressed views contradicted with the medical evidence that showed spinal injuries from the fall. The claimant's counsel relied on all medical reports without differentiating between those properly before the court and those that were not. I considered the evidence produced, limited or otherwise, on the claimant's medical position before the accident, immediately thereafter in the MRIs and her ongoing complaints.

12. The three doctors who gave evidence for the claimant namely Dr Kattamanchi, Dr Pierre and Dr Mahadeo made no clear link between her injuries and the fall whilst the defendant's expert, Dr Ramnarine, delinked the two. Dr Kattamanchi, an emergency medicine doctor, was the first doctor to examine the claimant after the fall but did not provide a report. In his referral letter to Dr Mahadeo on 7 June 2014, he stated that she had fallen on her back, hit her head on the floor and was complaining of pains in the cervical and lumbar spine, for which he prescribed arcoxia and baserol. The claimant relied on this evidence as establishing causation, stating in her witness statement that Dr Kattamanchi had reviewed the MRIs. This evidence was far from the truth and refuted by Dr Kattamanchi who testified that she had never returned to him with the MRIs. Her counsel argued, however, that the 2008 surgery corrected the claimant's old injury, leaving her pain free and able to function in her professional, private and social lives. The fall was the only intervening event since her surgery in 2008; and she began experiencing severe pain and discomfort in her cervical and lumbar spine after it happened.

13. I considered whether the contents of Dr Kattamanchi's referral letter sufficed, on a balance of probabilities, as establishing a nexus between the claimant's injuries and the fall. During cross-examination, Dr Kattamanchi confirmed that he had neither looked at nor reviewed the MRIs, as she never returned to his office after that one visit. To my mind, without checking the MRI results, Dr Kattamanchi would not have been in a position to make a connection between the injuries shown on the scans and the fall. As a witness, he seemed particularly ill-prepared to assist the court with an initial diagnosis or a causative link, admitting during cross-examination that he had no

file by which he could confirm the claimant's medical history. He made clear only that his referral letter documented her past cervical spine surgery, and not the fall and spinal condition since he had not seen the MRIs. He testified that his suspicion was that the claimant was suffering from inter vertebral disc prolapse (IVDP) given her 2008 surgery for IVDP in her cervical spine but he had made no confirmed diagnosis. He testified that it was for the specialist to make his findings of a formal diagnosis. In my view, Dr Kattamanchi's evidence directly contradicted that of the claimant's and fell far short of supporting her case of a nexus between the alleged injuries and the fall. I am satisfied that Dr Kattamanchi expressed no opinion on causation in his referral letter or oral testimony and certainly did not opine on whether the IVDP of the C-spine was corrected by surgery in 2008 or no longer existed or that she was pain free. In fact, he had found nothing wrong with her neck although she complained of neck pain when she saw him. Dr Kattamanchi's evidence did not help the claimant's case on nexus.

14. The second doctor who treated the claimant was Dr Mahadeo, a specialist neurosurgeon and neurologist, who saw her on 08 January 2015, some six months after the incident. He provided reports dated 02 April 2015, 10 June 2015, 20 March 2017, the injury leave certificate and the estimate for future surgery to the C5/C6 disc herniation. His diagnosis was mechanical instability of the cervical spine due to C5-C6 disc herniation with spinal cord and nerve root irritation. In his June 2015 report, he recommended surgery and that she should use a rigid cervical collar for a maximum of six hours per day. During cross-examination, Dr Mahadeo admitted that the MRIs showed reversal of cervical lordosis or injury to the spine that could be linked to degeneration with advancing age or a major trauma to the spine. He stated further that unless there was significant trauma to the spine, he would not have expected reversal of lordosis at the claimant's age of 51 due to degeneration alone, but he has seen it at that age although it was not common. His evidence did not eliminate disc degeneration due to aging as a cause of the claimant's spinal condition nor did he say that there was evidence of trauma on the MRIs. He testified also that when he saw the claimant subsequently in 2017, muscle power in the upper limb had improved and

the flexion of the elbow and wrist had returned to normal. In his report dated 20 March 2017, Dr Mahadeo confirmed bilateral trapezius spasm and restriction of neck movement by 50% and recommended surgery on the cervical spine. This report comes some 3 years after the fall. In the probing of the causative link, during cross-examination, Dr Mahadeo acknowledged that he had not made any link in his reports between the claimant's spinal changes shown on the MRIs to trauma or the fall. During cross-examination, Dr Mahadeo agreed that a 51 year old, with a pre-existing condition or who required surgical intervention seven years earlier was someone likely to have suffered cervical lordosis at an earlier than normal age. In essence, her history of surgical intervention to the cervical spine seven years earlier could have sped up the natural degenerative process caused by aging**.** Further, Dr Mahadeo was clear that he had never made a finding on his physical examination of the claimant that her complaints related to the fall. He also did not find that the claimant suffered 'significant trauma' or any trauma from the fall. Dr Mahadeo mentions the disc bulges in the lumbar spine but the symptoms she describes related to the neck/cervical spine and not the lower back/lumbar area.

15. The third doctor visited by the claimant was Dr Pierre who did not produce a medical report. Dr Pierre examined the claimant nineteen days after the fall and viewed the MRIs prior to making his "diagnosis". It was a single visit and in a referral dated 24 June 2014, he made medical notations and a diagnosis based on his clinical examination of the claimant. His referral mentioned taking a history of the fall and that she was suffering with multiple cervical and lumbar disc protrusions, neck pains and upper limb paraesthesia. Based on this, counsel for the claimant argued that Dr Pierre's evidence clearly supports, on a balance of probabilities, a causal connection between the claimant's injuries and the fall. I disagreed. Dr Pierre never linked the pleaded spinal conditions to the fall anywhere in his viva voce evidence or in any of the documents he authored that were produced in court. During cross-examination, he admitted that he had made no nexus with the information she gave him nor did he confirm what had caused her symptoms. Dr Pierre also revealed during cross-examination that while his diagnosis of the claimant was within his area of expertise,

she required treatment from a specialist so he had referred her to Dr Spann to take her treatment forward. He admitted that he might not have considered the MRIs but based his "diagnosis" on the claimant's physical responses. This admission severely compromised his evidence and his responses were vague and lacking cogency, so I placed little, if any weight, on his evidence as establishing the nexus.

16. The three doctors called by the claimant failed to satisfy me that they had made the causative link or nexus between the fall and the MRIs in any document they produced into evidence. I turned to the evidence of the fourth doctor who attended the assessment. This was Dr Ramnarine, the defendant's witness, who during cross-examination stated that the MRIs showed disc bulges, which were consistent with a chronic ongoing degenerative process. He was clear that trauma, such as a fall, could have aggravated her existing condition but not caused it. According to Dr Ramnarine, spinal conditions are caused by degenerative diseases of the spine or by trauma and an MRI was sensitive enough to pick up acute traumatic changes from an injury. The claimant's MRIs showed no acute trauma to the cervical and lumbar spine but mild trauma to the sacral area, where an increased marrow signal was found, but she did not complain of pain in this area. Whilst his evidence does not dispute that she has a spinal condition, he disputes that it was caused by the fall. The cervical spine had a pre-existing condition and the 'mild degenerative changes' on the lumbar spine also pre-existed the fall and was due to a chronic ongoing process. Dr Ramnarine pointed also to inconsistencies in what the claimant reported to him, Dr Mahadeo and Dr Tomancock (who was not called as a witness) respecting the location of her pain. He felt that the possibility could exist that the fall might have aggravated a pre-existing condition but expressed concerns as to the veracity of the symptoms she described since her reflexes were normal, even though she had reduced power on her right side.

17. I noted that Dr Ramnarine pointed out that the MRIs showed an the increased marrow signal in the sacrum (buttock area) but that there was no complaint of pain in this area and the pleadings were silent on it. In my view, Dr Ramnarine's observation about the sacral spine was not conclusive of any traumatic injury in that area. During cross-

examination, Dr Ramnarine stated that the MRI documented that the sacral finding could be artifactual i.e. suggestive of inaccuracy or a system error. This statement by Dr Ramnarine was not taken by me as conclusive of systemic error and I applied no weight to it. In any event, the claimant raised no case about trauma or pain in the sacral area. I noted, however, that Dr Ramnarine's report of 27 April 2016 reflected her ongoing pain and that she had suffered reduced power on the entire right side; reflexes were present with no changes in sensation; and that there was no physical sign of spinal cord compression. He awarded her a partial disability of 48%. Dr Ramnarine recommended ongoing physiotherapy for her chronic pain. I noted also that he first examined the claimant on the 27 April 2016, at the defendant's request, some twenty-two months after the June 2021 fall. I, therefore, scrutinized his evidence but found him to be an independent witness of truth who pointed to the documentary evidence in support of his conclusions.

18. In the round, I was not satisfied on the evidence that causation was established. Dr Ramnarine's findings of pre-existing chronic degenerative process in her spine, and that her symptoms might be suggestive of an aggravation of a pre-existing condition, clearly delinked the fall from her condition. The other doctors made no link also between her spinal condition and the fall, with Dr Mahadeo expressing that position clearly. A claimant is responsible for showing the nexus or causation between her injuries and the tort. In my view, visiting a series of doctors with complaints of pain after falling does not create a nexus, without more. The finding of the existence of an injury, during a medical examination, which a claimant alleges was caused by a fall would also not suffice in establishing nexus, without more. A referral with notations on it that documents a history taken from a claimant of having fallen does not establish nexus or causation. A medical report or other medical document that makes no connection between the injury and the tort would also fall short in establishing causation[8]. These documents merely prove the fact that an injury existed on the date

[8] *Shelly Ann Richards-Taylor* v *AG* CV2012-02211 where Jones J stated that a medical report adduced at trial, at best, proves that on 6 June 2008 the claimant attended that Health Facility, complained of injuring her back while lifting a patient and, on examination, was found to have suffered certain injuries. It does not prove

of the examination or that there is a complaint of pain but not the cause unless the nexus is made. To meet the threshold of proof of causation, it is not enough for the claimant to say she has sustained injury, or that she feels pain, or that before the fall she did not have any injury to the lumbar spine without proof. These allegations are self-serving. This is even more so the case as this claimant who had a pre-existing spinal condition failed to plead it upfront. It is for her to prove the causative link between her alleged condition and the fall by adducing cogent medical evidence and she simply failed to do so.

19. The undisputed fact in the present matter is that the MRIs, taken in the immediate aftermath of the fall, showed no traumatic changes to the spine but reflected an ongoing chronic degenerative condition. The only evidence of trauma was slight and in the sacral spine area (buttocks), of which she did not complain. I am unable to accept, therefore, that the existence of complaints of pain two days after the fall automatically translates into a finding of causation, as counsel for the claimant would have me to believe. I disagreed with the submission of the claimant's counsel that Dr Kattamanchi's evidence clearly supports a causal connection between her injuries and the fall, on a balance of probabilities, as the fall was the only intervening event since her surgery in 2008. Nowhere in Dr Kattamanchi's evidence does he make any link between any symptoms reported to him by the claimant and the fall. In fact, he did not even view the MRIs before making his referral. I accepted that the MRIs pointed to chronic degeneration of the spine and, in any event, as Dr Kattamanchi never saw the results his evidence does not help the claimant's case. Further, a single visit to Dr Pierre nineteen days after the fall was not evidence of nexus or causation, as counsel for the claimant has argued. Dr Pierre did not confirm that the fall caused her injuries and gave no opinion on nexus in the matter, merely referring her to another specialist. In my view, further, neither of the two neurosurgeons who gave evidence linked the

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that the injury was sustained on the previous day merely because the injury was found to be present on the day after the accident. What is undisputed is the fact that on examination on 6 June 2008 the claimant was found to be suffering from a back injury, which allegedly was sustained the day before, while lifting a heavy person.

claimant's spinal condition to the fall. Rather, their evidence linked her spinal condition in both areas to a chronic degenerative process and not to trauma or the fall that forms the subject matter of this claim. Further, this was a claimant who had failed in her pleadings to disclose her pre-existing condition, which was a material fact that impacted her credibility[9] and was short in her details on this to Dr Kattamanchi. The defendant having disputed causation and having led positive evidence that the spinal damage shown on the MRIs were not caused by the fall or trauma based, it was the responsibility of the claimant to prove causation. Instead, the claimant adduced no evidence from her doctors to dispute the absence of findings on the MRIs of signs of trauma to the cervical and lumbar spine. I also disagreed with the conclusion of counsel for the claimant that Dr Mahadeo's evidence served only to delink the fall from the cervical spine and not the lumbar spine or that he had made a link between the claimant's spinal condition and the MRIs. The MRIs showed that she has a chronic ongoing degenerative condition and Dr Mahadeo, who did not make the nexus, never disputed Dr Ramnarine's findings. He also specifically never said that the fall caused 'significant trauma to her spine' or made any nexus between the two but mentioned it in the context of identifying the possible causes of loss of cervical lordosis. His evidence supported an ongoing chronic degenerative process unrelated to the fall.

20. Dr Mahadeo referred to her persisting pain going down the anterior thighs; and that the MRIs showed mild degenerative changes with a broad based disc bulges in the lumbar spine but did not link these to the fall. He also never diagnosed the claimant with any damage to the sciatic nerve. However, the claimant's counsel submitted that the sciatic nerve was injured although this did not form part of the pleaded case. Of note is the submission that the claimant had no medical history of injury to her lumbar spine where she developed the disc bulges at the L4/L5 and L5/S1 levels. However,

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[9] *Giselle Kahl* v *Seelal Harilal* CV2015-01254 where Sobion M stated of a non-disclosure of a pre-existing condition that, "*the failure of the Claimant to disclose such a material fact or alternatively to dispel any notion of a pre-existing condition ought certainly to raise doubts as to her forthrightness and candor".*

Dr Ramnarine's evidence was that he saw signs of age related chronic degeneration, which was not disputed by her doctors.

21. Further, some two years after the fall, Dr Mahadeo makes mention in the report dated 20 March 2017 of new complaints of pain in the lower back but expresses no opinion on the cause of this new symptom. In my view, if the claimant had pain in the entire spine including her S4 (buttocks) area, she ought to have pleaded it. She cannot use what Dr Ramnarine has said about the increased marrow signal as evidence to establish a traumatic causal link to the fall in other areas of the spine. Further, as her pleadings reflected no case on aggravation, I placed no weight on her counsel's belated attempt to introduce aggravation of a pre-existing condition in submissions. Of further note is that Dr Ramnarine expressed serious concerns about the veracity of the symptoms she described to him, given the inconsistencies shown in his own clinical test where she had normal reflexes despite her loss of power. Further, the claimant made her submission as if Dr Ramnarine had found as a fact that there was an aggravation of the pre-existing condition. He stated that there was a "possibility" that if her symptoms were true, there could have been an aggravation. A mere "possibility" is not a confirmed diagnosis of a condition. The evidence does not meet the required standard of proof respecting nexus and causation issues.

22. I found overall on the evidence that Dr Ramnarine was the only medical professional who gave a credible medio-scientific basis for his findings and conclusions on the nexus and causation issue. He addressed it frontally and proceeded to set out his scientific justification for saying that the claimant's injuries related to an ongoing chronic degenerative process that pre-existed the fall. Without the evidentiary link being made by any of the claimant's doctors or a contradiction of Dr Ramnarine's findings that chronic degenerative process was the actual cause of the damage to her spine, I was not satisfied that she had established nexus and causation. I have found as a fact that following the fall, the claimant visited a series of doctors for treatment allegedly for spinal pain. The medical evidence documented a history of a prior injury but this was not her pleaded case. After the fall, she averred to an uptick in pain and

symptoms but the MRIs showed no acute trauma to her cervical and lumbar spine. None of her doctors made a causative link between the fall and injuries flowing from it. I am not satisfied on the totality of all the medical evidence produced that the claimant's surgery in 2008 corrected the injury at her cervical spine in existence before the fall and she was injury free thereafter. Indeed, there was no medical evidence produced before me to support this fact. The evidence pointed to her having a chronic ongoing degenerative spinal condition and she has not proven that it was more likely than not that a nexus existed between the fall and any spinal damage pleaded.

DISCUSSION OF GENERAL DAMAGES

(a) THE NATURE AND EXTENT OF THE INJURIES

(b) NATURE AND GRAVITY OF ANY RESULTING DISABILITY

23. The nature and extent of the injuries as well as the continuing disabilities were set out in her claim and are, as lifted from the MRIs in evidence. Dr Kattamanchi, first in time doctor to examine her, made no diagnosis of her injuries as he was not privy to the requested MRIs. The above discussion under causation contained the full evidence of the nature and extent of her injuries as presented by the doctors who attended the assessment, so will not be rehashed here. Of note only is that Dr Ramnarine expressed his belief that she was exaggerating and inventing symptoms and his concerns as to her veracity. Further, Dr Ramnarine had referred the claimant to public care at the Eric Williams Sciences Complex but it would appear that she failed to access this free service. The claimant's evidence was that she has been attending the Eric Williams Sciences Clinic for medical treatment and her last visit there was on the 27 June 2017 where she received a prescription.

24. The nature and gravity of the claimant's injuries and the resulting disabilities are reflected in the medical evidence properly produced in court. Her counsel submitted on inadmissible evidence or evidence that was struck out[10] or for which counter

[10] Physiotherapist, Dr Ian Mahase's documentary evidence was struck out and a counter notice filed

notices were filed. There was evidence from her that she had challenges with driving and could not perform household duties. It came out during cross-examination that she was able to work two jobs at the same time despite her alleged challenges.

(c) THE PAIN AND SUFFERING ENDURED

(d) LOSS OF AMENITIES

25. The claimant averred that the fall was traumatic and she suffered grave physical pain, distress and emotional turmoil because of her spinal injuries, which was ongoing. Prior to that incident, the claimant's evidence was that she was living life pain free and unhindered in the performance of her ordinary daily activities of living. She had had a previous old neck injury for which she underwent laser surgery in 2008 but was recovered fully. This pre-existing injury was not pleaded but she introduced it through her evidence.

26. Whilst a court would be extremely reluctant to avoid trivializing the level of pain reported by a personal injury claimant[11], her credibility would be critical. Pain was subjective and every claimant's experience must be contextualized. The claimant's evidence was that her pain was debilitating such as to grind a previously normal life to a halt. She sought to convince me that after the tort, her life as she knew it came to a ruinous freeze by her pain, and she wanted adequate compensation for this. She was entitled based on the principle of *restitutio in integrum* to be returned to the place she occupied before the wrong.

27. The claimant's evidence was that she had continued to seek medical assistance from the date of the accident (2014) and that she was experiencing continuing pain and discomfort to date. During cross-examination, she stated, *" to date I continue to experience severe pain and discomfort in my head, neck and back altogether numbness in my hands and limited mobility".* The objective evidence of pain painted a slightly different picture. I considered the truthfulness of her evidence against the backdrop of her medical expenses claim. Severe pain would be reflected in her purchases of pain medication or through some evidence that it was being supplied free of charge. Despite being referred to free medical

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11 *Kenny Toussaint* v *Tiger Tanks Trinidad Unlimited and Bankers Insurance* CV2014-00513

care at the neurological unit of the EWMSC, she produced into evidence a blank clinic card, for her appointment dates, and claimed that she had received one prescription from that institution. There was no evidence produced that the prescription related to her spinal condition and the objective hospital records of the neurological unit indicated that she never attended any of the appointments. The only hospital record of a visit was to the Emergency Triage on 27 June 2017, after a syncope episode (fainting), where she complained of right sided weakness paraesthesia of the right hand and got the prescription. I assumed that either she was accessing private care or maybe her pain was not as debilitating as she sought to convey and she was exaggerating. This was a claimant who claimed to be in excruciating, ongoing pain but who produced not a scintilla of proof that she was currently seeing a doctor, whether privately or publicly or was on pain medication. She averred that on 20 March 2017, her pain and discomfort caused her to return to Dr Mahadeo for treatment. However, Dr Mahadeo denied this, making it abundantly clear that this was not the reason for this examination. Dr Mahadeo clarified that her examination on 20 March 2017 was for a re-assessment, which was requested by her attorney. There was no evidence also that the claimant had sought any medical treatment from the neurosurgeons for her spinal pain between 2015 and 2017.

28. The objective medical evidence produced in court clearly belied her case of ongoing pain and suffering for an extensive period after the fall. There was evidence that immediately following the incident, she visited a huge slate of doctors for treatment, which pointed to some challenges with pain. During cross-examination, she admitted that she was not under the care of any doctor at present. This admission signaled to me that her pain was now at a manageable level if not completely resolved. I, therefore, accepted that the claimant suffered pain initially, which negatively impacted her life but any pain became manageable thereafter. Of further note was that despite building a case of unceasing symptoms of pain, the claimant changed jobs and pursued higher studies post the fall.

29. The claimant built a case of having suffered a huge loss of amenity. She stated that she was prevented from driving or doing domestic chores but she produced no evidence that she had hired a driver and housekeeper. Also, her claim of being told not to drive was not

corroborated, as Dr Mahase's evidence was struck out and he did not attend court, so little to no weight was given to it. She alleged that her lifestyle changed, as she was recommended to wear a neck brace, use orthopaedic shoes and bed and undergo surgery to treat with her ongoing pain and discomfort but produced no proof. She averred to being unable to wear high-heeled shoes, attend social functions or exercise as she used to do. She had serious problems sleeping and was unable to stand or sit for any lengthy period without experiencing severe pain. She also experienced a sensation of pins and needles in her hands and legs and was unable to function without the use of pain medication. This latter claim did not translate into evidence of huge medical expenses for painkillers.

(e) PECUNIARY LOSSES

30. She claimed that she was rendered effectively unemployable and disadvantaged within the insurance agent labour market and has suffered huge pecuniary losses. The evidence produced showed that she held employment after the incident and even upgraded her educational qualifications.

COMPARATOR CASES

31. The applicable standard, when using comparator cases, was set down in *Aziz Ahamad* v *Trinidad Transport Limited*[12]. Comparator cases are to be used as no more than "a guide" for generalized benefits and must be considered in the context of their own peculiar facts. Accordingly, Wooding CJ stated of past cases that they, " *provide a general standard or judicial consensus but are nevertheless referable to their own particular facts … it should be borne in mind that every decision may have some effect one way or another in establishing a trend. Indeed, past decisions are only helpful when and because they establish a trend*." Several other principles on conducting an assessment have been judicially set forth and play a significant role in arriving at just conclusions. Assessors will have regard to these judicial guides including that the award is a single one. In arriving at the award, courts are to

[12] *Aziz Ahamad* v *Trinidad Transport Limited* 1971 1 WIR at page 357

proceed cautiously in using arithmetical calculations and take account of the effects of inflation on the value of the dollar over the years and the economic situation. Claimants were not to secure betterment but were entitled to be returned to the pre-accident position. Compensation was not perfect but appropriate. Counsel for the claimant submitted that $150,000.00 would be appropriate whilst counsel for the defendant suggested a range of $10,000.00-$30,000.00 would be just and fair.

(a) ***THE CLAIMANT's CASES***

- ***Peter Seepersad*** v ***Theophilus Persad*** [13] where a vehicle went off a fly over and landed on top a maxi taxi killing two passengers. The appellant suffered a concussion, whiplash and injuries to his back in two spinal areas, L5 S1, the 5th, 11th and 12th thoracic vertebrae, but no serious damage either to cause spinal cord or thoracic nerve root compression. He did not undergo any surgical treatment and was unable to operate his taxi as a full term taxi driver or as a mechanic. He suffered restricted mobility, could not lift heavy objects or take part in the limited recreational activities he enjoyed before the accident. He had severe neck pain, was hospitalized for five days and was awarded $75,000.00 for general damages.

- ***Maude Contant*** v ***Alvin Critchlow and Ors***[14] where a registered nurse, seated at the back of a standstill ambulance, which was struck by a vehicle from behind, throwing her forward. She felt immediate pain and swelling in her lower jaw and neck. Her injuries included chronic whiplash, loss of cervical lordosis, C2-3 to C4-5 levels: minimal disc bulge with no neural compression, C5-6 level: diffuse disc bulge with mild propensity to right indenting thecal sac with no neural compression and C6-7 levels: diffuse disc bulge with posterior right paracentral propensity indenting thecal sac with no neural compression. She was prescribed a cervical collar and was on paid sick leave for six months. Upon resuming duties, she claimed she could not handle the workload and expressed a desire to retire because of the pain and restrictions she felt at work. At the time of the assessment, she continued to

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[13] *Peter Seepersad* v *Theophilus Persad and Capital Ins* PC No 86 of 2002 & CA Nos 136 and 137 of 2000

[14] *Maude Contant* v *Alvin Critchlow, the Beacon Ins Co Ltd, AG, NWRHA, Rowan Cummings, Trinidad and Tobago Insurance Limited* Claim No CV2009-00561 (763/2005) delivered on 11 March 2014 by Sobion Awai M

experience pain and had to take painkillers and use muscle rubs regularly for relief. She felt that she could not jog, do aerobics, dance, swim or hike. She had difficulty sleeping, doing domestic chores and was heavily dependent on her children to assist with the housework. There was no evidence that the claimant was unable to perform her work as a registered nurse competently and she had no adverse job performance reports on her duties or absenteeism. Her employer also did not refer her to a medical board to consider her fitness for duty. She was even able to complete a degree and was given a promotion at work. Only one doctor gave evidence but the court found the medical evidence unreliable and lacking in factual and scientific basis. She was awarded $100,000.00.

- ***Reshma Choon*** v ***Industrial Plant Services Limited***[15] where while descending a flight of steps, the claimant slipped on a liquid substance and fell. She sustained injury to her spine L5/S1, requiring surgery, laminectomy and discectomy. The claimant was found to be exaggerating her symptoms post-surgery and not credible and was awarded $90,000.00.

32. A comparative analysis of the above cases with the present matter shows all involved spinal conditions. In ***Seepersad*** the appellant had a degenerative condition as in the present case at bar but no issue of causation existed or a finding that nexus was not established. ***Reshma Choon*** was also useful as it addressed the issue of the claimant's credibility, which also existed in the instant case. Counsel for the claimant's submitted that her injuries were more severe than those suffered by the claimants' in ***Seepersad*** and ***Reshma Choon*** and that the mental and physical anguish that the claimant would have endured to date and continuing ought to be properly compensated by the defendant. Counsel proposed **$150,000.00** as due compensation for this particular and significant loss. Given the claimant's credibility challenge and the failure to establish a nexus between her spinal condition and the fall, she was hardly likely to attract the huge sum being sought for the tort.

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15 *Reshma Choon* v *Industrial Plant Services Limited* CV2006-00574

(b) ***THE DEFENDANT's CASES***

- ***Giselle Kahl*** v ***Seelal Harrilal and Guardian General Insurance Ltd***[16] involving a 37 year old who was injured in a car accident while at a standstill when it was hit from behind. She suffered injuries to her spine, similar to the case at bar. She was also experiencing neck pains for about five years prior to her accident. Both cases addressed whether the injuries outlined by the MRI report were caused by the accident, bearing in mind that both claimants were experiencing neck pains before the accident. The court in ***Kahl*** also had to deal with a non-disclosure of a pre-existing cervical injury. The court awarded damages of $30,000.00, stating that any existing neck pain was relevant to the assessment and the claimant's failure to disclose such a material fact raised doubts as to her candor. The court emphasized the need to establish a valid connection between the accident and the cervical spine illness. Neither the MRI nor the medical reports confirmed this link to show that her condition resulted from the accident and not a pre-existing condition.

- ***Shahleem Mohammed*** v ***AG*** [17] involving swelling of the neck and knee injury, which attracted damages of $25,000.00. The court reaffirmed that a claimant must discharge the burden of proof by adducing evidence to support his claims.

- ***Wylie, Wylie Titus*** **v** ***Sorzano***[18] involving minor soft tissue injury to the shoulder, neck and head, where an award was made of $2,800.00.

33. A comparative analysis of the defendant's cases showed that ***Kahl*** was almost on par with the instant case. The other cases were both dated, whose use could produce skewed results so were inappropriate comparators. Like ***Kahl***, the present claimant did not prove that there was any nexus between the damage to her cervical spine and the disc bulges in her lumbar spine and the fall. Our claimant was found also to be massaging the evidence and so not a credible witness. I considered the several

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16 *Giselle Kahl* v *Seelal Harrilal & Guardian General Ins* CV2015-01254 delivered on 23 November 2016

17 *Shahleem Mohammed* v *Attorney General* CV2010-04096 delivered 06 May 2014

18 *Wylie, Wylie Titus* v *Sorzano* HCA S-733 of 1992

inconsistencies in the evidence of the claimant. In ***Texaco Trinidad Inc*** v ***Oilfield Workers Trade Union*** **Civil Appeal**[19] the court stated that, *"A witness who makes contradictory statements on oath on an issue which is the kernel of the case ought not to be believed unless he is able to give a satisfactory explanation for having done this..."* In making my award, I considered that her doctors had failed to make the causal link and the defendant's doctor firmly concluded that the claimant had a prior chronic degenerative process ongoing in her spine before the fall. I considered also that the claimant had suffered a tort at the incautious hands of the defendant and that having fallen would have endured some pain and discomfort. She was entitled to be compensated for her injuries, which she must prove, no more and no less but she failed to show nexus. In any event, her MRIs showed no acute trauma related spinal injuries save the mild trauma to her buttocks, which did not form part of her pleaded case. I also considered the ***Kahl*** award, made some five years ago in 2016, and found it particularly low. It was a useful comparator but not one that I felt was reasonable or could be justified and replicated on our facts. I also considered a few other cases[20] involving soft tissue injuries in the spinal area but, unlike in the current case, the issues of nexus and/or causation did not arise. The awards in those cases would largely have been for pain and suffering but I found them helpful comparators. Moreover, the present claimant's failure to disclose her pre-existing condition and her challenges with credibility would have influenced my award. I felt that she might have been exaggerating her pain to an extent but accepted that she would have suffered some severe pain initially and for a few months thereafter. In the circumstances, I awarded $65,000.00 to cover her pain and suffering and loss of amenities.

SPECIAL DAMAGES

34. Special damages ought to be pleaded and proven. It is for the claimant to demonstrate by way of evidence that the pleaded loss is a direct consequence of the defendant's

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[19] *Texaco Trinidad Inc* v *Oilfield Workers Trade Union* Civil Appeal (unreported) #42/1969

[20] *Andre Marchong* v *T&TEC and Galt and Littlepage Limited* CV2008-04045 delivered on 21 May 2010; and *Carolyn Fleming* v *AG* CV2007-02766 delivered on 21 May 2012

negligence. The fact of loss is not enough without proof that the loss flowed from the defendant's breach of its duty of care.

(a) ***PRE-TRIAL LOSS OF EARNINGS***

35. The law on loss of earnings simply mandates that whatever is claimed must be proven. Documentary evidence is usually required for such claims to be allowed[21]. Further, expert witnesses must furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions[22]. The claimant claimed $168,604.00 for loss of earnings, which by the assessment date increased exponentially to $494,460.00. This figure was based on a fixed monthly salary of $14,950.04 and that she was the "top producer" at Pan American Life Insurance ("PALITT"). Both the PALITT paymaster and Guardian Life record keeper explained that an agent does not work for a fixed income but earnings that are based on commissions, with an advance component that is based on commissions they expect or hope the agent will make.

36. The claimant claims loss of earnings in the global sum of $168, 604.00 stating that her ability to continue working was diminished. It was also her claim that her injuries rendered her effectively unemployable and severely disadvantaged to work in the insurance agency industry. Payslips from Guardian Life showed that she was employed there after May 2017, in July and August 2017. Further, she admitted that she started working as an executive administrative officer with Air Tactical Services Limited on 11 September 2017 and received a salary of $6,000.00 while also being employed as an insurance agent at Guardian Life from 11 November 2017. She also pursued tertiary education, an MBA, and other professional development courses, which came out during cross-examination. This evidence came in the context of her evidence that she was unable to sit or stand for long periods.

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21 *Edwards* v *Namalco Construction & Ors* Civil App 28 of 2011

22 *Dayal Moonsammy* v *Rolly Ramdhanie and Capital Ins* CA 62 of 2003, Kangaloo JA at pages 4 to 5 where medical reports were found to contain insufficient evidence to sustain a claim for loss of earning capacity

37. It came out in evidence that she never received a salary in the amount claimed, as agents do not receive fixed incomes, and that her earnings were based on commissions. The claimant was not forthright in bringing the requisite evidence to substantiate her loss of earnings claim. None of the medical doctors called suggested that she could not work post the fall because of any injury or symptoms attributable to the fall. She made a loss of earnings claim that proved to be a mixed bag of contradictions.

38. It was necessary to examine carefully her loss of earnings claim of $168,604.00 and continuing. In her statement of case, she stated that in or about 01 January 2001, she was employed as an insurance agent with PALITT, trading as Apostolos, at the time of the accident, and was earning a monthly salary of $14,950.34. In her witness statement, her loss of earnings was $357,600.00, which she admitted, during cross-examination, she has no evidence to support. In the witness stand, she admitted that the date 01 January 2001 was wrong and she actually had started at PALITT in June 2002, and she resigned in December 2010 and then she returned to PALITT in December of 2012. By the assessment, her loss of earnings were stated to be $494,600.00. In cross-examination, she admitted that she has produced no document to support these figures.

39. The paymaster from PALITT gave evidence on her earnings, stating that an agent's commissions fluctuate so are not fixed. In cross-examination, he admitted that none of his documents show her ever earning a salary of $14 950.00 a month. Her earnings depended on what business she generated. The defendant's counsel stated that when her payslips for 2013 were added up, her net income was shown to be $76,198.00 that year. The payslip dated 13 December 2013 from PALITT reflected a total earnings figure up to that time of $99,346.94, with deductions of $23,148.85 and the net pay (after deductions) to that date as $76,198.00. It meant that her average net earnings for 2013 was $6,349.83 per month. Her current income at Air Tactical Services Ltd was $6,000.00 per month.

40. Mr Brandon Primus, legal counsel for PALITT, attended court and sought leave to question PALITT's paymaster in order to clarify the figures on the PALITT payslips. When questioned, the PALITT paymaster admitted that the documents he produced, relating to the claimant's

earnings, reflected advances made by PALITT in the hopes that the claimant would make that amount in commissions. There was a projected commission/advanced income component which was reflected in the payslips. The claimant who would have known this chose to assert a fixed figure income. Aside from the lack of pleading respecting her employment status post the fall, the payslips that were produced from Guardian Life showed that the claimant worked there after May 2017 (i.e. in July and August 2017). In addition, Ms Marina Whiteman from Guardian Group attended court and gave evidence that the claimant's professional relationship with Guardian Life began on 01 November 2016. She resigned voluntarily and her resignation became effective on 01 February 2018, which was contrary to her evidence in chief that her contract had "expired" on 01 May 2017. There was evidence that she never was asked to leave and, in fact, Ms Whiteman's evidence directly contradicts this assertion by the claimant. Ms Whiteman also gave evidence that agents work in a system where advances are given to them. She also explained that if clients do not pay their premiums sometimes the insurance company has to take back the advances paid to the agent.

41. In my view, this aspect of the claimant's evidence with its contradictions and lack of forthrightness and truthfulness could not be relied upon to safely ground a claim for loss of earnings. In neither her pleadings nor her witness statement did she address properly the manner, mode and system of payment from PALITT and Guardian Life. There was a lack of credible explanation as to the advances and commissions components in the calculations of her earnings. She also failed to come clear on the variance in her net income over the span of her employment history, as an agent, with these companies. Instead, she asserted that she earned a fixed income of $14,950.34 on a monthly basis, which the documentary evidence from PALITT, Guardian Life and herself failed to corroborate when considered in the round. There were other aspects to this claim, however, that had to be considered before settling any decision as to loss of earnings.

APOSTOLOS BUSINESS & INSURANCE SERVICES LTD

42. The claimant claimed loss of earnings in her personal capacity in this matter. The evidence shows that she had incorporated Apostolos in January 2014. She gives no evidence respecting the workings of Apostolos and how she was paid by that company. Instead, she pursued this claim as if she were the employee of PALITT at the time of the fall. The evidence was that Apostolos was the agent of PALITT, not the claimant or indeed the claimant trading as Apostolos, as it was not a sole trader registered business. Apostolos was an incorporated entity and, therefore, a separate legal personality from the claimant. I considered whether the claimant, in these circumstances, could legitimately raise and maintain a claim for loss of earnings in her personal capacity. Apostolos, the company, was not a party to this action and the claimant was not entitled as of right to any loss of earnings that the company would generate. During cross-examination, she expressed an inability to recall that Apostolos, a corporate entity, had become the employee with PALITT from January of 2014. She admitted also that she was not employed as an agent with PALITT trading as Apostolos since 01 June 2002 as stated in her witness statement, since Apostolos was only formally an employee in January 2014. She stated, however, that Apostolos and she are one and the same with Central Bank and that she had ceased to be the agent, with PALITT in December 2013. By January 2014, any financing, commissions, loss of income, profits or anything arising from the arrangement or relationship with PALITT was earned and payable to Apostolos, not the claimant. In effect, Apostolos was not the claimant but her employer.

43. In the context of the above evidence, the claimant cannot claim loss of earnings earned essentially by another legal entity. She was not 'trading as' Apostolos, as it was an incorporated entity with a separate legal identity entirely from its directors. The claimant failed to set out her relationship with Apostolos in evidence or the fact that Apostolos was her employer at the time of the fall. She also did not file the claim on behalf of Apostolos or advanced any case that as an employee of Apostolos, she suffered a loss of earnings because of the fall. Her case was that she was "trading" as

Apostolos, which was the agent employed by PALITT, at the time of the fall. In my view, her claim for damages for loss of earnings by Apostolos was not maintainable. PALITT's contract was with Apostolos not the claimant. Apostolos and the claimant are separate legal entities and whilst she was a director of Apostolos, she was not Apostolos. As a matter of law, the claimant could not pursue, in her personal capacity, any loss of earnings suffered by Apostolos, as if she and that incorporated entity are one and the same. Apostolos was not a party to this claim nor has she provided evidence as to the relationship between this incorporated entity and her[23].

44. The separation between member and company was emphasized recently in ***Dave Singh*** v ***Anirudh Persad***[24] where the Privy Council refused to allow a landlord to recover rent from an individual when the lessee was not identified as the individual but a 'single man' company that the individual had incorporated. The arguments of the defendant on the separate juristic personalities of the incorporator/claimant and the incorporated entity/Apostolos, which rely on the layman's language of the paymaster, cannot render null or inapplicable basic legal principles in this matter. The claimant simply failed to justify why Apostolos and she are, in law, one and the same and should be treated as such against the weight of settled legal principles[25].

45. I considered that the claimant might have suffered a dip in her pecuniary prospects for a period after the fall but the evidence failed to show the actual extent of this loss.

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[23] The law holds sacrosanct the separation between the individual incorporator /director and the company of which he is a member. It is only in rare and exceptional instances the court will allow the corporate veil to be pierced. Where the loss was incurred allegedly by the incorporated entity, the individual in her personal capacity cannot pursue a claim for damages/loss of earnings.

[24] *Dave Singh* v *Anirudh Persad (2017) UKPC 32 where the Board stated that to "pierce the corporate veil" the conditions outlined in the Prest Petrodel Resources Ltd [2013] 2 AC 415 must be met. Thus, "piercing" will be appropriate only where a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.*

[25] *Salomon* v *Salomon* [1897] AC 22 sets separate juristic personality principle. "It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

I was not satisfied that her pleaded monthly earnings of $14,950.34 was corroborated by her documentary evidence or payslips. I accepted the evidence, which showed that she was not the employee of PALITT at the time of the fall but the employee of Apostolos. Indeed, it was Apostolos that held the contract with PALITT. She has produced no evidence respecting the organization of this incorporated entity, no evidence as to how it was managed including if and how it remunerated its members including herself (as a director) and her ex-husband (the other director). The lack of clear evidence left me to speculate if the claimant had sustained any loss of earnings as an employee of Apostolos. There was no evidence even to suggest that Apostolos could not continue trading.

46. The claimant appeared challenged with credibility throughout her evidence, leaving me to assume that she was using exaggeration, omissions, lack of recall and plain sanding down of the evidence to build the case she wanted. It was not about being forthright, upfront, honest or truthful but about shifting and massaging the information to hoodwink the court. In cross-examination for instance, she contradicted the documentary evidence about her employment with Air Tactical Services Ltd as a full time executive administrative officer to a two-day a week job as a consultant. I assumed it was her attempt to explain away how, with her ongoing pain and other physical challenges, she could hold down two full time jobs - with Air Tactical Services from 11 September 2017 and continuing employment with Guardian Life from 01 November 2016.

47. In the context of the evidence produced on loss of earnings, where the claimant stated that she was unemployable or severely disadvantaged in the insurance agent labour market, I am unable to find that her case was proved. She failed to amend her case to show that she was working at Guardian Life after the injury and since November 2016, including up to when she secured another full time job with Air Tactical Services earning $6,000.00. She was not truthful about how her relationship with Guardian Life ended, claiming her contract expired on 01 May 2017 (despite having payslips of July and August 2017) rather than that she had resigned voluntarily. Her ability to hold

down two full time jobs in her condition, where she alleged an inability to drive, sit or stand for long periods, pointed to a lack of credibility. I was not satisfied, therefore, that the claimant's ability to continue to work or earn income was significantly diminished or that she was effectively unemployable on the labour market.

48. I do not accept the arguments of her counsel that the evidence of Mr Smith of PALITT that her pay records for the year 2012, 2013 and 2014 showed that she earned approximately $4,300.00 per week. I also do not accept that he had sufficiently explained the nexus between Apostolos and the claimant as being only a name change used in the Career Agent's Agreement and/or that Apostolos and the claimant are one and the same with Central Bank. To support this argument, counsel pointed out that both Apostolos and the claimant have the same employee number and same NIS number. Counsel sought further to argue that Mr Smith confirmed the claimant's earnings prior to the fall as $4,300.00 per week which comprises various forms of earnings, bonuses and commissions; and that between 01 January 2014 to 10 June 2014 (a period of six months) she had earned a net income of $76,427.97.

49. Counsel further argued that Mr Smith has produced clear evidence of the true nature of the arrangement between the claimant and PALITT, including the mechanism and formula used to maintain the employer/employee relationship in circumstances where the employee was paid by cheque rather than being placed on the payroll. The court was asked to accept Mr Smith's evidence, the fact that the claimant had executed a contract on behalf of Apostolos in December 2013 and had continued to receive income from PALITT until February 2014 as sufficing to render irrelevant and inapplicable the principles on piercing the veil. The court was asked also to believe in the truthfulness of the claimant whose evidence was that her injuries clearly changed how she operated after the incident, in a job that she has performed for over 30 years. The court was invited also to accept that she was advised not to drive or travel for extended periods of time and that she be assigned to a desk job despite the medical evidence not being produced. The court was asked to find she cannot continue in her trade or occupation because of the injury and has suffered a diminution in her earning

capacity or alternatively that she was entitled to be compensated for a reduction in her earning capacity up to trial.

50. Counsel also submitted in the alternative that they were not disputing that since the accident the claimant was able to work on a limited basis. Their argument was that despite this, she suffered a diminution in her earnings. He worked her losses from 05 June 2014 to 28 March 2018 as being $855,700.00 with PALITT (i.e. 199 weeks x $4,300.00 per week). The claimant mitigated her losses by working with Guardian Life from 01 November 2016 to 01 February 2018 due to her disabilities. At Guardian Life, she earned $2,000.00 per month, which amounted to $30,059.25 for the above mentioned period. She never met the minimum criteria to get a permanent contract so got a job on 11 September 2017 with Air Support Tactical for $6,000.00 per month. Counsel submitted that she earned for the period 05 June 2014 to 28 March 2018 the sum of $110,428.51, rather than what she should have earned $855,700.00. Her loss, therefore, was $745,271.49. Alternatively, counsel for the claimant argued that should the defendant's argument about Apostolos be accepted then $86,000.00 (20 weeks x $4,300.00) should be deducted from $745,271.49 amounting to $659,271.49.

51. In my view, the claim for past loss of earnings *vis a vis* PALITT cannot be maintained by the claimant because she was not employed by PALITT. She was not Apostolos and Apostolos was not a claimant in this matter. She was not entitled to damages on the basis that because of her fall she lost income from PALITT. The issue of deducting from an award for past pecuniary loss, what would have been paid to Apostolos from the date of the fall to October 2014 when the relationship with PALITT ended does not arise. In my view, the claimant was seeking compensation from November 2014 onwards up to the assessment date using the Apostolos income data as her monthly multiplicand as if she were Apostolos. In effect, she was advancing an argument for past pecuniary loss based on earning figures belonging to another entity. In the circumstances, I did not consider it safe to use a net salary of $4,300.00 per week, which Mr Smith averred comprised her pre-fall earnings (i.e. an annual income of $223,600.00 of which $64,844.00 or 29% comprised deductions. This weekly

multiplicand of $4,300.00 was based apparently on what Apostolos made whilst it was contracted to PALITT. This figure cannot be used as a fixed weekly or monthly net earnings figure since apart from it being Apostolos' earnings, there was an advance component included (for both projected and renewal commissions). This component was based on the likelihood of an agent earning a particular sum for that period and clients renewing their policies.

52. In the context of the above evidence, I was minded to accept the defendant's submissions that any sum for loss of earnings suffered from the fall should be based on the PALITT payslips for 2013. These showed her net income was $76,198.00 that year, an average of $6,349.83 net per month. Considering the medical evidence, the lack of nexus between her spinal condition and the fall, I was minded to award loss of earnings for a nine-month period instead of the three-months suggested by the defendant. The claimant suffered a fall that caused pain, which would have required some time to be resolved or become manageable. The duration of pain is not predictable and cannot always be pinned down to a fixed period so I rejected the defendant's suggestion that it would have likely been resolved in three months. Rather, I considered a nine-month period to be more than reasonable for the claimant to have recovered from any minor effects that she might have experienced from the fall. Using $6,349.83 as a monthly multiplicand by nine months, I award her $57,148.47 for loss of earnings.

(b) COLLAR NECK BRACE

53. The claimant sought cost of a collar neck brace of $1,500.00. Dr Kattamanchi, who examined her two days after the incident, found no restriction of movement when moving her neck. Six months later upon the recommendation of Dr Mahadeo, she was asked to obtain a neck brace. She provided no evidence to support the purchase of the neck brace but claims she still needs it. This claim is disallowed for lack of proof.

(c) ORTHOPEDIC MATTRESS, BED BASE, SHOES AND FOOT ORTHOTICS

54. The claimant sought to recover the costs of orthopaedic bed $14,999.00, mattress $7,499.00 and shoes $1,000.00 and foot orthotics $1,200.00. She claimed these were recommended but produced in evidence no documentary evidence that these items were required because of the fall so were disallowed for lack of proof.

(d) MEDICAL EXPENSES AND PHYSIOTHERAPHY

55. Counsel for the defendant argued that medical expenses should be disallowed since the doctors were not treating her for injuries sustained in the fall given that there was no nexus established. The defendant suggests a reasonable figure of $300.00 for medication arising from any short-term symptoms connected to the fall. In my view, the defendant's tort led her to seek treatment for her pain for which she incurred expenses for doctors' visits and medication. The sum of $300.00 was unreasonable and rejected. She claimed physiotherapy of $250.00, which helps relieve pain and is reasonable. Based on documentary proof produced, I was minded to allow her to recover for medication and medical expenses the sum of $3,449.50.

FUTURE LOSS OF EARNING CAPACITY

56. The claimant sought an award for allegedly being unable to work in the future given that her ability to continue working was diminished significantly since the incident. Her counsel argued that there was no doubt that the claimant was totally incapacitated by her injuries and unable to attain maximum medical recovery. Counsel also argued that even Dr Ramnarine had recommended ongoing physiotherapy for her chronic pain and that both he and Dr Mahadeo recommended surgical intervention to treat with her ongoing symptoms and signs of instability in the cervical spine. Counsel then softened his position by stating that, on the evidence, the claimant clearly was not unemployable but still suffered a loss of earning capacity for diminution in her earning power resulting from the nature and gravity of her disability.

Counsel used a salary of $4,300.00 per week and a multiplier of six to reach an award of $457,217.28 ($76,202.88 x 6) representing her 48% loss of earning power for a period of six years. Alternatively, counsel asked for a lump sum award to reflect her diminution in earning capacity.

57. I totally reject this submission of total incapacitation as it was against the weight of the evidence. To attract an award under this head of damages, a claimant could be working as at the time of trial but face, *"a risk that he may lose employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damage from an actual loss of future earnings which can be proved at the trial."*[26] Loss of earning capacity would also apply where the claimant's inability to attain maximum medical recovery "*will disqualify her from obtaining present employment unless she obtains surgical intervention*". On the evidence, the claimant was employable and clearly working post the incident. To this end, I considered if the claimant will suffer some disability for the rest of her working life linked to the fall. I considered the lack of evidence on the nature of her work before the fall, the absence of a proper demonstration of why she could not continue working, the fact that she held two different jobs at the same time and that she was studying after the fall. Further, there was no medical evidence to suggest that she could not work post the fall. On the evidence, I could not conclude that she was likely to suffer future loss of earnings, was effectively unemployable and severely disadvantaged within the insurance agent labour market. Indeed, Dr Mahadeo had confirmed that her symptoms in the upper limbs have actually improved and the flexion of the elbow and the wrist had returned to normal. The onus was on the claimant to prove that her injuries affected her to the extent as claimed such that current earnings are diminished significantly. Given the huge quantum sought and the fact that none of the three doctors supporting the claimant's

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[26] *Moeliker* v *A. Reyrolle and Company Limited* [1977] 1 AER 9 per Lord Justice Browne at page 16; see also *Fairley* v *John Thompson Design and Contracting Division Limited* [1973] 2 Lloyd's Report page 40 at 42

case confirmed her incapacitation from injuries sustained in the fall, I could find no justification for making this award.

FUTURE SURGERY

58. The claimant claimed for future medical care including physiotherapy and surgery. Dr Mahadeo who recommended that she undergo anterior cervical decompression and fusion did not link this to the fall. Dr Spann who gave the estimate of $83,600.00 for this surgery never attended court to establish the nexus between her spinal condition and the fall. Dr Ramnarine, twenty-one months after the accident, stated that while the claimant may benefit from surgery there was no nexus between the fall and her condition. I am not satisfied that future surgery arise out of the fall. The claimant claimed an award of $88,500.00 under this head of damages i.e. surgery of $80,000.00 plus MRI scans for $7,600.00 and review of scans for $900.00. No award is made here because of lack of nexus to justify the claim.

DISPOSITION

59. It is hereby ordered that the defendant do pay the claimant as follows:
    i. General damages of $65,000.00 with interest at the rate 2.5% per annum from 27 October 2015 to 7 September 2021.
    ii. Special damages of $60,597.97 with interest at the rate of 1.25% per annum from 5 June 2014 to 7 September 2021.
    iii. Costs are assessed in the sum of $30,096.34.

60. It is ordered also that there be a stay of execution of this order of twenty-eight days.

Martha Alexander

Master

MARTHA ALEXANDER
MASTER OF THE SUPREME COURT OF
TRINIDAD AND TOBAGO