IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO CV2016-02111

BETWEEN

DENISE JAMES

First Claimant

DARON JOSEPH (AN INFANT)
BY HIS MOTHER AND NEXT FRIEND DENISE JAMES

Second Claimant

AND

DAREN JOSEPH

First Defendant

(T.A.T.I.L.) TRINIDAD AND TOBAGO INSURANCE LIMITED

Second Defendant

PRIAM DUBAL DASS

Third Defendant

NAGICO INSURANCE COMPANY LIMITED
formerly known as GTM INSURANCE COMPANY LIMITED

Fourth Defendant

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Before: Master Alexander

Date of delivery: **June 10, 2020**
Appearances:
For the Claimants: **Mr Edwin Roopnarine instructed by Ms Shanta Balgobin**
For the 3rd & 4th Defendants: **Mr Richard Arjoon Jagai instructed by Mr Sham Sahadeo**

DECISION

BACKGROUND

1. This claim was brought for compensation following a motor vehicle accident that occurred on June 25, 2012. The claimants were passengers in motor vehicle registration number PBB 338, which was involved, allegedly, in a violent head on collision with vehicle registration number PBA 9086. The accident occurred along Cora Road, Cumuto, as both vehicles were approaching from opposite directions. At the material time, vehicle registration number PBB 338 was owned by the first claimant, and was being driven by her husband, Daren Joseph, who was also the first defendant in this matter. Subsequently, the claimants withdrew the claim against the first and second defendants by notice filed on September 19, 2016. At a case management conference on November 18, 2016, judgment was entered against the third and fourth defendants (hereinafter 'the defendants') for liability and the assessment of damages referred to a master. In this assessment, parties held diametrically opposed positions on the specific issues of loss of earnings, loss of pension and future surgery, with both sides taking different stances on what constituted fair and appropriate compensation for the personal injuries, losses, and inconvenience suffered.

THE EVIDENCE

2. The first claimant called in addition to herself the evidence of Daren Joseph and Vashti Maharaj, a witness from the Treasury Division (Ministry of Finance). There were certain facts in this case that were not in dispute including that, at the time of the accident, the first claimant was a renal failure patient[1] with end-stage renal disease secondary to hypertension. It was also not in dispute that

[1] Medical report of Mr Dean Baiju dated December 06, 2012

pre- accident, the first claimant was receiving long-term haemodialysis at the Sangre Grande Hospital in the Dialysis Unit three times weekly. The first claimant pleaded also that at the material time of the collision, she was employed as a Clerk 1 at the Ministry of Trade and Industry where she was receiving a net salary of $5,516.00, which was inclusive of an acting allowance in the sum of $1,471.00.

GENERAL DAMAGES (FIRST CLAIMANT)

3. The responsibility of determining what would constitute fair compensation for both claimants in this matter was entrusted to this court. Thus, this court embarked on a consideration of the principles set out in ***Cornilliac*** v ***St Louis***[2] to arrive at the appropriate quanta. Of prime relevance in guiding the process was the principle that the object of damages in a personal injury matter was *restitutio in integrum* or putting the claimant back into the position that she was in prior to the tort. To achieve this, a claimant has the duty to prove the damages claimed, which in effect means that all losses must be supported by evidence. In any assessment, it is the evidence that influences the award with the process also being aided by judicial precedents. So the mind of an assessing court would always be aware of and guided by the wealth of judicial utterances including that:

Litigants and their advisers in this jurisdiction must come to understand that motor vehicle accidents, though unfortunate, are not lotteries with huge jackpots to be won. They must also understand that perfect compensation is never available, all that is, is adequate or fair compensation, and that the tendency to ask for the moon and the stars with the hope of settling for less,

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[2] *Cornilliac* v *St Louis* (1965) 7 WIR 491 where the relevant principles were identified as: the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering which had to be endured; the loss of amenities suffered; and the extent to which the claimant's pecuniary prospects have been materially affected.

achieves very little and is counterproductive in so many ways. Litigants are far better off presenting credible, accurate and precise evidence, rather than that which is unsubstantiated, exaggerated and vague.[3]

4. The first claimant pleaded that her injuries were a blocked fistula and abdominal injuries. This resulted in pain to her chest, back, neck and knee. She provided four medical reports into evidence, adduced by hearsay notices dated May 28, 2018: report of Dr Andre Thomas dated September 27, 2012; report of Dr Kareema Ali dated November 26, 2012; report of Dr Dale Maharaj dated February 19, 2013; and report of Mr Dean Baiju dated December 06, 2012.

5. The first report of Dr Andre Thomas dated September 27, 2012 was issued from the Eastern Regional Health Authority ('ERHA') and it documented the complaints of pain by the first claimant. It was noted also that her Arterio-Venous fistula was non-functional 'likely' secondary to trauma sustained in the accident. She was diagnosed therein as having suffered soft tissue injury consistent with the said trauma. Some five months after the accident, Mr Dean Baiju stated in his report dated December 06, 2012, that the left arm fistula had stopped working; and that she had suffered a loss of consciousness for 'a few minutes' in the A&E Department. The report also noted that there was swelling in the right neck and pain in left lower ribs, described as mild tenderness with no swelling or restriction of respiration. Counsel for the defendants pointed out that Mr Dean Baiju was making the link that the AV fistula had stopped working because of the trauma and that the first claimant sought treatment at the St Clair Medical Centre where she had the AV fistula procedure done in 2008. A surgical procedure to remove a clot at a cost of $27,000.00 was carried out but the fistula remained non-

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3 *Mario's Pizzeria Limited* v *Hardeo Ramjit* Civ App No 146 of 2003 @ para. 32

functional. The first claimant's case, therefore, included that the AV fistula has to be re-done at a cost of $30,000.00. The defendants accepted the diagnosis in the ERHA's report of soft tissue injury suffered by the first claimant but sought to delink the non-functional AV fistula from the trauma. That initial diagnosis in the ERHA's report of the 'likely' link between the non-functional AV fistula with the accident was a thorny issue between the parties. Counsel for the defendants submitted that as the first claimant did not call her attending doctors, they were not provided with the opportunity to cross-examine them on the issue of the non-functional AV fistula and the effects on her. The court was asked to hold that the first claimant had suffered only soft tissue injury to her head, neck and chest arising from the trauma of the accident leading to complications to her left arm and neck. The defendants' counsel argued that this was the only medically confirmed position, as it was set out in the initial ERHA's report.

6. In the view of this court, all the medical evidence was properly before it. It was unable to view favourably the invitation of counsel for the defendants to accept only the part of the ERHA's report containing the diagnosis of soft tissue injury, and to ignore the statement making a possible link between the accident and the non-functional AV fistula. Whilst the court agreed with counsel that the non-availability of the attending doctors for cross-examination placed the defendants at a disadvantage; this was not considered as sufficient ground for this court to ignore medical evidence validly placed before it. The non-functional AV fistula and the effects on the first claimant were material parts of her case, and all efforts should have been made to clarify any continuing nebulous issues between the parties. Despite this, it was felt that there was medical evidence properly before the court to assist its consideration. Thus, the evidence of the soft tissue injury consistent with trauma and that the AV fistula was non-functional 'likely' secondary to trauma sustained in the accident was accepted, together with the

evidence in all reports before the court. The nature and extent of the injuries suffered by the first claimant were accepted by this court, therefore, as comprising of the contents of all the medical reports before it.

7. By large, the evidence was not contested as to the gravity of the resulting physical disability. Essentially, the first claimant suffered soft tissue injury, which would have caused her to endure short-term discomfort. Notably, the medical evidence was silent as to the need for domestic assistance, bed rest or time away from work. Usually, where there was no medical bespeaking of the need, following injury, for such assistance and/or recuperative downtime, the court would presume that these were not necessary.

8. While objective medical evidence of pain and suffering linked to an injury is helpful, a court is always better served, when it understands that pain is subjective, and that a claimant is best placed to advance the evidence of his pain. This court, therefore, closely and meticulously considered the averments of the first claimant as to her pain following the injury. In her evidence in chief, the first claimant stated that when the accident occurred, the left side of her body was slammed against the left side of the car, rebounded, and then went forward before slamming back against her seat. She alleged that she was in shock by what happened but was able to exit the vehicle. In the immediate aftermath of the accident and continuing to present, she, allegedly, experienced severe pain throughout her body. She averred to being unable to use the bathroom by herself and that she was dependent on her husband to care for her. Also in evidence, was that the first claimant had spent approximately two weeks at the Sangre Grande Hospital, where she underwent treatment and the insertion of a temporary Perm-Cath. Ostensibly, this procedure was necessary as her AV shunt had stopped working because of the accident. She stated, further, that this

procedure and her injuries caused her unbearable pain, which continued after her discharge. Pain medication provided little relief and she would become overwhelmed by the pain that she would most times give up on trying to move around or perform her personal hygiene. She claimed that her husband helped her to access the bathroom and toilet and generally took care of her for approximately four months after the accident.

9. She avowed also that sometime after her discharge, she underwent surgery at the Sangre Grande General Hospital, to restart her AV fistula that was non-functional. This procedure was unsuccessful and after a second attempt at the procedure sometime in January, 2013, she developed several complications, which warranted further testing. She claimed that she experienced depression because of these procedures.

10. This court stiffly resisted counsel's attempt to convince it that the first claimant's evidentiary recounting of her pain and suffering was truthful. In fact, this court formed the opinion that this aspect of the first claimant's evidence was perfidious and porous, and totally unsupported by her medical evidence. While it was accepted that the first claimant would have endured pain upon the impact, and continuing in the aftermath of the accident for a period; overtime, this pain would have been on a decreasing level. Her attempt to mount a claim that her pain from the accident continued unabated during her recovery period, with the same sustained level of intensity to present, smacked of a credibility challenge. Moreover, it was noted by this court that there was no updated medical to support the claim that her pain continued, at the same elevated level as occurred on impact and in its immediate aftermath, and remained unchanged. Her available medical evidence, albeit dated, also failed to speak to her unending complaints of pain of excruciating intensity and continuation. The absence of independent medical evidence documenting her treatment with painkillers or of

receipts evidencing such purchases did not aid her case. The attempt to sell this court the story that the level of intensity of her pain from soft tissue injury continued undiminished in concentration and duration was unfortunate and unaccepted. At the risk of offending, this court wishes to reiterate that evidentiary perfidy is counterproductive whilst, at the same time, identifying with the sentiments expressed by Kangaloo JA that, '*Litigants are far better off presenting credible, accurate and precise evidence, rather than that which is unsubstantiated, exaggerated and vague.*[4]' It was concluded that the evidence as to never-ending, same intensity pain must be rejected as being massaged to influence a higher award. Moreover, it was inconsistent with the injury suffered and, certainly, not mirrored in the medical and documentary evidence before the court.

11. The first claimant averred to having suffered a huge loss of amenities, stating that the accident significantly changed her life since she now has to endure pain every day and was boarded medically unfit from her occupation. She claimed that she was unable to work as her left hand was restricted and the pain she continued to experience limited her activities such as gardening. She stated further that much of the enjoyment and fulfilment that she previously experienced from working has gone from her life. In the view of this court, the first claimant suffered a soft tissue injury so it was reasonable to accept that it would have impacted her life, initially slowing down her activities and dimming her joy in living life. There was no medical evidence provided to support any case advanced by her that her soft tissue injury permanently excluded or temporarily restricted her from participating in gardening or other similar physical type activities. This court was willing to accept that in the immediate aftermath of the accident and during her

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[4] *Mario's Pizzeria Limited*, supra

recovery from soft tissue injury, the first claimant's physical activities might have slowed or even stalled temporarily, but that any claim to a permanent deprivation of enjoyment of life because of this accident was manufactured. Her claim for loss of amenities was viewed with suspicion, and as being inflated to attract an undeserved award.

CASES

12. All cases provided by counsel are set out hereunder:

    i. ***Ferosa Harold*** v ***ADM Import and Export Distributors Limited***[5] where a claimant slipped on some substance and fell in the defendant's business place. She was diagnosed with soft tissue injury to the neck, lumbar spine and left shoulder. She suffered with pain and tenderness in her left wrist, lower back, left knee and ankle and was awarded $60,000.00 plus interest in general damages. The claimant in ***Ferosa Harold*** gave evidence that during the 7-year period from injuries to trial, there was no improvement in her daily pains and this affected every facet of her life. She could not sit in one position for too long, walk upstairs or perform domestic duties of cooking and washing wares. In ***Ferosa Harold***, the court was not satisfied on the medical evidence that she was disabled to the extent claimed and actually found Dr Pierre's evidence was not an independent, objective and scientific assessment of her disability but read as if it were a repetition of the claimant's complaint made to him. The court also expressed concerns about that claimant's credibility.

    ii. ***Lennard Garcia*** v ***Point Lisas Industrial Port Development***[6] where a 60 year old claimant sustained injuries twice; initially from a fall after slipping on some

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[5] *Ferosa Harold* v *ADM Import and Export Distributors Ltd* CV2009-03728 delivered on April 17, 2015 Alexander M

[6] *Lennard Garcia* v *Point Lisas Industrial Port Development Corporation Ltd* CV2010-03061 delivered on September 19, 2013 Alexander M

oil at the defendant's workplace and then at the hospital when he was dropped from a stretcher. His injuries were to his upper right shoulder, left palm, soft tissue injuries to his back and right knee; persistent right-sided sciatica; degenerative spinal stenosis at L4-5 and L5-S1 levels. He experienced daily lower back pain, which was radiating down his left leg to his knee posteriorly, and there was triggering of the left middle finger in his left palm. He also had mild prolapses of the L3-4, L4-L5 and L5-S1 discs; mild spinal canal stenosis at L3-L4, L4-L5 and L5-S1 areas of the discs; some nerve root entrapment on the left side; pain when sitting, standing and walking; weakness in his left leg and wasting of his left quadriceps muscle from the nerve being pinched by the prolapsed disc. Medical evidence pointed to him getting moderate to severe lower back pain for the rest of his life, with the only means of relief being analgesia and if he loses weight. He was awarded $80,000.00 in general damages.

iii. ***Hector*** v ***Bhagoutie and Reinsurance Company***[7] where a claimant suffered injuries to the neck, chest and shoulder, with continuing neck and right shoulder pains. The claimant felt intense pains for three months and some eighteen months after the accident he could not participate in sports, bend or stand for long periods without feeling pain in his shoulder and neck. Medical evidence showed that his daily activities were affected and he was unable to perform his work. He admitted, however, that the lingering disabilities were relatively minor pain and discomfort and he was awarded $19,000.00 updated in December 2010 to $28,110.00.

iv. ***Harbackan*** v ***Samlal***[8] where for multiple bruises to the right hip region, contusion to the chest wall and sterna area, tenderness over the right ribs,

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[7] *Hector* v *Bhagoutie and Reinsurance Co* HCA S-1115 of 2000 delivered on June 14, 2006 by Kokaram J (as he then was)

[8] *Harbackan* v *Samlal* HCA S-182 of 1985 delivered on October 13, 1989

whiplash injury to the neck and minor concussion, an award was made of $6,500.00 as updated to December, 2010 to $24,163.72.

v. ***Gittens* v *Hutson***[9] where for trauma to the head and right chest; loss of consciousness for an undetermined period of time; a 5 cm laceration behind right ear; a 2 cm wound on his right forehead; and tenderness in the right chest an award was made of $5,000.00; adjusted to December 2010 to $14,855.00.

DISCUSSION

13. A comparative analysis of the above with the present matter at bar shows certain similarities in that the main injury in all cases was soft tissue. The soft tissue injury manifested differently in each case and caused slight variations in continuing effects. Some cases also had evidence of other minor injuries such as laceration, multiple bruises, contusions, mild disc prolapses and nerve entrapment issues that were not present in the matter at bar. Holistically, it was found that the cases provided excellent comparative gauges for assessing the first claimant's award. In so doing, this court found that the injuries in ***Garcia*** were more wide-ranging and somewhat more severe than those at bar, so that case could be distinguished. Further, in ***Ferosa Harold*** that claimant, while presenting with soft tissue injuries, also suffered loss of cervical and lumbar lordosis linked to the injury, as confirmed by her medical doctor. Of peculiar usefulness were the cases of ***Harbackan*** and ***Hector***, which together with the common principles employed on assessments formed the sturdiest comparative platforms for fixing the current award. This court bore in mind all the evidence before it, the precedents provided and its finding of a not so subtle attempt, by the first claimant, at convincing this court that she continued, to

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9 *Gittens* v *Hutson* HCA 290/1990 delivered on March 29, 1993 by Paray-Durity M

present, to experience unrelenting pain at the same level of intensity. Having rejected this aspect of the first claimant's evidence and, in a bid to render a fair and just award, this court concluded that $50,000.00 was appropriate as general damages for pain and suffering.

SPECIAL DAMAGES

14. Any claimant who approaches an assessing court with a claim for special damages must do so with the expectation that he has to prove his losses. A claimant should not commence suit, particularly where he makes a claim for special damages, with the intention upfront of not proving his case. It will serve a claimant better to bring evidence that is trustworthy, clear-cut and detailed in proof of his claim, rather than to plan from upfront to come unprepared and bereft of evidence, with the aim of throwing himself at the feet of the court so it would exercise its discretion in making a favourable award. This tactic of relying on a court utilizing a flexible approach to special damages, whether a claimant can or cannot produce evidentiary support for his claim, is contrary to the law that requires proof of special damages. An assessing court should never wane on its firm application of the law that special damages are to be pleaded, particularized and proved strictly. These damages are exceptional in nature and capable of identification, setting out and being supported by documentary and other proof. So short of there being exceptional circumstances, where the proof is hard to come by, a claimant should come armed with a documentary arsenal of evidence to support his claim[10]. Expected also is that a claimant would have specifically set out his claim, with full particulars, so that a defendant is apprised upfront of the case he must meet.

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[10] *Mario's Pizzeria Limited* v *Hardeo Ramjit* Civ App No 146 of 2003

15. In the present matter, by amended statement of case, the first claimant specifically pleaded the following:

i. Medical expenses

The first claimant sought $38,862.00 for medical expenses, providing evidence in chief as to how she had incurred this sum. She relied on a report of Caribbean Vascular & Vein Clinic dated February 19, 2013 and medical receipts, which were admitted into evidence by hearsay notice. She can recoup $38,862.00.

ii. Domestic Assistance

The first claimant specifically claimed domestic assistance of $2,500.00 from June 25, 2012 and continuing in her amended statement of case filed on November 16, 2016. She gave evidence of being in unceasing and debilitating pain, which restricted her movements and ability to self-care, and so required domestic assistance. She provided evidence in chief, of receiving such care from her husband for approximately four months after the accident (i.e. from June-November, 2012).

Interestingly, this plea for continuing domestic assistance was contained in a statement of case filed initially on June 22, 2016 and amended on November 16, 2016 with no revisit of the pleaded case. Why would the first claimant insert a plea for continuing domestic assistance in a statement of case filed more than four years after the accident, when she would have been aware that this was not the case? She was clear in her evidence in chief, as corroborated by her husband, Daren Joseph, that she only required the assistance at home up to November, 2012 after the accident because of the constant pain. 'At home, I needed a lot of care because I was **unable to do anything for myself up to November, 2012**. I remained **mainly in bed during these months** until I was able to move around on my own. Both my sister and husband took care of me.'

(Emphasis the court's.) The court extracted from the first claimant's evidence that in the four months after the accident, there were times when she was not confined to bed and that while she allegedly needed 'a lot of care', this did not mean 'constant' or 'full time care'. Further, the court assumed from the first claimant's evidence that the alleged need for domestic assistance for self-care stopped after four months post-accident or, at the very least, was reduced substantially. The court observed that she provided no medical evidence to support her case that she needed domestic care after the accident, and the timeframe of such assistance. If in a case of soft tissue injury, there was any requirement for domestic care for twenty-four hours per day, for at least a four-month period, and possibly continuing, whilst the first claimant recuperated, the medical reports should have detailed this. The silence in the reports was inferred negatively against this claim advanced by the first claimant. Similarly, the evidence of her sole witness, husband Daren, was viewed as self-serving when he stated that, "at home, Denise was on bed rest. I would do most of the housework and look after Denise… When I was at work, I worried about Denise at home and I would always call her during the day to check in." In the absence of medical evidence, it was presumed that her bed rest was self-advised and recommended, including the length or period for which domestic assistance was needed. Her failure to take advantage in her amended claim to set out an accurate case for homecare was inexcusable. In the view of this court, it was beyond suspicious that several years after the accident, she would file a claim for continuing homecare when she allegedly utilized four months' assistance.

It was considered that the first claimant had suffered no bony injury and used no assistive devices for ambulation. It meant that, most likely, she would not have needed extensive or even the four-month domestic care of which she gave evidence. It is always unfortunate when a claimant departs from the pleaded

case, but when the opportunity to revisit the claim is not seized upon and the situation is compounded with evidence contrary to the pleaded case, the court must scrutinize the totality of the case and evidence presented to arrive at fair compensation. Further, and in any event, the first claimant's evidence as to unending pain, continuing at an unreduced level post-accident, was not accepted as a truthful presentation of the evidence as to pain and suffering. Moreover the cases[11] relied on by her counsel to justify an award under this head all involved injuries of a particular severity and spread that bore no equivalency to the first claimant's minor injuries. In fact, this head of claim was starved evidentially of medical and other credible details surrounding the alleged provision of homecare, save the claimant's self-serving evidence. Given the evidence, this court found that this claim, as mounted in the elevated sum, was contrived; and was only prepared to allow her a sum to cover at maximum two weeks domestic assistance for the injuries suffered. She can recover $1,250.00, as reasonable and fair compensation in the circumstances.

iii. Travelling and continuing

This first claimant claimed travelling expenses in the sum of $1,800.00 and continuing without tendering evidence on this in her witness statement or through the provision of receipts or other documentary proof. She did not set out the alleged dates travelled or provide information on the nature and purpose of purported journeys. Indeed, there was absolutely no foundation constructed to platform this claim, give proof to it, convince of its reasonableness or even corroborate it. The law requires the first claimant to prove this claim strictly; but instead she failed to convince the court, on a balance of probability, that she had incurred the sums as claimed or any reduced

[11] *Amanda Duncan* v *Neil Mungal & anor* CV2013-03270; *Ian Sealy* v *AG* CV2016-00004

amounts under this head. It was determined that there was no evidential basis for such an award so none was made.

iv. Property damage

The first claimant claimed $575.00 for the Adjuster's Report (invoice provided) and $20,000.00 for salvage value of her motor vehicle PBB 338. The motor survey report from Ezee Adjusting Services ('the report') sets out the pre-accident value of PBB 338 as $32,000.00 and its salvage value of $12,000.00. The report advised that the claim be settled on a constructive loss basis. She can recover $20,575.00 under this head.

v. Loss of use

Loss of use was claimed in the sum of $8,400.00 for forty-two days at a cost of $200.00 per day. In evidence, she advanced that she did not have the use of her vehicle for approximately six weeks. Counsel for the defendants objected to any award being made hereunder on the basis that no evidence as to the cost of alternative transportation was provided. In the view of this court, the first claimant was not the author or contributor to the accident that led to her losses and, to be fair she should be compensated for being without her vehicle. An appropriate award for loss of use is $150.00 for forty-two days in the sum of $6,300.00.

vi. Loss of earnings

The first claimant pleaded loss of earnings in the combined figure of $6,900.00. In her viva voce evidence, she confirmed that she was employed at the Ministry of Trade and Industry, earning a net salary of $5,115.00 as a Clerk I and $1,103.00 as a Clerk III, which when combined totalled $6,218.00.

A witness, Mrs Vashti Maharaj, was summoned from the Ministry of Finance, who confirmed that the first claimant worked for twenty-two years and eight months and, at the time of the accident, was employed as a Clerk I, in the acting position of Clerk III. Mrs Maharaj testified that the first claimant held several acting positions and was in the employ of the Ministry up to November 16, 2014, when her employment ceased because of ill-health. The first claimant sought compensation for loss of half her income from January, 2013 to June, 2013 and loss of full income from July, 2013 to November, 2014. She did not produce pay slips for the period where she claimed that her salary was discounted by half for six months in 2013. Mrs Maharaj confirmed, however, that as of November, 2014 the first claimant's employment ended for ill-health.

Counsel for the defendants pounced on the failure of the first claimant to produce documents in support of her claim for loss of earnings. He outlined these 'missing documents' as those that could confirm:

(a) her date of appointment and if it was for a fixed or indeterminate period;

(b) any sick leave, extended medical leave or injury leave;

(c) she was medically boarded or that her retirement on grounds of illness was voluntary; and

(d) the collision led to the cessation of her employment, as opposed to her pre-existing illness.

Counsel then pointed to the evidence of Mrs Maharaj, which showed from files in her possession the acting appointments of the first claimant were for the periods January 08, 2007 to December 31, 2007 and January 01, 2008 to January 07, 2008. She then went to the Immigration Department as an Immigration Officer I from February 08, 2008 to June, 2008; July 01,

2008 to July 08, 2008; July 23, 2008 to August 13, 2008 and August 15, 2008 to December 08, 2008. Mrs Maharaj was not in possession of documents to corroborate the first claimant's claim that she held acting appointments immediately prior to the accident. Counsel asked, therefore, that in the absence of records furnished by Mrs Maharaj evidencing acting appointments, this court should not entertain the claim.

In the matter at bar, it is imperative that this assessing court seeks to do justice upon a fair contemplation of all the evidence before it. First, the first claimant produced pay slips that clearly documented that she was in receipt of an acting allowance immediately preceding the accident for the months of May and June, 2012. Her pay slips for August – November, 2012 all documented that she was not in receipt of acting allowances, which it can be assumed meant that there was some intervention that halted the allowance. It was the first claimant's responsibility to clarify the position with her acting allowance for this court, by bringing her employer, her treating doctors or through the provision of other documentary evidence. It was not the duty of this court to prove the first claimant's case but to consider the full extent of the evidence placed before it and arrive at its best decision. In this case, the court cannot accede to the invitation of counsel for the defendants and refuse to award a sum for losses under this head of claim. That would be patently unfair, as she has produced some evidence that she was earning an acting allowance when her working life was interrupted, rather unceremoniously, by the defendants' tort. That she failed to furnish complete or more fulsome evidence of this pre-accident loss and that such evidence was available and simply not pursued were facts accepted by this court. However, this court would not fall prey to the defendants' counsel contention that there was no evidence before

it to 'corroborate that the first claimant held an acting appointment immediately prior to the accident.' Her evidence was not flawless and as a provable head of loss, an assessing court would always better be aided by clear evidence of such a pecuniary loss. Further, the evidence of Mrs Maharaj showed that there were brief intervals (e.g. between July 08, 2008 to July 23, 2008) when there was no information as to increased earnings or acting allowances and the first claimant provided no explanation.

To be clear, this court accepted that the first claimant was earning an acting allowance when she was struck by the defendants' tort. It also accepted that the evidence as to acting allowances could have been better presented, for the removal of all doubts. Presumed also was that acting appointments can be interrupted and the first claimant failed to prove continuity or explain the breaks, if any. Moreover, and in agreement with counsel for the defendants, her medical reports failed to clarify how her injury in this accident impacted her working life and the extent of it. Given that at issue here was a soft tissue injury, it was unfortunate that its link with what happened with her employment, if any, was not more clearly made. Her full earnings were received, as seen in her pay slip, for June, 2012. From July, 2012 when she was recuperating her pay slips provided (save July and December, 2012) show that she was not in receipt of an acting allowance, but she was getting her basic salary of a Clerk I. This is in stark contrast to her amended pleaded case for loss of earnings from the date of the accident. It was uncertain also as to why she failed to plead loss of half earnings from January to June, 2013 and support this loss with medical and other evidence. Based on the evidence, this court accepted that the first claimant had suffered a loss of her acting allowance from July 2012 to December, 2012 and assumed that it might have been linked to

the accident. Indeed, she was still undergoing medical treatment for the AV fistula, as seen in receipts from MEDCORP Limited dated September 28, 2012 and January 26, 2013, which remained outstanding. In the circumstances, this court found it only as fair to allow her to recover the loss of half salary also from January 2013 to June, 2013. In the view of this court, there is no sufficient medical evidence before this court to support a continuing loss of earnings after that date or that her soft tissue injury (i.e. mild tenderness and swelling) would have led to her loss of employment or retirement, especially in the context of pre-existing illness. Her loss of acting allowance from July to December, 2012 would amount to $8,826.00 (i.e. $1,471.00 x 6) and loss of half salary from January, 2013 to June, 2013 in the sum of $18,654.00 (i.e. $3,109.00 x 6). She placed no sufficient evidence to justify her continuing loss of earnings linked to the accident and/or that her subsequent departure from her employment was related to the accident and not her pre-existing illness and/or that she was medically boarded or certified unfit to work because of her accident. She can recover pre-accident loss of earnings of $27,480.00.

vii. <u>Reduced pension</u>

The first claimant claimed for compensation for a 'reduced pension as a result of being medically unfit and continuing' because of the accident. Her counsel argued that the first claimant's evidence was that she was in line for promotion and a higher salary would have likely attracted a higher pension. Counsel also posited that had the first claimant been able to serve out her full 33 1/3 years work service, she would have benefitted from a higher pension. Her witness, Mrs Maharaj, confirmed that this was "most likely the position". Counsel asked the court to award a figure that would reflect the possibility of this loss, by adopting a mean average approach which was the rationale used by the Court

of Appeal in *Ramnarine Singh* v *Johnson*[12]. In rejecting this position, the court found that there was no evidence to support the case that the first claimant was certified unfit for work or was medically boarded or to show how the accident led, in any way, to her early retirement. She said that she, 'was forced to retire as being medically unfit to work by the Ministry'. Where, therefore, is the evidence of being medically boarded by the Ministry? Where is the evidence of any of her private doctors that supports the case that her soft tissue injury rendered her medically unfit to work? Where is the proof that the reduced pension was directly attributable to the accident[13] and not delinked from it? It was the first claimant's duty to bring the evidence to make the case for compensation for a reduced pension. She simply failed to discharge her burden to prove this aspect of her case and this court was not moved to grant any such award.

FUTURE SURGERY

16. The first claimant pleaded cost of future surgery to address the blocked AV fistula. She provided a report dated December 06, 2012 containing a recommendation of Mr Baiju to re-do her AV fistula in the sum of $30,000.00. Subsequent to this report, she averred that she was relying on another report dated February 19, 2013 from Caribbean Vascular & Vein Clinic (which post-dates the Baiju report) that stated, 'In January Miss James did an insertion of another fistula on the left upper hand'. It is clear based on her averments in her witness statement, that the February, 2013 report followed her second attempt in January, 2013 to have another AV fistula inserted. She averred that she had developed complications from the January, 2013 procedure, which led her to

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12 *Ramnarine Singh* v *Johnson* Civ App No 169 of 2008

13 *Munroe Thomas* v *Malachi Ford; RBTT Bank Limited (formerly Royal Bank of Trinidad and Tobago Limited)* Civil Appeal No 25 of 2007 paragraph 8

undergo further testing and to obtain the February, 2013 report. As of 2018 when she filed her witness statement, she averred to still being desirous of having this procedure done. She is allowed future surgery in the sum of $30,000.00.

THE SECOND CLAIMANT'S CASE

17. The second claimant (11 years old at the time of the accident) suffered a 2cm laceration to the right temporal region of the scalp, which was sutured, and he was placed on 'neuro-watch' and then discharged. He relied on the medical report of Dr Kareema Ali of the Accident and Emergency Department, Sangre Grande, dated November 26, 2012. No other report was provided and this court assumed that recovery was uneventful. There was no evidence provided of pain and suffering or loss of amenities. It was assumed that his pain would have been insignificant, given that it was a minor injury. As to general damages, counsel for the claimant sought a sum in the range of $27,000.00 to $28,500.00 citing several dated cases[14]. On the other hand, counsel for the defendants recommended an award of $15,000.00 also on dated cases[15]. In the

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[14] *Mohammed* v *Supersad* HCA S-154 to 157 of 1981 where for lacerations and minor scarring, Lucky J awarded a four year old $8,500.00 as updated to December, 2010 to $38,057.00; *Wellington* v *Paul & Sylvester* HCA 2081 of 2000 where for a laceration of the finger with no bony injury, Narine J awarded $12,000.00 as updated to December, 2010 to $20,733.00; *Brooks* v *Oxley* HCA 2045 of 1977 where for a laceration to the forehead and right arm, skin loss near the elbow, Wooding J awarded $2,750.00 as updated to December, 2010 to $24,123.00

[15] *Samuel* v *T&T Telephone Co Ltd* HCA 1262 of 1970 where the 3rd plaintiff was knocked unconscious and suffered abrasions on the left shoulder, right elbow and near the left wrist, and swelling and pain for four days after the accident of the terminal joint of the left index finger, Malone J awarded a twelve year old $500.00 as updated to December, 2010 to $11,539.00; *Chandler* v *Deane* HCA 2264 of 1971 where for a deep incised wound approximately ¾ inches on her right upper lip (inner) and a small incised wound ¼ inches on right upper lip (outer), scarring, a permanent feature of which was a raised spot on the lip that the doctor described as "not unsightly" but would lead to enquires as to how it was obtained, Bourne J awarded a four year old girl $500.00 as updated to December, 2010 to $9,204.00; *Ramjit* v *Ali* HCA 2372 of 1971 where for multiple abrasions about both elbows, a contusion on the right buttock, scalp lacerations on the occipital region, shock and pain in the hip and lower spine, Hassanali J awarded an infant $500.00 as updated to December, 2010 to $14,681.00

circumstances, where evidence as to pain and suffering was non-existent, it was felt fair to award general damages of $15,000.00.

18. As to special damages, the second claimant sought compensation for one-month's domestic assistance of $2,500.00. No evidence as to this need was proffered and it was found to be an unjustifiable and unwarranted claim so no award was made. He claimed medical expenses of $37.50 and again provided no documentary evidence in support, with even the witness statement being silent on same. This court made no award for special damages to the second claimant.

DISPOSITION

19. The court orders the third and fourth defendants to pay the following:

    <u>To the first claimant</u>

    i. General damages of $50,000.00 with interest at the rate of 2.5% per annum from July 11, 2016 (date of service) to June 10, 2020;

    ii. Special damages of $94,467.00 with interest at the rate of 1.25% per annum from June 25, 2012 (date of accident) to June 10, 2020;

    iii. Cost of future surgery in the sum of $30,000.00.

    <u>To the second claimant</u>

    iv. General damages of $15,000.00 with interest at the rate of 2.5% per annum from July 11, 2016 (date of service) to June 10, 2020.

20. It is ordered further as follows:

    i. Costs are prescribed in the sum of $39,676.60;

    ii. Stay of execution 28 days.

Martha Alexander
Master