REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA S 2048 of 2004

BETWEEN

ROSEANN MAHABAL

Plaintiff

AND

MAHADEO MAHARAJ

First Defendant

AND

GUARDIAN GENERAL INSURANCE COMPANY LIMITED

Second Defendant

Before: Master Margaret Y Mohammed

Appearances:

Mr K Samlal for the Plaintiff
Ms R Chattergoon instructed by Ms S Narine for the Defendants.

REASONS

1. On May 1, 2012 I gave the plaintiff permission to amend her statement of claim pursuant to Order 20 rule 5 (1) of the Rules of the Supreme Court 1975 ("the RSC") to include certain medical reports which were dated between January 11, 2007 to January 6, 2012

and to provide an update at the assessment of damages, to include a pleading for loss of earnings in the sum of $196,000 for the period May 29, 2004 to January 20, 2012, surgery expense incurred on November 9, 2006 in the sum of $ 10,000, medical expense for doctor visits and the costs of a MRI in the sum of $8,700, to update the court of the plaintiff's ongoing expenses at the date of the trial of the assessment of damages, to include a claim for pain, suffering and loss of amenities, future medical expense/surgery and future loss of earnings. I also ordered the plaintiff to pay the costs of the application, certified fit for advocate attorney, to be taxed in default of agreement.

2. The issue to be determined was whether the defendants can be compensated with an order for costs for any prejudice caused to them by the proposed amendment. I was of the view that they could for the reasons set out hereafter.

3. There was agreement by the parties on the relevant law applicable to the plaintiff's application. Order 20 rule 5(1) of the RSC states that:

" Subject to Order 15, rules 6,7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

4. Mendonca JA in **Aron Torres v Point Lisas Industrial Port Development Corporation Ltd**[1] identified the factors the court ought to consider in exercising its discretion in allowing/disallowing an application for an amendment. Mendonca JA summed up the position at paragraph 13 where he said :

"13 Counsel however accepted that an amendment may be made at any stage of the proceedings, even during or after the closing addresses, and therefore without more, the application could not be said to be too late. Under Order 20 r 5 (1), an amendment may be granted at any stage of the proceedings, on such terms as to costs or otherwise as may

[1] Civ Appeal 84 of 2005 at para 13

be just and in such manner (if any), as the court may direct. The Judge in the exercise of his discretion to amend therefore should be guided by his assessment of where justice lies. In a case such as this, where the amendment sought is not within O 20 r 5 (3) - (5), then subject to the consideration of the impact of the amendment on the administration of justice, it is, generally speaking, an appropriate exercise of the Judge's discretion to grant an amendment no matter how late it is made if the prejudice to the parties may be compensated by an order as to costs. After all, the purpose of an amendment is to formulate the real issues between the parties. Of course, in determining whether a party can be adequately compensated by order as to costs the Court should consider all the circumstances and may take into account such matters as the strain litigation imposes on the litigants, particularly if they are personal litigants rather than corporate entities; the anxiety occasioned by facing new issues; the raising of false hopes; and the legitimate expectation that a trial will determine the issues one way or the other (see **Ketteman v Hansel Properties Limited [1987] 2 WLR 312**. The Court should also take into account the impact on the administration of justice if an amendment were to be granted."

5. In **Gaitri Kalicharan v Kasraj Preerangee and Ravi Lal**[2] I stated that I understood the general rule is "that amendments ought to be allowed at any stage of the proceedings for determining the real issues in the proceedings or to correct any defect or error in the proceedings and a clear distinction is to be drawn between amendments to clarify issues in dispute and those which provide for a distinct claim to be raised for the first time. It is undisputed that an amendment should not be granted if it is unfair, prejudicial, or creates an injustice to the other party for which he could not be compensated with costs or otherwise. In determining whether costs would be an adequate remedy the following factors are to be considered by the court:

   (a) Would a strain be imposed on the defendant in particular if he was a personal litigant and not a company?
   (b) Would any anxiety be caused to defendant?
   (c) Did the amendment cause the defendant to suffer any false hope?

[2] HCA S 525 of 2001 at paragraph 5

(d) Was there a legitimate expectation that the trial would determine the issues one way or the other?

(e) Does the amendment impact on the administration of justice?"

6. The nature of the amendment concerned particulars of injury, particulars of special damage and particulars of general damage. In **Mario's Pizzeria Limited v Hardeo Ramjit** [3]Kangaloo JA at paragraph 12 explained the difference in pleading of special and general damages as:

> "12. The terms general and special damage have different meanings depending on the context in which they are used. With reference to pleading, Lord Dunedin in **The Susquehanna** says:
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> *"If there be any special damages which is attributable to the wrongful action that special damages must be averred and proved, and if proved, will be awarded. If damage be general then it must be averred that such damage has been suffered, but the quantification is a jury question."*(See (1926) AC 655 @661)"

7. The learned judge further set out at paragraph 13 that " the general rule is that general damages are such as the law will presume to be the direct natural or probable consequences of the action complained of while special damages are such as the law will not infer from the nature of the act. They are exceptional in character and therefore, they must be claimed specially and proved strictly. (See Lord Macnagthen in **Stroms Bruks Aktie Bolag v Hutchinson (1905) AC 515, 525-526).** At paragraphs 16 and 17 Kangaloo JA continued "…the future medical expense of the operation flowed naturally as a result of the accident and was therefore general in nature but was capable of calculation and so ought to have been pleaded if the respondent intended to obtain damages for it. What consequences follow as a result of the non pleadings of the cost of the future operation depends on whether an objection is taken to the leading the evidence or not…"

[3] Civ App 146 of 2003

8. Having considered the nature of the proposed amendment and the principles which the court must take into account in exercising its discretion I granted the aforesaid amendment for the following reasons :

(a) Any prejudice to the defendants could be compensated by an order for costs.

(i) The plaintiff's pleaded injuries were lower back pains and left sciatica and a herniated disc. The proposed amendment sought to include injuries adduced from 6 medical reports. The medical report dated June 7, 2004 referred to injuries to the L4-5 disc, the June 24, 2004 medical report referred to recurrence of low back pain and persistent left sciatica, the medical report of June 30, 2004 referred to the permanent partial disability 1 year after surgery, medical report of January 31, 2007 referred to the continuing medical symptoms unrelieved by physiotherapy, medical report of January 31, 2008, no change in medical condition, medical report of January 6, 2012 further surgery advised, permanent partial disability of 50% and medically unfit to work in any capacity.

(ii) The reason for the amendment was set out at paragraph 4 of the plaintiff's affidavit filed on January 27, 2012 which was " her treatment has been undergoing after the accident on May 29, 2004 and therefore the claim filed on November 9, 2004 does not include subsequent medical expenses, losses and injuries." I was of the view that the medical reports which all pre-dated the institution of the action ought to have been considered and would have been the basis for the particulars of injury pleaded in the statement of claim filed on November 9, 2004. As such I did not allow the amendment to include the medical reports dated June 7, 2004, June 24, 2004 and June 30, 2004. However, the information in the medical reports dated January 11, 2007 January 31, 2008 and January 6, 2012 gave an update of the plaintiff's medical condition at various intervals, crystallizing the issues to be determined with respect to the plaintiff's

medical status. This was not a new claim. I saw no prejudice in allowing the amendment to include these reports.

(iii) Under the heading of "Particulars of Special Damages" the plaintiff pleaded "To be supplied". The plaintiff's proposed amendment set out the plaintiff's loss of earnings from May 29, 2004 to January 20, 2012 for a sum of $196,000, surgery expenses for surgery underwent in November 9, 2006 in the sum of $10,000 and medical expenses incurred for doctor visits and an MRI in the total sum of $8,700. I agreed with the defendants that at the time when the claim was instituted some of the information to plead the details of special damages was available to the plaintiff such as the claim for loss of earnings up. However, the defendants were put on notice that claims for special damages were forthcoming and it would not have been unreasonable to assume that a claim for loss of earnings was one of the claims which would have followed as a consequence of the accident. When I balanced the interest of both parties I was of the view that it would have been more prejudicial to shut out the plaintiff's claim for special damages and when the defendants could be compensated for any prejudice with an order for costs.

(iv) I appreciated that an assessment of damages is a one-off event to determine the plaintiff's loss. In my opinion the defendants having been put on notice that a claim for special damages would be supplied the amendment served to crystallize the claim which the plaintiff had indicated it would have provided. In any event the claim for special damages while pleaded must still be proven.

(v) The second defendant was not an individual. It is a company which has resources to allocate to meet its liability in this matter.

(b) It was in the interest of the administration of justice.

In the context of other similar matters filed under the RSC, the history of this matter was not typical of matters instituted under the RSC. It was instituted on November 9, 2004 some 6 months after the accident which took place in May 2004. It was set down for trial 3 months later in January 2005. The trial on liability took place in July 2008 and the first hearing of the assessment of damages took place in November 2011. At that hearing the parties indicated that they were trying to settle the damages and were awaiting an updated medical report. The assessment of damages was adjourned to February 1, 2012 and the plaintiff's application to the statement of claim was filed a few days before this date. For a period of 8 years that is from November 2004 to January 2012 there were 4 hearings for the trial on liability and 1 for the assessment of damages. I allowed part of the amendment sought which dealt with the information which was available after the action was instituted since I did not believe that it was a waste of the court's resources by this instant case when compared to the resources used by other cases. I also did not share the view that to allow the amendment would have caused delay to other persons in the queue in the administration of the civil justice system.

(c) The information on which the proposed amendment was allowed was not previously available.

The medical reports for the period January 11, 2007 to January 6, 2012 were not available before her claim was filed on November 9, 2004. The particulars of special damages which the plaintiff sought to introduce were in a large part incurred after the claim was instituted and incurred in the period thereafter. The particulars of general damages which the plaintiff sought to amend, to include in my opinion was a direct natural or probable consequences of the accident. According to Kangaloo JA in **Mario's Pizzeria v Hardeo Ramjit** [4]costs of future medical expense, which is

[4] Civ Appeal146 of 2003

capable of calculation, ought to be pleaded, but the failure to do so is not detrimental to plaintiff's claim since evidence could still be led on this issue. Adopting the aforesaid position I was of the view that the particulars of general damages which the plaintiff sought to include was a natural consequence of the accident and the plaintiff ought not to be shut out from pleading this claim. In any event any evidence which the plaintiff may choose to lead in support of this claim would still tested in cross-examination.

(d) Reason given by the plaintiff for the delay was excusable.

The plaintiff's reasons for the proposed amendment were her treatment and expenses as a result of her injuries have been on-going since the accident. I found this explanation to be acceptable and consistent with the medical information which was available to the plaintiff.

Dated this 1st June, 2012

Margaret Y Mohammed
Master (Ag).