

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. **CV2012-02217**

**BETWEEN**

**SHURLA GARCIA**

Claimant

**AND**

**GULF HOMES LIMITED**

First Defendant

**BENEDIC EDWARDS**

Second Defendant

**MOTOR & GENERAL INSURANCE COMPANY LIMITED**

Co-Defendant

**Before the Honourable Madame Justice Margaret Y Mohammed**

**Date of Delivery July 16, 2019**

**Appearances:**

Mr. Asaf Hosein Attorney at law for the Claimant.

Ms. Indra Ramdial Attorney at law for the First Defendant and the Co-Defendant

Mr. Owen Hinds Attorney at law for the Second Defendant.

## **RULING**

1. The instant action concerns a claim in negligence for special and general damages arising out of a motor vehicular accident which occurred on 19 February 2009. The Claimant applied on the 19 March 2019 (“the application”) for permission to re-re-amend her Statement of Case to include in the Schedule of Special Damages the hospital fees paid to Amita Health Care for her left hip replacement on the 21 July 2017 in the sum of \$US 61,544.00 and hospital fees paid to Amita Health Care for her right hip replacement on the 21 February 2018 in the sum of \$ US 58,812.00.

### **The background**

2. To place the application in context it is necessary that I set out the state of the proceedings. During the case management stage, the instant action was consolidated with another matter CV 2012-00236 Lystra Miller v Gulf Homes, Benedic Edwards, Shurla Garcia, Motor and General Insurance Co Ltd and Presidential Insurance Co Ltd (“the first matter”). Both matters concerned the same motor vehicular accident which occurred on the 19 February 2009. In the first matter, the Claimant was a passenger in a motor vehicle driven by Shurla Garcia, the Claimant in the instant matter. The collision took place when the motor vehicle driven by the Defendant Benedic Edwards, the Second Defendant in both matters collided with the motor vehicle driven by Shurla Garcia.
3. The parties agreed at the case management stage for the Court to determine liability in the first matter and to be bound by the order on liability in the first matter in the instant matter. At the trial in the first matter, liability was apportioned for Gulf Homes and Benedic Edwards and Motor and General insurance Co. Ltd to pay Lystra Millar 70 % of her claim and for Shurla Garcia and the Second Co-Defendant to pay Lystra Miller 30 % of her claim. Damages were assessed for Lystra Miller and costs was apportioned accordingly. The effect of the order on liability in the first matter on the instant matter is that the Defendants and Co-Defendants in the instant matter are liable to the Claimant, Shurla Garcia for 70 % of her loss.

4. The Defendants in the first matter, including the Claimant in the instant matter appealed the order on liability. The appeal has not been heard and the Assessment of Damages in the instant matter has not been scheduled pending the outcome of the appeal. At the hearing of the application, Counsel for the Claimant indicated that the Record of Appeal was filed for the appeal in the first matter.

### **The application**

5. The grounds in the application and the Claimant's affidavit in support of the application were identical and can be summarized as :
  - (a) The Claimant has been out of the jurisdiction living in the United States of America.
  - (b) The Claimant underwent a left hip replacement on the 27 April 2016 at St. Alexius Medical Centre. She misplaced the receipt which was dated 21 June 2017 in the sum of US\$61,544.00 and she had to reapply for a copy of it from Amita Health. She only received it upon her return to the United States sometime after the 31 August 2018.
  - (c) The Claimant upon returning to the United States on the 31 August 2018 only received via regular mail the receipt from the said Amita Health for hospital fees in the sum of US\$58,812.00 for her right hip replacement which was done at St. Alexius medical Centre on the 24 January 2018.
  - (d) The Claimant's re-amended Claim Form and Statement of Case were filed on the 13 June, 2018.
  - (e) The Claimant returned to Trinidad on the 3 March 2019 and she took copies of the documents which she received whilst in the United States to her Attorney's office on the morning of the 12 March 2019 namely:
    - Receipt from Amita Health for hospital fees for left hip replacement dated 21 June 2017 in the sum of US \$61,544.00;
    - Receipt from Amita Health for hospital fees for right hip replacement dated 21 February 2018 in the sum of US \$58,812.00.

- (f) From the receipts listed above it was disclosed that the Claimant had incurred hospital fees for her left hip replacement on the 27 April 2016 in the sum of US\$61,544.00 and for her right hip replacement on the 24 January 2018 in the sum of US\$58,812.00.
- (g) The surgeon's fee for both hip replacements were separate and apart from the hospital fees which the Claimant had incurred which includes Anesthesia, EKG/ECG, Lab, Occupational therapy, pharmacy, physical therapy amongst other expenses.
- (h) Upon receipt of the new documents listed above the Claimant's Attorney at Law immediately made an application for permission to re-re-amend the Claimant's Statement of Case to include these new documents.
- (i) The Claimant will be severely prejudiced if permission is refused to re-re-amend her Statement of Case to include these new documents as she will be out of pocket for the sums expended for hospital fees for both the left and right hip replacement surgeries and she will not be able to recover the costs of same.
- (j) The Defendant will not suffer any prejudice if permission is granted to the Claimant to re-re-amend her Statement of Case since it relates to a matter of Special Damages which ought to be specifically pleaded. The re -re-amendment of the Statement of Case is necessary because the documents were only disclosed to the Claimant's Attorney on the morning of the 12 March 2019.

6. In support of the application, Counsel for the Claimant acknowledged that the application was made after the Court delivered its decision on liability on 7 June 2018 and after the Court granted permission to the Claimant to file a re-amended Statement of Case. He submitted that the application was made promptly since it was made shortly after the new information was brought to his attention. He also submitted that the Claimant had a good explanation for this information not being provided earlier since she had misplaced

the receipts and she was awaiting the replacement copies. Counsel submitted that the interest of the administration of justice would not be adversely affected since the Assessment of the Damages has not been scheduled as yet, pending the outcome of the appeal in the first matter.

7. Counsel submitted that even if the proposed re-re-amendment is allowed the Claimant still has to prove her damages and the Defendants are not prejudiced since they entitled at the Assessment of Damages to put forward evidence to address the proposed re-re-amendment; the proposed re-re-amendment is factually consistent with the Claimant's case since it concerns the Claimant's hospital stay when she had the left and right hip replacement surgeries; and no date has been fixed for the Assessment of Damages.
8. The Defendants opposed the order sought by the Claimant in the application. Counsel for the First Defendant and the Co-Defendant submitted that the Claimant has failed to meet the threshold requirements under Rule 20.1 CPR since she failed to provide a good explanation for now seeking the proposed re-re-amendment. Counsel submitted that the Court granted permission to the Claimant to file the re-amended Statement of Case on 13 June 2018. At that time, even if the Claimant did not have the receipts for the hospital fees, she was aware that she had incurred expense for the said fees and she had an idea of the costs. It was information which was available to her when she applied to re-amend the Statement of Case and she could have indicated that she was awaiting the receipts and that she would have provided the respective sums when she received the receipts.
9. Counsel for the Second Defendant submitted that the Claimant has failed to demonstrate a good explanation for now seeking the order since she failed to indicate in her affidavit in support of the application why she did not seek permission to include the information, which she now seeks to have included, in her application to re-amend the Statement of Case filed on 4 June 2018 as this information was within the Claimant's knowledge since

2016. Counsel also argued that the fact of aftercare treatment in the hospital was not pleaded as such it is factually inconsistent with the Claimant's case.

10. It was also submitted by Counsel for the Second Defendant that the Claimant has not made the application promptly since she was aware of the after care hospital treatment since 2016 and 2018 respectively and she only filed the application in March 2019.

11. Rule 20.1 CPR as amended <sup>1</sup> governs amendment of a Statement of Case. The relevant part of the rule states:

“(3) The court shall not give permission to change a statement of case after the first case management conference, unless it is satisfied that-

- (a) There is a good explanation for the change not having been made prior to that case management conference and
- (b) The application to make the change was made promptly.

(3A) In considering whether to give permission, the court shall have regard to-

- (a) The interest of the administration of justice;
- (b) Whether the change has become necessary because of a failure of the party or his attorney;
- (c) Whether the change is factually inconsistent with that what is already certified to be the truth;
- (d) Whether the change is necessary because of some circumstance which became known after the date of the first case management conference;
- (e) Whether the trial date or any likely trial date can still be met if permission is given; and
- (f) Whether any prejudice may be caused to the parties if permission is given or refused.”

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<sup>1</sup> By Legal Notice 126/11

12. While Rule 20.1 CPR as amended contemplates that any minor change such as a typographical error is not caught by it<sup>2</sup>, the change proposed to the amended Statement of Case is not in my opinion a minor change since it introduces new facts. I will now examine the threshold provisions.

**Good explanation.**

13. The Court of Appeal in this jurisdiction has said that a good explanation is not an infallible explanation<sup>3</sup> and that “when considering the explanation for the breach it must not therefore be subject to such scrutiny so as to require a standard of perfection.”<sup>4</sup>
14. It was not in dispute that the application was filed approximately 9 months after the Court made its order on liability and after the Claimant was granted permission to file the re-amended Statement of Case. The explanation which the Claimant has put forward for making the application was that she misplaced the receipts which were dated 21 June 2017 in the sum of \$ US 61,544.00 and the receipt dated 21 February 2018 in the sum of \$ US 58,812.00 and she only received the replacement copies on the 31 August 2018 when she returned to the USA. The Claimant acknowledged in her affidavit in support of the application that she underwent the left hip replacement surgery on the 27 April 2016 at the St Alexis Medical Centre and right hip replacement surgery at the St Alexis Medical Centre on the 24 January 2018. She also explained that the fees she pleaded for the costs of the said surgeries were separate from the fees for her after care hospital stay.
15. The Claimant’s explanation is not perfect. It is not infallible but in my opinion, it is a good explanation for now seeking to place before the Court the matters raised in the proposed re-re-amendment for the following reasons. First, although the Claimant was aware that

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<sup>2</sup> Even though **Charmaine Bernard v Ramesh Seebalack** [2010] UKPC 15 was decided by the PC prior to the amendment of Part 20.1 as effected by legal Notice 126 of 2011 the meaning of the word “change” under the rule is still applicable despite the amendment.

<sup>3</sup> The AG v Miguel Regis Civ Appeal No. 79/2011

<sup>4</sup> Civ Appeal 52/2012 In The Matter of the Partition Ordinance, Rawti a/c Rawti Roopnarine and anor. V Harripersad a/c Harripersad Kisso and ors<sup>4</sup>, Mendonca JA at para 33

the costs of the respective surgeries and the hospital after care were separate, she did not have proof of the hospital fees until August 2018 of the actual sums she paid. Second, her explanation that she misplaced the initial copies of the receipts is reasonable and third, during the period after both her surgeries it is reasonable that the Claimant would have placed a greater priority on her recovery rather than pursuing the receipts.

**Promptness.**

16. In **Rawti a/c Rawti Roopnarine and anor v Harripersad a/c Harripersad Kisso and ors**<sup>5</sup> the Court stated that “Whether an application is made promptly depends on the facts of each case.”
17. In my opinion given the facts of this case, the application was made promptly. Although the Claimant was aware of the hospital after care in 2016 and in 2018, she only received the receipts on the 31 August 2018 and she produced them to her attorney at law when she was next in Trinidad in March 2019 during which month the application was made.
18. The threshold provision is cumulative and I have concluded that the Claimant has met both conditions. I now turn to the factors in exercising my discretion under 3A.

**The interest of administration of justice.**

19. In two decisions by the Court of Appeal in this jurisdiction,<sup>6</sup> the interest of the administration of justice was described as “consideration of the needs and interest of the parties before the court as well as other court users.” In considering the interest of the administration of justice where a party has made an application to amend a pleading under Rule 20.1 as amended, Jones J in **Export-Import Bank of Trinidad and Tobago v Waterworks Limited et al**<sup>7</sup> stated that:

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<sup>5</sup> Civ Appeal 52/2012 Mendonca JA at para 24 decision 22<sup>nd</sup> June 2012

<sup>6</sup> Civil Appeal No P215 of 2014 Dr Keith Rowley v Anand Ramlogan per Rajnauth Lee JA at para. 34 and Civil Appeal No 44 of 2014 Roland James v The AG per Mendonca JA at para 40

<sup>7</sup> CV 2010-03594 at para 37



“The rules also require a court to consider all the circumstances including the objectives identified at Part 1.1(2) which are (a) ensuring, as far as, practicable, that the parties are on equal footing; (b) saving expense; (c) proportionality; (d) expedition and (e) allotting to the case an appropriate share of the court’s resources in the context of the demands made by other cases on these resources.”

20. In my opinion, the interest of the administration of justice is not adversely affected by granting the proposed re-re-amendment. It was not in dispute that no steps have been taken with respect to the Assessment of Damages since the Defendants appealed the order of liability in the first matter. The Defendants in the first matter are the same parties in the instant action. It was also not disputed that the Record of Appeal has been filed and that the parties are awaiting the Court to fix a date for the hearing of the appeal. In the absence of the Assessment of Damages being scheduled, none of the parties have incurred any expense in terms of filing witness statements thus far; the Court’s resources have not be allocated to the hearing of the Assessment of Damages and expedition is not an issue since the parties in the instant matter are awaiting the outcome of the appeal in the first matter before the Assessment of Damages in the instant matter is scheduled. I am of the opinion that granting the proposed re-re-amendment would not put the parties on an unequal footing since the Assessment of Damages has not been scheduled.

**Failure by the party or its attorney.**

21. There was no evidence that the Claimant’s attorneys were aware of any of the information in the proposed re-re-amendment. Based on the Claimant’s affidavit I have concluded that the failure was the Claimant’s and not its attorneys failure to no have to seek the proposed re-re-amendment.

**Change factually inconsistent with that what is already certified to be the truth.**

22. As stated before the Claimant suffered severe personal injuries arising from the accident. In the re-amended Statement of Case filed in June 2018 she pleaded that she underwent left and right hip replacement surgeries. The proposed re-re-amendment concerns the

hospital after care for the said surgeries. In my opinion, the hospital after care is a reasonable consequence of such surgeries and as such the proposed change is factually consistent with the case currently advanced by the Claimant on its pleadings.

**Change is necessary because of some circumstance which became known after the date of the first CMC.**

23. It was not in dispute that the information became available long after the first CMC.

**Trial date or any likely trial date can still be met if permission is given.**

24. It was also not in dispute that the trial on liability concluded and the decision delivered on 7 June 2018. The trial on the Assessment of Damages has not been scheduled since the parties are awaiting the hearing of the appeal. In my opinion if the proposed re-re-amendment is permitted the trial for the Assessment of Damages can still be met.

**Prejudice may be caused to the parties if permission is given or refused.**

25. The prejudice to the Claimant is that she would not be able to advance at the hearing for the Assessment of Damages the significant costs she incurred for the two periods of hospital after care associated with left and right hip replacement surgeries.
26. The prejudice to the Defendants is that if the proposed re-re-amendment is permitted their exposure in damages would now increase by approximately \$ US 120,000.00. In the re-amended Statement of Case the total special damages claimed was TT \$ 73,295.00 and US \$30,485.00. In the proposed re-re-amendment the part of the US dollar claim would increase to US \$150,841.00.
27. In my opinion, the Claimant would suffer the greater prejudice for the following reasons. First, if the proposed re-re-amended Statement of case is not permitted she would be unable to advance a significant part of her claim. Second, any prejudice to the Defendants can still be addressed by permitting them to make any consequential amendments. Third,

the parties have not filed any witness statements for the Assessment of Damages as yet and the Defendants still have the opportunity to put evidence before the Court to dispute the claim sought in the proposed re-re-amendment.

28. For the aforesaid reasons I will exercise my discretion and grant the Claimant permission to file and serve the proposed re-re-amendment of the Statement of case within 7 days of the date of this order. I also grant the Defendants and Co-Defendant permission to call any witnesses to address the propose re-re-amendment of the Statement of Case.

**Order**

29. Permission to the Claimant to file and serve the proposed re-re-amendment of the Statement of case within 7 days of the date of this order.
30. Permission to the Defendants and Co-Defendant to call any witnesses to address the propose re-re-amendment of the Statement of Case.
31. I will hear the parties on the costs of the application.

**Margaret Y Mohammed**  
**Judge**