

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-00620

BETWEEN

NIKISHA DE GRAFF-OLIVER

Claimant

AND

DEORAG JAGGERNAUTH

First Defendant

NAGICO INSURANCE (TRINIDAD AND TOBAGO) LIMITED

Second Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr. Earl John instructed by Ms. Laura Bailey for the Claimant

Mr. Richard Arjoon Jagai instructed by Mr Varun Debideen for the Defendants

Ruling on Defendants' Evidential Objections

[1] On April 24th, 2018, the Defendants filed objections to certain parts of the evidence which the Claimant is seeking to adduce in support of her case. The objections were in relation to the witness statements of Nikisha De Graff-Oliver and Carlene Estrada.

On 24th May, 2018, the Claimant filed submissions in response to the evidential objections made by the Defendants.

[2] Having considered the submissions of the Defendants and the Claimant, the following are my rulings on the objections.

Witness Statement of Nikisha De Graff-Oliver

Paragraph 3

[1] The words “*In the first lane turning left there was a car which stopped and gave me the ok to cross.*” are struck out on the basis that it is a material fact which ought to have been pleaded.

[2] The words “*It happened so fast, the next thing I knew, I was flying midair, feeling I was gone, being propelled on to another car before landing on the very hot pitch road.*” are permissible. The witness is entitled to give evidence on what happened to her after she was hit by the car.

Paragraph 12

[3] The words “*During that period I had difficulty in remembering certain things, such as events and things from a long time ago.*” are not permissible and are struck out. This is a material fact which goes to the issue of damages and therefore ought to have been pleaded.

Paragraph 16

[4] Paragraph 16 in its entirety is struck out on the basis that therein are material facts which ought to have been pleaded in the Statement of Case/Amended Statement of Case.

Paragraph 19

[5] The words “*Doctors at the clinic indicated that the pain would be inevitable until I did surgery.*” are struck out on the basis that they are inadmissible hearsay.

Paragraph 20

[6] The words “*since he felt my injuries were extensive.*” are struck out on the basis that these words constitute inadmissible hearsay.

Paragraph 21

[7] The words “*You could actually see the crack in my left knee. Whereas my right knee there was something preventing the two bones from rubbing direct, in my left knee they were*”

rubbing direct.” are permissible and will not be struck out. The witness is entitled to give evidence on the observations that she made having looked at the MRI scan.

Paragraph 24

[8] The words “*I still had to be carried around to go anywhere. I still could not cook or do household chores. I was incapable of working at the time. I could not stand or sit for long since I would get a lancing pain in my leg.*” are struck out on the basis that they constitute material facts which ought to have been pleaded.

Paragraph 25

[9] The words “*since without the surgery, there was no real change or progress and all I would get was pain killers.*” are struck out on the basis that they express the witness’ opinion and not a statement of fact. The witness is not competent nor qualified to give this opinion.

Paragraph 28

[10] The words “*although they are in the form of severe migraines, which last about 3 days. The migraines make me want to shut down. All my jaw, cheekbone and temple would hurt.*” are struck out on the basis that they constitute material facts which ought to have been pleaded.

Paragraph 32

[11] The words “*Up to today I still have trouble remembering. Details to certain things are blank, just blank.*” are struck out. These are facts which ought to have been pleaded.

Paragraph 33

[12] Paragraph 33 in its entirety is struck out since the words therein are material facts which ought to have been pleaded.

Witness Statement of Carlene Estrada

Paragraph 4

[13] The words “...*the driver of the staff vehicle realised that traffic had stopped on the opposite side*” are struck out since it is the witness’ opinion on the thoughts of the driver and it is not a statement of fact. This witness cannot give evidence of what the driver *realised*. This evidence delves into the realm of speculation and therefore not admissible.

[14]The words “*Less than five minutes after*” and “*and it seemed as if someone had gotten knocked down*” are permissible. The witness is allowed to give evidence on the conclusion which she came to, premised on her observations.

Paragraph 6

[15] The words “...*and an East Indian woman. The woman was in the front passenger seat. Neither the man nor the woman came out of the vehicle to help*” are permissible and will not be struck out. The witness is entitled to give evidence on what she observed on the date in question.

Paragraph 7

[16] Paragraph 7 in its entirety is struck out. This is the witness’ opinion of what the persons present at the scene saw and were thinking: this is not a statement of fact. This evidence is also highly speculative of what the persons on the scene wanted to do to the First Defendant.

Paragraph 8

[17] The words “.... *and she was in a lot of pain. She was crying for pain.*” are struck out save and except the words “*She was crying*”. The witness cannot give evidence as to what the Claimant was experiencing or feeling on the day but could give evidence of what she saw (the Claimant crying).

Paragraph 11

[18] The words “*She could not talk for long because she had a lot of aches and pain.*” are not permissible and are struck out. The witness cannot say what the Claimant experienced or suffered on the day. The only person who could say what experience the Claimant faced on that day, is the Claimant. The witness cannot know what the Claimant experienced or did not experience unless the Claimant told her.

Order:

Witness Statement of Nikisha De Graff-Oliver

- i. **The evidential objection to the words “*In the first lane turning left there was a car which stopped and gave me the ok to cross*” in paragraph 3 is upheld.**
- ii. **The evidential objection to the words “*It happened so fast, the next thing I knew, I was flying midair, feeling I was gone, being propelled on to another car before landing on the very hot pitch road*” in paragraph 3 is overruled.**
- iii. **The evidential objection to the words “*During that period I had difficulty in remembering certain things, such as events and things from a long time ago*” in paragraph 12 is upheld.**
- iv. **The evidential objection to paragraph 16 is upheld.**
- v. **The evidential objection to the words “*Doctors at the clinic indicated that the pain would be inevitable until I did surgery*” in paragraph 19 is upheld.**
- vi. **The evidential objection to the words “*since he felt my injuries were extensive*” in paragraph 20 is upheld.**

- vii. **The evidential objection to the words “*You could actually see the crack in my left knee. Whereas my right knee there was something preventing the two bones from rubbing direct, in my left knee, they were rubbing direct*” in paragraph 21 is overruled.**
- viii. **The evidential objection to the words “*I still had to be carried around to go anywhere. I still could not cook or do household chores. I was incapable of working at the time. I could not stand or sit for long since I would get a lancing pain in my leg.*” in paragraph 24 is upheld.**
- ix. **The evidential objection to the words “*since without the surgery, there was no real change or progress and all I would get was pain killers.*” in paragraph 25 is upheld.**
- x. **The evidential objection to the words ““*although they are in the form of severe migraines, which last about 3 days. The migraines make me want to shut down. All my jaw, cheekbone and temple would hurt.*” in paragraph 28 is upheld.**
- xi. **The evidential objection to the words “*Up to today I still have trouble remembering. Details to certain things are blank, just blank.*” in paragraph 32 is upheld.**
- xii. **The evidential objection to paragraph 33 in its entirety is upheld.**

Witness Statement of Carlene Estrada

- i. **The evidential objection to the words “*...the driver of the staff vehicle realised that traffic had stopped on the opposite side*” in paragraph 4 is upheld.**
- ii. **The evidential objection to the words “*Less than five minutes after*” and “*and it seemed as if someone had gotten knocked down*” in paragraph 4 is overruled.**
- iii. **The evidential objection to the words “*...and an East Indian woman. The woman was in the front passenger seat. Neither the man nor the woman came out of the vehicle to help*” in paragraph 6 is overruled.**
- iv. **The evidential objection to paragraph 7 in its entirety is upheld.**

- v. **The evidential objection to the words “... *and she was in a lot of pain.*” in paragraph 8 is upheld. The words “*She was crying*” in the next sentence are allowed but the words immediately following, that is, “*for pain.*” Would be struck out.**
- vi. **The evidential objection to the words “*She could not talk for long because she had a lot of aches and pain.*” in paragraph 11 is upheld.**

Dated this 21st day of November, 2018

Robin N. Mohammed
Judge