REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2011-1833

Between

JAMAL MOHAMMED

Claimant

AND

THE PORT AUTHORITY OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE JUSTICE RICKY RAHIM

Appearances:

Mr. R. Ramsaran for the Claimant
Ms. S. Indarsingh instructed by Mr. K. Alexander for the Defendant

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Judgment

1. This is an action in Negligence for damage and loss alleged to have been suffered by the Claimant during the course of his employment with the Defendant.

2. The Claimant, age 29, of No. 66 Duke Street, Port-of-Spain, was at the material times employed with the Defendant as a Forklift operator/Trailer truck driver/Equipment Operator.

3. The Defendant, a body corporate having its head office at No. 1D Dock Road, Wrightson Road, Port-of-Spain, was sued in its capacity as the Claimant's employer.

4. The parties are in agreement that on or about the 17th May 2007 and on or about the 18th July 2007 the Claimant was involved in two separate accidents on the Defendant premises. The parties, however, disagree on the specific details of how the accident occurred and the issue of negligence.

The Claim

5. The Claim Form and Statement of Case were filed on the 16th May 2011.

6. On the 17th May 2007 (the first incident) the Claimant averred that he had been working the 7 a.m. to 3 p.m. shift at the Defendant's Port-of-Spain shed premises when he was instructed to perform a task of loading containers from shed nine yard onto a ship.

7. The Claimant claimed that at around 8:30 a.m. that day, while reversing the trailer truck, the truck's tyre went into a pot hole, jerking the vehicle. This, he said, caused him to slam into the frame of the door of the truck as the vehicle was not equipped with a seatbelt.

8. The Claimant averred that he was granted four days sick-leave and two weeks annual vacation to recover from the incident.

9. As a result of the first incident, the Claimant set out at paragraph 4 of his Statement of Case, Particulars of Negligence and Particulars of Breach of Statutory Duties by the Defendant:

PARTICULARS OF NEGLIGENCE AS REGARDS
THE FIRST INCIDENT

The Defendant was negligent by:

*a) Failing to cover or repair the pot holes prior to the **First incident** and thereby failing to provide a safe place of work as required at common law and or;*

*b) Failing to provide adequate notice, caution or warning of the said pot hole**;***

c) Failing to provide adequate and suitable safety equipment and or devices, including a safety belt, despite the Claimant having made several complaints of same;

d) Failing to assess, review and maintain the roadways within the Defendant's premises on a reasonable regular basis;

e) Failing to pave, cover, fill in or fix the said pot hole prior to the first incident;

PARTICULARS OF BREACH OF STATUTORY DUTIES AS REGARDS
THE FIRST INCIDENT

The Defendant breached its statutory duties by:

*a) Failing to provide adequate and suitable safety equipment or devices including a safety belt as required by **Occupational Safety and Health Act 2004 Section 6(2)(c)** **'**the provision of adequate and suitable protective clothing or devices of an approved standard to employees who in the course of employment are likely to be exposed to the risk of head, eye, ear, hand or foot injury, injury from air contaminant or any other bodily injury and the provision of adequate instructions in the use of such protective clothing or devices**';***

*b) Failing to provide a safe place of work as required by **Occupational Safety and Health Act 2004 Section 6(2)(e)** **'**so far as is reasonably practicable as regards any*

*place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without risks'**;***

c) *Failing to conduct suitable and sufficient annual assessment of the risks to the safety and health of his employees to which they are exposed whilst they are at work as required by* ***Occupational Safety and Health Act 2004 Section 13A(1)*** *'Every employer shall make a suitable and sufficient annual assessment of the risks to the safety and health of his employees to which they are exposed whilst they are at work'**;***

d) *Failing to provide and/or revise a written statement of the Defendant's general policy with respect to the safety and health of persons employed in the industrial establishment as required by* ***Occupational Safety and Health Act 2004 Section 6(7)*** ***'****An employer of an industrial establishment of twenty-five or more employees, shall prepare or revise, in consultation with the representatives of his employees, a written statement of his general policy with respect to the safety and health of persons employed in the industrial establishment…**'.***

e) *Failing to provide adequate information and training on the potential hazards associated with driving a trailer truck as required by* ***Occupational Safety and Health Act 2004 Section 6(2)(d)*** ***'****the provision of such information, instruction, training and supervision as is necessary to ensure, so far is reasonably practicable, the safety and health at work of his employees'**;***

10. The second incident upon which the claim is based occurred on the 18th July 2007 (the second incident). The Claimant claimed that on that day he was working the 11 a.m. to 7 p.m. shift when he was instructed to drive a Haul Major trailer truck ITV#11 and its twenty foot cargo to shed four. It was while performing this task at around 1:30 p.m. that the vehicle suddenly jerked and switched off causing the steering system and braking system to lock.

11. The Claimant pleaded that despite his efforts to stop the vehicle it continued onwards and collided with a stack of three containers located on the roadway opposite shed ten causing him to be thrown from his seat and hitting his head, neck and side against the frame of the vehicle.

12. The Claimant averred that he continues to suffer from sever pain and injuries and that he continues to be treated as an out-patient at Port-of-Spain General Hospital Physiotherapy Department and attends a chiropractor for further treatment and care.

13. As a result of the second incident, the Claimant set out at paragraph 8 of his Statement of Case Particulars of Negligence and Particulars of Breach of Statutory Duties by the Defendant:

PARTICULARS OF NEGLIGENCE AS REGARDS
THE SECOND INCIDENT

The Defendant was negligent by:

a) Failing to provide an adequately safe and functional trailer truck and thereby a safe system of work with adequate safety equipment;
b) Failing to service, maintain and or assess the said vehicle on a reasonably regular basis given the particular circumstances of this matter;

PARTICULARS OF BREACH OF STATUTORY DUTIES AS REGARDS
THE SECOND INCIDENT

The Defendant breached its statutory duties by:

a) Failing to provide a safe system of work in particular an adequately safe and functional truck as required by ***Occupational Safety and Health Act 2004 Section 6(2)(a)*** *'the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health'****;***

b) *Failing to provide a safe system of work for the Claimant as required by* ***Occupational Safety and Health Act 2004 Section 6(2)(b)*** *'arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of equipment, machinery, articles and substances'****;***

c) *Failing to provide adequate and suitable safety equipment or devices including a safety belt as required by* ***Occupational Safety and Health Act 2004 Section 6(2)(c) '****the provision of adequate and suitable protective clothing or devices of an approved standard to employees who in the course of employment are likely to be exposed to the risk of head, eye, ear, hand or foot injury, injury from air contaminant or any other bodily injury and the provision of adequate instructions in the use of such protective clothing or devices****';***

d) *Failing to provide adequate information and training on the potential hazards associated with driving a trailer truck as required by* ***Occupational Safety and Health Act 2004 Section 6(2)(d) '****the provision of such information, instruction, training and supervision as is necessary to ensure, so far is reasonably practicable, the safety and health at work of his employees****';***

e) *Failing to conduct suitable and sufficient annual assessment of the risks to the safety and health of his employees to which they are exposed whilst they are at work as required by* ***Occupational Safety and Health Act 2004 Section 13A(1)*** *'Every employer shall make a suitable and sufficient annual assessment of the risks to the safety and health of his employees to which they are exposed whilst they are at work'****;***

14. Additionally, the Claimant listed the Particulars of Injury, Particulars of Special Damages and Particulars of General Damages in relation to both incidents at paragraph 14 of his Statement of Case.

The Defence

15. The Defence was filed on the 16th June 2011.

16. The Defendant denied liability to the Claimant in relation to both incidents and asserted that the incidents were as a result of the negligence and/or contributory negligence of the Claimant. The Defendant listed the Particulars of Negligence of the Claimant at paragraph 6 and 13 of the Defence.

17. The Defendant also denied that the incidents were as a result of any breach of statutory duty by the Defendant and further contended that any complaints and/or alleged breaches under the Occupational Health and Safety Act 2004 is a matter for the Industrial Court and not this Court.

18. In relation to the first incident, the Defendant asserted that if the trailer truck was not equipped with a seatbelt, it was not necessary for the safe operation of the vehicle.

19. The Defendant averred that the Claimant's vacation leave, which he took after the first incident, was unrelated to the injury which he allegedly sustained.

20. In relation to the second incident the Defendant denied that the incident occurred as a result of a failure of the vehicle. The Defendant contended in this respect that even if the vehicle jerked and the engine switched off, the brakes of the vehicle were air brakes and would have continued working since its function is separate from the engine and would have been able to stop the vehicle and avoid the collision.

21. The Defendant pleaded that the Claimant received no injuries as a result of the second incident and denied the medical reports proffered by the Claimant.

The Claimant's Evidence

22. Evidence in chief for the Claimant was given by the Claimant, Jamal Mohammed, in his Witness Statement filed on the 11th November 2011.

23. The Claimant commenced employment with the Defendant on or about the 10th August 1997 as a stevedore but was soon transferred to the transport department and trained as an equipment operator.

24. The Claimant testified that on the day of the first incident he was working the 7 a.m. to 3 p.m. shift at the Defendant's Port-of-Spain premises when he was instructed by his supervisor to load containers from shed nine yard onto a ship. He gave evidence that while performing this task, the trailer tuck's right rear tyre went into a pot hole. This, he said, occurred while he was reversing the vehicle and its container cargo haul into place while looking through the window and to his right. During cross examination the Claimant stated that he did not know there was a pot hole in the yard despite having made five to seven trips before the incident occurred.

25. When the vehicle's right tyre sank into the pot hole, the Claimant testified that there was a sudden jerk of the machine causing him to slam into the frame of the door of the truck. As a result, the Claimant testified that he initially experienced pain from his neck and within what felt to him like seconds his head started hurting and he was unable to move or call out.

26. The Claimant gave evidence that there were no mirrors or seat belts installed in the vehicle at the time of the first incident. He however testified that there was a thin rope attached to the door frame but which was not generally utilised as it could not be properly secured. The Claimant further indicated that there were no notices, caution or warnings on the compound of the existence of the pot hole.

27. During cross examination, the Claimant gave evidence that he could not say what speed he was reversing at since the speedometer in the vehicle was not working. However he admitted that there was a speed limit on the port which was 15 km/hr and he was driving a little less than the speed limit. He confirmed that precautions were taken since he could not see the road.

28. The Claimant testified that after the first incident occurred, the foreman at the time, a Mr. Joseph, radioed the ambulance and he was then taken to the Port-of Spain General Hospital where he was examined, a few X-rays were conducted and he was administered medication. He has annexed a copy of the Casualty Card from Port-of-Spain General Hospital dated 17th May 2007 to his witness statement.

29. The Claimant gave evidence that he was given four days sick leave which carried into his annual vacation leave of two weeks which he said he had booked two weeks in advance and used it to recover from the first incident. He explained that he did not know that the annual vacation leave could be stopped or postponed on injury.

30. A Supervisor's Accident report dated 17th May 2007, a Treatment of injury form dated 19th May 2007 and the HSE Warden report dated 22nd October 2007 were annexed to the Claimant's witness statement. The Claimant testified that he gave the information contained in the report to his supervisor, Mr. Sandy.

31. The Claimant alleged that in or about April 2008 the pot hole, which the Claimant said was the cause of the first incident, was covered over with steel plate coverings.

32. The Claimant testified that the second incident occurred during his 11 a.m. to 7 p.m. shift when he was instructed by his supervisor to drive a Haul Major trailer truck ITV#11 and its twenty foot container cargo to shed four. He gave evidence that while carrying out this job, at around 1:30 p.m. the vehicle suddenly jerked and switched off. The steering system and the braking system then locked but the vehicle continued moving in the

direction of a stack of three containers located on the roadway near shed ten. The vehicle continued forward and collided with the stack of containers.

33. The Claimant clarified in cross examination that the shift was actually 11 p.m. to 7 a.m. and that the accident had occurred in the early hours of the morning between 1:30 a.m. to 2:00 a.m.

34. The Claimant gave evidence that the impact caused him to be thrown from his seat and that he slammed his head, neck and side against the frame of the vehicle which was not fitted with a seatbelt. He testified that he instantly felt pain shoot from his neck, back and spinal region and that he could not call out for help but climbed out the vehicle and lay on the ground.

35. The Claimant explained during cross examination that Dock Road, the road on which the accident occurred, is a flat road and runs from East to West and that there were containers parked on the Southern side of the road. The Claimant explained that he was driving in an easterly direction at approximately ten to twelve km/hr. The engine stopped operating and the vehicle slowed just a little having lost power but continued moving.

36. In explaining how the vehicle which was heading east hit the containers to the right of the vehicle, the Claimant gave evidence in cross examination that when the engine stopped working, the wheel locked in that direction.

37. Although the Claimant stated that the impact of the truck hitting the container seemed harsh to him in cross examination the Claimant explained that the vehicle did not actually hit the containers hard. This, the Claimant said knew because if the truck had collided with the containers hard, the containers would have fallen onto the truck. During cross examination he further asserted that he did not brace himself as his focus was on restarting the vehicle. He testified during cross examination that despite the vehicle hitting the containers at a slow speed he was thrown from the seat.

38. An ambulance was called by the foreman and the Claimant was taken to the Port-of-Spain General Hospital where he was examined, a few X-rays conducted, administered medication and given four days sick leave.

39. During cross examination, Counsel for the Defendant noted that the casualty card from his visit to the Port-of-Spain General Hospital after the second incident stated that he was not thrown out of the vehicle. The Claimant explained that he had told the doctor what had happened but that he did not know what the doctor wrote. Nevertheless, the Claimant gave evidence that he was thrown out his seat, not that he was thrown out the vehicle.

40. The Claimant confirmed in cross examination that he gave and signed a statement on the morning of the 18th July 2007 to Ms. Brenda Maximim. He admitted that there was nothing in the statement indicating that the brakes of the vehicle had failed. He also indicated that he was unaware that he told Ms. Maximim that he had no injuries. There were, in fact, no injuries noted in the statement taken from Ms. Maximim.

41. A Supervisor's Accident report dated 18th July 2007, and a Treatment of injury form dated 18th July 2007 were annexed to the Claimant's witness statement.

42. The Claimant admitted in cross examination that the injury leave he received from the Defendant ended in March 2008 but that he did not return to work until October 2008.

The Medical Evidence

43. When the first incident occurred the Claimant testified that the pain he experienced initially emanated from his neck and within what seemed like seconds to him he began experiencing pain in his head as well. He testified that he was not able to move or call out.

44. The Claimant gave evidence that on the occurrence of the second incident he instantly felt pain shoot from his neck, back and spinal region and that he could not call out for help.

45. He testified that to date he continues to suffer from severe pain, continues to take pain killers and seek treatment when the pain becomes overbearing. The Claimant explained that he can neither sit for more than forty minutes nor stand for more than one hour without pain in his neck. He also complained of not being able to sleep for long periods without feeling pain and discomfort. The Claimant gave evidence that the injuries have affected his sexual relationship with his wife. However during cross examination he admitted that he did not tell the doctors who medically examined him after the incidents about this complaint as he considered it personal.

46. The Claimant relied on the medical findings provided by Dr. Jason Ettienne and Dr. Steve Mahadeo and Dr. Ameeta Varma. The Defendant indicated in court that there would be no objection to use of the report by Dr. Varma although she was not called to give evidence as Dr. Mahadeo made reference to her report in his report. Dr. Varma's medical findings were reduced to writing in report dated 14th December 2007. The date on which Dr. Varma examined the Claimant is not clear but on the evidence it would seem that it was after the occurrence of the second incident. Dr. Ettienne prepared a medical report dated 20th February 2008 after having examined the Claimant subsequent to the first incident. Dr. Mahadeo reduced his findings to writing in report dated 14th January 2008 after having seen the Claimant on the 14th January 2008, a date subsequent to the occurrence of the second incident.

47. Dr. Varma assessed the Claimant as having:

> *Loss of cervical lordosis*
> *Disc dessication at all levels*
> *C2-3 and C3-4 levels: mild disc bulge with no compromise of central spinal canal and bilateral neural foramina*

C4-5 level: diffuse disc with posterior right paracentral propensity indenting thecal sac with no significant compromise of bilateral neural formina
C5-6 level: diffuse disc bulge causing mild compromise of left neural formamen
C6-7 level: diffuse disc bulge causing severe compromise of left neural foramen.

48. According to the medical report of Dr. Ettienne, he examined the Claimant on the 17th May 2007 at 10:00 a.m. at the Emergency Department Port-of-Spain General Hospital subsequent to the occurrence of the first incident on that day. Dr. Ettienne assessed the Claimant as having mild traumatic brain injury (low risk).

49. In the medical report, Dr. Ettienne explained that the Claimant's vital signs were within normal ranges with a Glasgow Coma Scale of 15/15. During Cross Examination, Dr. Ettienne explained that the Glasgow Coma Scale was an objective indicator of the mental state of the patient. He noted that fifteen is an alert patient and three is an unresponsive patient. The doctor therefore found that when the Claimant came into the hospital he was fully alert.

50. It was the evidence of Dr. Ettienne, after performing a neck exam of the Claimant, that the Claimant had no tenderness on all the parameters of a standard neck examination. He explained in Cross Examination that patients who sustain injuries to the head are at high risk of neck injuries and it is standard medical practice to evaluate the neck. The doctor stated that X-rays confirmed that there was no injury to the Claimant's neck after the first incident.

51. Dr. Ettienne explained in cross examination that on presentation at the hospital a patient is usually asked about the details of the accident and if the Claimant reported that he could not move or call out when the first incident occurred, it would have been noted in the medical report. It was not noted in the report.

52. Dr. Ettienne testified that he prescribed pain killers for duration of five days and given four days sick leave.

53. Dr. Mahadeo in his medical report stated that he saw the Claimant for a neurosurgical consultation on the 14th January 2008, some time after both incidents. In the report he explained that when the Claimant presented himself he told him of an accident which occurred in May 2007 in which he struck his head against the cab of the trailer truck he was operating as a result of the truck dropping into a hole on the Port Authority compound. He stated in his report that the Claimant had been experiencing pain at the back of the neck and the right scapula, and that he uses medication almost constantly. Dr. Mahadeo also reported that the Claimant informed him of the second incident.

54. On examination, Dr. Mahadeo found that the Claimant's symptoms included severe neck stiffness with severe restriction of neck extension due to injury to the C4/C5 disc with resultant segmental instability.

55. Dr. Mahadeo opined that the first incident would more than likely be the initiating event and that the second incident would have further aggravated the injury. He added however, that the segmental disability may also have been caused by a fight in which the Claimant was struck in his head. The Claimant however denied the occurrence of a fight. He concluded that the Claimant was in need of C4/C5 anterior cervical decompression and fusion and estimated the cost of the surgery to $58,300.00. On 18th June 2009 Dr Mahadeo estimated the cost of the surgery to be $59,800.00. Dr. Mahadeo stated that the date of the last report should have been 18th June 2008 and not 2009 and that this was due to a typographical error.

56. Dr. Mahadeo stated in his examination in chief that at the time he formed his opinion, he believed that the surgery was necessary. However he gave evidence that if the Claimant were to have the procedure at a date subsequent to his assessment, he would have had to re-examine him to ascertain if he still needed that type of surgery.

57. Dr. Mahadeo explained in cross examination that he based his findings on his perusal of the films of MRI scans taken of the Claimant and the Radiologist Report. He explained in

cross examination that he agreed with the findings of the Radiologist Report for the most part.

58. Dr. Mahadeo clarified in cross examination that the C3 to C7 segment of the spine, where the Claimant was injured, is called the cervical spine. He explained that there was a normal curve in that spine called lordosis. When lordosis is lost, the spine is straightened out and this shows that there is something wrong in that part of the spine. He opined that the usual cause of loss of lordosis was injury of the cervical spine. Dr, Mahadeo concluded that based on the Claimant's MRI scan, he believed that the main problem was at the C4 to C5 level.

The Defendant's Evidence

59. Evidence in chief on behalf of the Defendant was given by Ms. Brenda Maximim, Mr. Carl Vallie, and Alfred Duntin by their Witness Statements all filed on the 14th October 2011.

60. Ms. Maximim is an Investigating Officer employed at the Defendant, Mr. Vallie is an Industrial Relations Officer employed at the Defendant and Mr Duntin is a Mechanical Foreman employed at the Defendant.

61. Ms. Maximim cited her duties as being responsible for the investigation of accidents and ensuring health and safety compliance at the Port. In relation to the present matter, Ms. Maximim conducted investigations into both the incidents and prepared reports in relation to them.

62. The report on the first incident was dated the 22nd October 2007 in which Ms. Maximim found that the injuries sustained by the Claimant were as a result of an accident caused by the Claimant when he operated the equipment assigned to him without due care and attention.

63. In relation to the second incident Ms. Maximim gave evidence that she was called to the scene at around 2:00 a.m. When she arrived, she observed the Claimant standing next to the ITV#11 she then spoke to the Claimant and took a statement from him at 2:38 a.m. which he signed in her presence. Ms. Maximim gave evidence that the Claimant said he was not injured but as standard procedure she insisted that he be taken to the Port-of-Spain General Hospital.

64. Pursuant to the conversation with the Claimant Ms. Maximim prepared a preliminary report, in which she summed up that the Claimant operated the vehicle in a reckless fashion and did not exercise due care and attention while operating the vehicle. The date and time of this document is 18th July 2007 at 1:57 a.m.

65. Subsequent to this Ms. Maximim testified that she conducted further investigations and prepared a final report dated 19th July 2007 in which she found, inter alia, that the Claimant sustained no injuries as a result of the accident. She further testified that the accident was a direct result of the Claimant not exercising due care and attention while operating the equipment.

66. During cross examination, Ms. Maximim gave evidence that the Claimant did inform her at the scene of the second incident that the vehicle had malfunctioned, nevertheless she concluded that the Claimant did operate in a reckless fashion and without due care and attention.

67. Ms. Maximim testified in cross examination that the Claimant walked into the ambulance when it arrived on the scene after the second incident.

68. Contrary to Ms. Maximim's evidence in her witness statement that she took a statement from the Claimant, in cross examination she testified that at the time when the incident occurred she did not take a statement from the Claimant but was given a copy of one taken by the Port Police at the scene. When probed whether her evidence in relation to

taking the statement from the Claimant at the scene was untrue, Ms. Maximim hesitantly stated she did not know.

69. Mr. Vallie indicated that his duties and responsibilities included reporting and investigating all industrial relations issues at the Port. The evidence of Mr. Vallie related to the Claimant's claim for loss of earnings for the period 12th March 2008 to 24th October 2008.

70. Mr. Vallie testified that the Claimant was in fact not paid during that period but however stated that it was due to the Claimant not following the procedure for resumption of duty following an injury and also due to the Claimant himself not reporting to work at all.

71. According to Mr. Vallie, the Claimant was required to furnish the Human Resources Department with a Certificate of Fitness from the Port's doctor by 12th March 2008, as a consequence of the Claimant not submitting the required form at the required time, the payments for earnings to the Claimant ceased.

72. Mr. Vallie gave evidence that on the 17th July 2008 the Labour Office enquired of the Human Resource Manager about the absenteeism of the Claimant. The memorandum containing this enquiry is annexed to his Witness Statement. Mr Vallie testified that when the Human Resource Department contacted the Claimant about his absenteeism the Claimant responded by letter dated 22nd October 2008 with a Certificate of Fitness dated 3rd October 2008. This letter and certificate were also annexed to Mr. Vallie's Witness Statement. Subsequent to the receipt of these documents the Claimant was allowed to resume his duties.

73. Mr. Vallie gave evidence in cross examination that he was employed with the Defendant in September 2011 and therefore the matters referred to by him in his evidence were based on his perusal of the Claimant's file.

74. Mr. Duntin explained that his duties included conducting repairs to trucks, trailers, forklifts, tractor trucks/ITV's and other types of locomotive and automotive equipment at the Port.

75. Mr. Duntin gave evidence that he was working the 10:00 p.m. to 6:00 a.m. shift on 17th July to 18th July 2007 (the second incident) and that he was called to the scene of an accident around 1:57 a.m. during that shift. He testified that when he arrived at the scene he noticed the ITV 11, which had a damaged cab, next to a damaged container. He testified that the road on which the incident occurred, Dock Road, was a flat road.

76. Mr. Duntin clarified in cross examination that he arrived at the scene of the accident at 2:00 a.m. and the damaged container was a container on the roadway into which the Claimant collided.

77. Mr. Duntin testified that he spoke to the Claimant about the incident and then arranged to have the vehicle taken back to the garage for further examination. After the examination he prepared an Accident/Incident report dated 18th July 2007 which was attached to his Witness Statement. He gave evidence that the only mechanical defect on the vehicle was the steering valve hose and reasoned that it was more than likely caused by the accident. He testified that the Claimant did not tell him when he questioned him that morning about the accident that the vehicle had cut out and the brakes failed prior to the accident.

78. During cross examination Mr. Duntin gave evidence that he could not recall speaking to the Claimant after the incident nor could he recall whether he took a note from the Claimant about the incident. He admitted that he did take a note on the site of what happened but did not think it was from the Claimant.

79. He testified in cross examination that he did not drive the vehicle from the site but had it wrecked to the garage.

80. Mr. Duntin gave evidence during cross examination that the vehicle was not equipped with seat belts.

Submissions

Defendant's Submissions

81. Written Submissions on behalf of the Defendant were filed on the 17th April 2012.

The First Incident

82. Attorney for the Defendant acknowledged that there exists a duty of care on the part of an employer to provide its employee with a safe place of work. However, Counsel asserted that it is the duty of the Claimant to prove the negligence of the Defendant by pointing specifically to the alleged negligent acts committed by the Defendant. In denying any liability for the first incident, the Defendant's Attorney pointed out the following:

    a. That reasonably neither seat belts nor mirrors would have prevented this accident and therefore these alleged failures do not render the Defendant negligent and/or liable for the accident.

    b. The claimant's evidence is that he looking back to reverse. He is not alleging that whilst reversing his vision was impaired so the presence or absence of mirrors is irrelevant.

    c. The Claimant also says that he was looking backwards outside of the cab when the incident occurred. Given his position when the accident occurred and the standard design of the seatbelt, it is submitted that the seatbelt would not have restrained the blow the Claimant received to his forehead. The presence or absence of seatbelts is therefore also irrelevant for Claimant to avoid this accident or to act as an appropriate safety device in the circumstances.

d. The Claimant says that the absence of warnings of potholes is also a failure on the part of the Defendant and if there were caution signs or notices the accident could have been prevented. The Claimant has not provided any evidence on the alleged size or dimensions of the pothole for the court to assess whether a caution sign was necessary.

e. Given the Claimant's own evidence of having moved containers in that area at least 5 to 7 times prior to the accident on the morning of 17th May 2007 without issue and having worked on the Port since the year 1997 it is submitted that in the circumstances of this case more likely than not a warning sign or notice of a pothole was unnecessary. There can be no doubt that he is familiar with the roadway and therefore when reversing would have been aware of the pothole and could have taken reasonable steps to avoid it. Further given that nothing was impairing his vision when looking backwards it is difficult to understand how he was able to clear both containers when reversing and avoid the pothole but not see the pothole which was on his right side and the same side on which he was looking out the window.

f. The learned authors ***Clerk & Lindsell on Torts 19th Edn. Pages 180 -181 para 3-51*** sets out the standard of care as follows:

> *"the standard of care in contributory negligence is what is reasonable in the circumstances… and requires foreseeability of harm to oneself. A person guilty of contributory negligence whenever he ought to have reasonably foreseen that if he did not act prudently he might suffer injury and he must take into account the possibility of others being careless. The standard of reasonable care is normally objective and the care which the Claimant should take is to avoid accidents of the general class as opposed to that particular accident."*

g. It is therefore submitted that in the circumstances of this case the Court ought to find that the Claimant given that he was looking backward whilst driving could have reasonably seen the pothole and taken steps to avoid it.

h. The question now therefore turns as to whether the mere existence of a pothole on the Port's compound renders the Port negligent and or in breach of its duty of care to the Claimant.

i. The learned author ***Charlesworth on Negligence 7th Edn paragraph 11-09*** states as follows:

> *"Moreover the duty to provide a safe place of work is fulfilled by providing a place as safe as care and skill can make it having regard to the nature of the place…. Thus situations may frequently arise where there exists possible dangers the risk of which a prudent employer can foresee and yet the particular danger cannot be removed easily if at all."*

j. Given that the standard is to take **reasonable care for the safety of an employee**, it is submitted that the mere existence of a pothole on the Defendant's compound should not be prima facie evidence of negligence. The Claimant has not stated factually that the roads on the Port were in bad condition and filled with potholes and/or poorly maintained. If he had said this as a fact then the issue of whether the Defendant was maintaining its roadways or was in breach of its duty to repair and/or maintain its roadways could have arisen. His only allegation is that when he was reversing he went into a pothole. It is submitted that in the circumstances of this case it would not be practical for the Port in the exercise of its duty to take reasonable precautions for the safety of its employees to ensure that at all times there are no potholes on its roadways.

k. Similarly In the case of ***Davies v De Havilland Aircraft Co. Ltd [1950] 2 All ER pg 582*** at pg 583 paragraphs C to F, Sommerwell LJ stated as follows

> "Assuming that that there was, as I have found water that might be slippery at the time in question or assuming that there was an unexplained patch of oil I do not think that that amounts to a failure by the defendants to comply with the duty imposed on them … The fact that there is an uncertain period and in the circumstances which no one can explain there was a patch of oil does not seem to me to amount to a failure to maintain. I hold that the facts do not amount to a breach of this requirement…. It would be impracticable to maintain passages and roads so that there was never a slippery place especially after rain, on which a man might slip. Slipping is quite a common incident of life and usually no harm is done…

l. The Defendant therefore cannot also in exercising its duty to maintain its roads be reasonably expected to ensure that there are no potholes on its compound and in discharging its burden to take steps to render its premises reasonably safe for the Claimant it is submitted that the mere existence of one pothole is insufficient to give rise to a breach of the Port's duty to maintain its roadways. The Court therefore ought to find on a balance of probabilities that the mere existence of a pot hole on the Port's roadways does not amount to a danger that can be easily remedied and that even if the Port did have a pothole on its compound same is not sufficient for a finding that the Port in acting as a reasonable employer failed to exercise its duty of care to provide a safe place of work for the Claimant.

The Second Incident

83. The Defendant's Attorney invited the court to consider that the facts of the second incident as alleged by the Claimant, could not reasonably be what actually occurred. Counsel submitted that it was not credible that a truck with a stalled engine could have caused the damage to the truck and the alleged injury to the Claimant which occurred on that morning. It was contended that the severity of the damage to the vehicle did not suggest that the engine cut off at all. Counsel offered that given the damage to the Haul Major Truck the Claimant may have more than likely been speeding, or not exercising due care when driving which lead to the occurrence of the incident.

84. In furtherance of this submission, points out that the mechanical report submitted by the Port's foreman Alfred Duntin who was on site within minutes of the accident contains no record of any of the alleged malfunctions to the motor vehicle and the only damage noted on the report was in relation to the cab and steering valve which Mr. Duntin opined resulted from the impact.

Damages

85. In relation to the Claimant's claim in special damages for loss of earnings during the period 12th March 2008 to 24th October 2008, the Defendant did not dispute that the Claimant was not paid after 12th March 2008.

86. It was argued that no evidence was proffered by the Claimant that he continued on injury leave after 12th March 2008 or that the Port deliberately withheld earnings lawfully due to him. Attorney for the Defendant submitted that the Claimant did not report to work after 12th March 2008 until 24th October 2008 and therefore was not entitled to be paid earnings for the period of time that he did not report for work and was not on any valid leave from the Port.

87. Counsel reminded the court that the Claimant had been on injury leave from the first incident and had returned to work following the expiration of his injury leave on that occasion. Counsel submitted that based on this it was reasonable to presume that the Claimant was well aware of the procedure to follow injury leave.

88. In addressing the measure of general damages which ought to be awarded, Attorney for the Defendant submitted that after his 4 days sick leave from the first incident was up he proceeded on vacation for 2 weeks and returned to work. In this regard, it was submitted that there was no evidence of the Claimant requiring further sick leave arising from this incident until July 18, 2007 when the second incident occurred. With respect to the injuries reported by the Claimant from the second incident Counsel contended that in so far as the Claimant sought to give evidence as to what happened to him when the second incident occurred and of his pain and suffering at the time the incident occurred, his evidence is largely exaggerated and not truthful.

89. Counsel stated the law in assessing general damages to be that stated in ***Victor Cornilliac v. Griffith St. Louis (1965) 7 WIR 491***. He stated the categories for consideration arising from the Cornilliac case (supra) were:

    (a) The nature and extent of injuries sustained;

    (b) The nature and gravity of the resulting physical disability;

    (c) The pain and suffering endured;

    (d) The loss of amenities suffered; and

    (e) The extent to which consequentially, the plaintiff's pecuniary prospects have been materially affected.

90. Counsel therefore submitted that in reviewing the Claimant's evidence there was very little to assist the Court to make a finding in relation to the nature and gravity of the resulting physical disability; the pain and suffering endured; and the loss of amenities suffered as required under the Cornilliac guidelines for assessment

91. Counsel noted that although the Claimant averred that he was in a lot of pain after the second incident, he was able to give and sign a statement immediately after the incident. Further Counsel pointed out the evidence of Ms. Maximim that when she arrived at the scene of the accident within minutes of its occurrence she found the Claimant standing next to the damaged vehicle and he assured her that he was okay but that it was she who, in keeping with the Port's procedure, elected to make arrangements for him to go to the hospital.

92. Attorney for the Defendant attempted to discredit the injuries of the Claimant by noting that the area where the injury occurred according to the medical evidence was the Claimant's neck, however Counsel claimed that the factual evidence led by the Claimant related to a back injury of which the Court has no medical evidence.

93. Counsel asserted that the allegations about how his personal and physical life has been affected since the injury is diametrically opposite to the evidence relating to his work life and drew attention to the following:

    (a) The Claimant is a permanent employee of the Port as a Heavy Equipment Operator. He says that he cannot sit for more than forty minutes nor stand for more than one hour without pain running through his neck. However as an Equipment Operator he operates heavy machinery on the Port's compound at least for an eight hour shift each day of the week and admits to working two shifts at least once per week (sixteen hour days) when he is paid overtime. He has absolutely no complaint about his ability to work and was medically certified fit to return to work as a Heavy Equipment Operator as at October 2008. He admits that he is currently eligible for promotion on a higher grade of equipment and admits also to having no hindrances in relation to his performance at work. As an indication of the strenuous nature of his work the court is asked to consider his evidence that on the day of the first incident, 17th May 2007, he was involved in the accident around 8:30am having assumed duties at 7:00am and as at that time had already made five to six trips to load and off load containers.

(b) He says further in his witness statement, in support of his claim for loss of amenities and the resulting effect of his injury that he wakes up two to three times per night and has to ask his four year old daughter to walk on his back to alleviate the pain. He must sleep with a board under his mattress and without pillows **yet** he appeared to have sat comfortably for several hours in the Court under cross examination and during the course of the trial without any visible sign of discomfort and also led no evidence that the job he performs causes him any discomfort.

94. Having considered the evidence and several cases Counsel submitted that a reasonable range within which this Court ought to consider an award of general damages should be within the range of $30,000 and $40,000. (***Dr. Emmanuel Griffith v Garth Cunningham HCA No. 839 of 1998 page 9; Clifton Richardson and Ors. v Kiss Baking Company Limited HCA No. CV696 of 1996 pages 9 to 11; Selwyn Charles v The Attorney General of Trinidad and Tobago HCA No. 2092 of 2002; Damian Moreno v Anthony Brusco and Ors HCA No. 3130 of 2004 see pages 2 to 3 and 11 to 14***)

95. In relation to the future cost of surgery, Counsel submitted that the Claimant did not established an entitlement to his claim for payment for future surgery and noted the following:

(a) the Claimant's evidence is very limited on the issue of his future surgery and there is no evidence on his part that he is aware of the benefit of the future surgery to him or that this was discussed with Dr. Mahadeo.

(b) Dr. Mahadeo's evidence also lacks any details on the issue of future surgery save to quote the price. He gave no evidence oral or otherwise showing that:

i. He discussed the possibility of future surgery with the Claimant;

ii. Established as fact the benefits to the Claimant by reason of the future surgery;

iii. In cross examination he admitted to examining the Claimant only once which was on 14th January 2008 when he prepared his medical report and reviewed the Claimant's MRI. He admitted to having no knowledge of the Claimant's medical records prior to the MRI and was unaware of any other medical documents relating to the Claimant's medical condition.

iv. The estimate he gave on the 14th June 2009 for the cost of the future surgery was a repeat of what was stated in the 14th January 2008 report and Dr. Mahadeo admitted this new estimate was prepared without having examined the Claimant and was just issued by his office.

96. On the issue of costs, Counsel submitted that interest accrues on the claim made for damages by the Claimant as follows:

    (a) Claim for general damages from the date of service of the Claim Form at the rate of 12% per annum. Interest ought to therefore accrue from 19th May 2011.

    (b) Claim for Special damages for the loss of earnings, interest ought to accrue at the rate of 6% per annum from the date the claim arose to the date of judgment.

    (c) Claim for cost of future surgery this award will carry no interest since it has not yet been incurred.

97. Counsel submitted that costs on a liquidated damages claim is prescribed costs and ought to be assessed accordingly.

Claimant's Submissions

98. Written Submissions on behalf of the Claimant was filed on the 31st May 2012.

99. Counsel submitted that once it is established that there was a duty of care to the Claimant, a breach of that duty by the Defendant, that there was a casual link between the

Defendant's conduct and the damage to the Claimant and that such damage was not too remote, then the Defendant is liable in negligence.

100. Counsel contended that it was the Defendant's interpretation of this duty of care, and whether there was in fact a breach of same that is contested.

101. Counsel for the Claimant submitted that if the Claimant provides sufficient evidence to create a prima facie case of negligence against the Defendant in a situation where the evidence relating to negligence is particularly within the control of the Defendant, it then falls to the Defendant to refute same (***Clerk and Linsell on Torts, 8th Edition, Paragraph 7-191*).**

102. The essence of Counsel's submission on this point was that although there was a legal burden on the Claimant to show that the Defendant had been negligent, and the Claimant raises a 'presumption' or a 'prima facie' case and if nothing more appeared, the court might well infer the Defendants were negligent, and in that sense it places a burden on defendants to answer it (***Brown v. Rolls-Royce [1960] 1 All E.R. 577, H.L.; Basted v. Cozens and Sutcliffe [1954] 2 Loyd's Rep. 132***).

103. Counsel also submitted that the Defendant owed a duty of care to the Claimant to provide adequate plant and appliances such as a safe working trailer truck and sufficient safety devices such as safety belts.

First Incident

104. In relation to the first incident, Counsel contended that had it not been for the lack of side mirrors the Claimant would not have needed to look back through the window while reversing. Counsel submitted that the Claimant's angle and position at the time of the accident was as a direct result of the lack of side mirrors. He further submitted that while seatbelts may not have prevented the accident, it could very well have prevented the Claimant from slamming against the frame. Counsel concluded that if not for the

Defendant's failure to provide a safe working vehicle with adequate side mirrors and seatbelts, the Claimant would have been facing forward in an upright position and secured by the safety strap when the vehicle dropped into the pothole.

105. Counsel for the Defendant had submitted that since the Claimant had previously moved containers in the area in which the accident occurred at least five to seven times prior to the accident on the morning of 17th May 2007 without issue, that in the circumstances, more likely than not, a warning sign or notice of a pothole was unnecessary. In this regard, Counsel for the Claimant submitted that Counsel was making a wrong assumption that the five to seven trips to Shed nine were at the same section of Shed nine that the concerned pothole was found when in fact, according to the Claimant's evidence when cross-examined, Shed nine was not a shed or covered area but a large space designated for stacking/storing containers.

106. Counsel for the Claimant contended therefore that it did not matter how many times the Claimant made trips to Shed nine, even if all five to seven trips were in the same vicinity as the pothole, the Claimant's evidence was that he did not see the pothole before the truck reversed into it. If the Claimant missed the pothole five, seven or even ten times before the accident, it was submitted, that the responsibility remained on the Defendant to regularly inspect its roadways and repair reasonably foreseeable dangers such as this pothole, or at least provide adequate notice or warning to any employee nearing the said danger.

107. On the issue of the foreseeability of the danger of the pothole, Counsel for the Claimant stated that the danger was reasonably foreseeable and submitted that the Supervisor's Accident Report dated the 17th May 2007 supported this contention. In the report, Counsel noted that it stated that '*Several potholes remain unpaved which often results in incidents as has occurred above*'. Counsel contended that the Supervisor, Mr. Lorne Sandy in his assessment of the accident, did not assign any blame or unsafe act to the Claimant but attributed negligence to the Defendant's property management department for failing to maintain the surfaces of the roadways. Mr. Salandy then

recommended that there be immediate resurfacing of all major depressions and pot-holes in the yards and roadways.

108. Attorney for the Claimant contended that although it was the Defendant's statutory duty to generate at least one general risk assessment report each year under **Section 13A(1)** ***Occupational Safety and Health Act 2004,*** it was not attached, pleaded, entered into evidence or even properly referenced in the Defence, documentary support or any witness statement filed on behalf of the Defendant.

109. Counsel submitted that the Defendant's submission that there was contributory negligence by the Claimant was based on the wrong assumption that the Claimant ought to have seen the pothole. Counsel contended that this conclusion would be entirely against the weight of the evidence.

110. Counsel distinguished the case of ***Davies v De Havilland Aircraft Co. Ltd [1950] 2 All ER*** in that the danger therein, being an unexplained puddle of water with oil/mud particles, arose suddenly after rainfall whereas in the present matter, the danger developed slowly over an extended period of time. Counsel contended that while slipping may be quite a common incident of life, heavily laden trucks reversing into unnoticed potholes without safety belts and other proper reversing gear (such as side mirrors) should not be accepted as commonplace.

111. Counsel concluded that having presented a prima facie case of negligence before the Court, a provisional burden of proof now lay with the Defendant to show that it acted reasonably in the circumstance to identify and rectify potholes to the safety of its employees, which the Defendant has not shown. Counsel therefore submitted that it would be reasonable to foresee harm if the potholes along the Defendant's roadways are not monitored and at least warned of if not properly filled in and repaved.

Second Incident

112. Counsel in his submissions, made an evaluation of what, in his opinion, the evidence revealed. In so doing Counsel submitted that the Claimant had presented a prima facie case of negligence against the Defendant with respect to the second incident. Counsel for the Claimant submitted that the Defendant had failed to provide any evidence that it was maintaining the ITV11, driven by the Claimant, prior to the accident, or that the vehicle was roadworthy at the time of the accident. Counsel concluded that it was open to the Court to infer carelessness against the Defendant and make a finding that the Defendant breached its duty of care to the Claimant.

Damages

113. With respect to the claim for loss of earnings, Counsel for the Claimant pointed out that one of the Defendant's witnesses, Mr. Vallie could not properly identify for the Court what the proper policy for returning to work after a period of sick leave was, nor could he identify the source of that policy.

114. Counsel contended that Mr. Vallie could not indicate to the Court that the Claimant was served with notice of that policy. Neither could it be confirmed that the Claimant was aware that he had to bring in a certificate of fitness by 12th of March 2008. Counsel therefore submitted that it would be unfair to hold an employee to suffer from a policy that was perceived from documents, not provided with notice of this said policy nor made aware of pending deadlines.

115. In considering the factors identified in ***Cornilliac*** **(supra)** as it relates to the First Incident, Attorney for the Claimant submitted the following:

Nature and Extent of injuries sustained

i. The Claimant's injuries as it relates to ***the First Incident*** *are submitted as follows:*

a. *headaches, dizziness and nausea;*
b. *mild traumatic brain injury; AND*
c. *dormant cervical spinal injury (as per evidence of Dr. Mahadeo as the probable 'initiating event').*

Nature and Gravity of the resulting physical disability

ii. *The Claimant injuries herein and the resultant physical disability was mostly fleeting. He stated through his evidence that he could not initially move and started experiencing headaches, dizziness and nausea. It can be reasoned that he endured such symptoms for a period more than four (4) days but less than two weeks thereafter as he utilized his two weeks vacation leave to fully recover. It should be remembered though that the Claimant's severe cervical spinal injuries were identified as having originated or initiated by* ***the First Incident.***

The Pain and suffering and Loss of amenities

iii. *The Claimant experienced intense pain from the time of the accident to the time he was treated at the Port of Spain General Hospital. It must be remembered that the Claimant complained to the attending physician that he was experiencing nausea, dizziness and headaches. He was subsequently prescribed strong painkillers discharged with four days sick leave and mild brain injury instructions. The Claimant further stated at paragraph 6 of his evidence, that he utilized the two weeks following his sick leave to recover. Hence, it can be reasoned that the Claimant continued to endure pain and suffering and his activities continued to be curtailed for almost the entire time he was away from work, being the 17th May 2007 to the 4th June 2007.*

The extent to which consequentiality, the Plaintiff's pecuniary prospects have been materially affected.

iv. The Claimant remains employed with the Defendant company and has indeed been given opportunity to advance in his career, by training to drive/operate a larger piece of machinery, known as a reach stacker. Under cross examination the Claimant stated that he was once again in line to be trained to operate another piece of machinery. Hence, if analyzed solely in relation to the injuries sustained by ***the First incident*** *and for that duration between the first and second incidents, the Claimant's pecuniary prospects would not have been affected.*

116. Counsel submitted that the award with respect to the first and second incidents should be separated since, although the Claimant's injuries sustained through the First Incident may have been aggravated by the Second Incident, the Claimant has been made to endure pain and suffering and loss of amenities because of the Defendant's negligence through the First Incident.

117. Attorney therefore submitted the range of **$5,000.00 - $10,000.00 (*Jamurat v Aziz Ahamat Limited HCA 1414/74; Sattoo v Hernandez HCA 704/70***

118. The Claimant's Attorney submitted the following with respect to the Second Incident:

Nature and extent of injuries

i. Injuries sustained and supported by the medical evidence of Dr. Steve Mahadeo, Port of Spain General Hospital Accident and Emergency casualty reports and MRI report of Ameeta Varma MD are submitted as follows:

a) Initial dizziness, nausea and headaches, mild whiplash injury and mild cerebral concussion;

b) severe neck stiffness with severe restriction of neck extension, right lateral rotation and right lateral bending.

c) *Bilateral spasm on the right with tenderness at the insertion on the scapula;*

d) *Weakness of the right deltoid muscles;*

e) *Sharp sensation was reduced in C5 and C6 dermatomes on the right with diminished biceps and supinator reflexes bilaterally;*

f) *Symptoms and signs are due to injury to the C4C5 disc with resultant segmental instability;*

g) *Loss of lordosis and Disc dessication at all levels;*

h) *Mild disc bulge at C2-3 and C3-4 levels;*

i) *Diffuse disc bulge with posterior right paracentral propensity indenting thecal sac at C4-5 level;*

j) *C5-6 level: diffuse disc bulge, mild compromise of left nural foramen; AND*

k) *C6-7 level: diffuse disc bulge, severe compromise of left nural foramen.*

It has been recommended by the same medical expert who testified in the matter herein, that the Claimant undergo anterior cervical decompression and fusion surgery.

Nature and gravity of resulting physical disability

ii. *The nature and gravity of the Claimant's physical disability has been amply set out in paragraphs 20 – 23 and 26 of the Claimant's witness statement. Some of the major difficulties he faces can be summarized as follows:*

a. *Right pectoralis major muscle is smaller than the left and there has been weakness of the right deltoid muscles;*

b. *Continuing to suffer from severe intermittent pain that appears in sudden waves and requires pain killers and treatment when the pain gets too intense to bear, at which point he is dependent on others;*

c. *Can neither sit more than forty minutes nor stand more than one hour without pain running through his neck;*

d. *Disrupted and disjointed sleep, shortened sleeping hours as a result of the pain – cannot use pillows and must sleep on a board as recommended by physiotherapist – can only sleep for approximately five and a half hours in an eight hour attempt – wakes from sleep two to three times per night and must stretch and change position to alleviate pain;*

e. *Experiences waves of pain lasting between one and two hours at a time;*

f. *Cannot carry approximately three gallons of liquid, one hundred feet;*

g. *Claimant cannot greatly assist in housework nor complete all the yard work himself but must seek assistance or hire handymen.*

Pain and suffering endured

iii. *From the moment the Claimant slammed against the frame of his vehicle, he began experiencing intense pain that would have kept him inside the cab if the fear of impending danger did not drive him to escape. Same is properly elaborated on at paragraphs 10 and 11 of the Claimant's witness statement. He was treated, medicated, prescribed pain killers, granted sick leave for four days and discharged with instructions to the effect that he was to return should he experience any further pains and symptoms of more intensive injuries.*

iv. *It seemed for approximately twelve weeks thereafter that the Claimant was recovering well when suddenly he was struck with a bout of pain that virtually crippled same for approximately the next one year and three weeks. It is important to consider paragraphs 12 to 15, 20 to 22 and 26 in this regard.*

Loss of amenities suffered

v. *From the Claimant's evidence it can be reasoned that he had been an active, physically fit, family-oriented man of 28 prior to* ***the Second Incident.*** *He enjoyed working outside and had a healthy sexual relationship with his common law wife. There is some overlap with the factor* ***Nature and Gravity of the resulting physical disability*** *and as such the submissions at* ***ii.*** *above should be duly noted under this head. Finally, it should be noted that Mr. Mohammed enjoyed taking walks with his four (4) year old daughter in his arms as well as assisting his cousins and other family members to build or renovate their homes. The structure and muscular frame of the Claimant's body is of itself testimony of his previous hard working life and supports the Claimant's evidence herein. It would also be important under this head to also consider paragraphs 20 to 23 and 26 of the Claimant's witness statement.*

The extent to which the Plaintiff's pecuniary prospects are materially affected

vi. *To date, the Claimant has developed in his current career as an equipment operator/ driver employed with the Defendant company. He has been promoted and has been recommended for further training since the two incidents concerned herein. However, it is necessary to also consider the effect these injuries would have on the Claimant's future. To this it is submitted that given the Claimant's injuries and the unpredictability of the Claimant's bouts of pain, he may not be able to train and operate all of the equipment at the Port. As such, his ascent through hard work may very well plateau.*

119. Counsel submitted that the cases presented by the Defendant for the Court's consideration on quantum of damages were significantly dissimilar to the injuries sustained by the Claimant. The cases referred to therefore proffered awards for pain and suffering and loss of amenities that were way below that which was just and reasonable in the circumstances.

120. Consequently, Counsel submitted that the court consider the cases of ***Evans Moreau v Port Authority of Trinidad and Tobago CV.2006-03958; Anna Maria Hazell Peters v Andre Ramjohn and The New India Assurance Company Limited CV 2007-01972; Wayne Wills v Unilever Caribbean Limited HCA CV 2007-04748*** in awarding a sum within the range of $75,000 to $202,990.87

121. Counsel for the Claimant agreed with the submissions of the Attorney for the Defendant on the issue of costs and interest. However counsel noted that the Claimant had incurred additional costs of $5,000.00 to secure the attendance of Dr. Steve Mahadeo at the trial. Counsel submitted that should the Claimant succeed in its claim, the Defendant be made to compensate the Claimant for the said additional costs.

Issues

122. The issues to be determined are:

a. Whether the Defendant was wholly or partially negligent and/or in breach of its statutory duty of care to the Claimant as its employee to take reasonable care to provide him with a safe place of work.
b. Whether the Claimant was negligent in the conduct of his duties and whether his negligence wholly or partially caused either or both incidents.
c. What, if any, is the quantum of damages owing to the Claimant.

Law and Liability

Negligence

123. The tort of negligence arises where there is a failure to take care and there is resulting damage from this failure. The central feature of the tort thus is the existence of a duty to take care. Where there is no such notional duty to exercise care, negligence in the popular sense has no legal consequence: ***Charlesworth & Percy on Negligence 11th Edn. Para 1-19, Halsbury's Laws of England 5th Edn, Volume 78. Para 2***

124. In an employment situation, an employer has a duty to employees to take reasonable care for their safety: ***Charlesworth & Percy on Negligence 11th Edn. Para 10-02***. Employees must not be subject to unnecessary risk or injury. "Unnecessary" in this context means:

> *…a duty not to subject the employee to any risk which the employer can reasonably foresee, or, to put it slightly lower, not to subject the employee to any risk that the employer can reasonably foresee and against which he can guard by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved:* ***Harris v Bright Asphalt Contractors (1953) 1QB 617 at 626***

125. There exists a duty at common law on employers to provide their workmen with a safe place of work. That is, not merely to warn against unusual dangers known to them, but also to make the place of employment as safe as the exercise of reasonable skill and care would permit: ***Naismith v London Film Productions Ltd [1939] 1 All E.R. 794 at 798***

126. The duty to provide a safe place of work is fulfilled by providing a place as safe as care and skill can make it, having regard to the nature of the place.

127. An employer is also burdened with the duty to take reasonable care to provide and maintain proper plant and machinery. "Plant" is used in this context to denote all things employed in the course of work. The plant must be kept in good order and the employer must also set up a regular system of maintenance: ***Munkman: Employer's Liability at Common Law, 15th Edn. Chapter 4.***

128. The onus of proving negligence always rests upon the claimant, though the temporary onus of producing evidence (provisional burden), e.g. to show why trade practice has not been followed, may shift from time to time during the trial: ***Brown v Rolls Royce Ltd [1960] 1 All ER 577***. The situation is very different in statutory duty claims where, having established that an injury of the kind envisaged by the statute has occurred, the burden passes to the defendant to demonstrate either that it complied with the statute or

that any non-compliance was not the cause of the injury: ***Munkman: Employer's Liability at Common Law,15th edition Chapter 3.***

129. Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it often lies upon the latter: ***Halsbury's Laws of England 5th Edn, Volume 11. Para 772***

The First Incident

130. The Claimant has alleged negligence on the part of the Defendant on the following grounds:

a) Failing to cover or repair the pot holes prior to the First incident and thereby failing to provide a safe place of work as required at common law and or;

b) Failing to provide adequate notice, caution or warning of the said pot hole;

c) Failing to provide adequate and suitable safety equipment and or devices, including a safety belt, despite the Claimant having made several complaints of same;

d) Failing to assess, review and maintain the roadways within the Defendant's premises on a reasonable regular basis;

e) Failing to pave, cover, fill in or fix the said pot hole prior to the first incident

131. It is not in dispute that the vehicle was not equipped with seat belts. Mr. Duntin, a witness for the Defendant, gave evidence during cross examination that the vehicle was not equipped with seat belts.

132. On the evidence the failure of the Defendant to keep the premises free of potholes is, in this courts view, a breach of the common law duty to provide a safe place of work in these circumstances. It is common knowledge that the work being performed at a Port would of necessity involve the haulage and transportation of heavy cargo of considerably large dimensions by similarly heavy and sizeable trucks and trailers. It would in this context be the duty of the employer to take such reasonable care to maintain the access

roadways which are used for such haulage and transportation in such a manner that the employee would not be put at risk in the regular performance of his task. It is reasonably foreseeable that any pothole present on the roadway may lead to the occurrence of an accident while manoeuvring a truck and trailer. Contrary to the arguments proffered by the Defendant, the Claimant need not provide evidence of the size or dimensions of the pothole. In these circumstances, no pothole of any size would be acceptable having regard to the technical nature of the task of safely manoeuvring the truck and trailer.

133. Further, the court does not accept the argument of the Defence that the Claimant ought to have been aware of the pothole on the account of him having moved containers in that area at least five to seven times prior to the accident on the morning of the 17th May 2007 without issue and having worked on the Port since the year 1997. It may well have been that the Claimant's jobs that morning did not require him to traverse over the pothole. The Defendant could not reasonably expect that the pothole could easily have been seen without mirrors particularly because of the type and size of vehicle being driven. Further, the evidence was that the Claimant was twisted and looking back to ensure that the roadway was clear. In those circumstances it is quite a reasonable proposition that a driver may not see a pothole on his side of the roadway as it may be too low for him to see especially in a high trailer vehicle or for several other reasons. The court therefore believes it more likely than not that the Claimant did not see the potholes on that morning.

134. In any event, familiarity with the pothole would not have, in these circumstances, abrogated the Defendant's duty to provide a safe place of work. This duty, in the court's opinion was to ensure that the road way was properly maintained and further that any potential dangers were sufficiently brought to the attention of the employees whether by way of appropriate signage or otherwise. The Port of Port of Spain is one of this nation's busiest ports and is located in the heart of the capital city. Considering the high volume of shipping traffic at the port, it is highly likely that an accident of this nature would occur should there not be timely and adequate maintenance of equipment and plant.

135. Additionally, this court is of the view that the failure of the Defendant to have seat belts and mirrors fitted in the trailer truck driven by the Claimant was a breach of its common law duty to provide and maintain proper plant and machinery. Plant in this case being the truck used by employees to haul containers onto ships and into sheds. It being foreseeable that in the driving of large equipment, an accident of this nature may occur; it was the duty of the Defendant to supply to the employee equipment fitted with adequate safeguards for the protection of the employee in case of accident. In the twenty first century, when the provision of seatbelts in all vehicles is at the least a minimum safety standard, there can be no justification for the employee's use of vehicles not fitted with seatbelts at the minimum.

136. But the matter does not end there. It is almost inconceivable that an employee would be supplied with a trailer truck which is to be used to reverse, with a large trailer attached *without a rear view mirror*. This places the employee in the precarious position of having to look back out of the window to ensure that his way is clear, while at the same time manoeuvring the large truck and trailer. Certainly this is a dangerous practice which may well result in damage to property and injury to the person. This would be especially so should there be no one standing at the back of the trailer to assist with directions. What is more, the provision of mirrors in the vehicle is also otherwise relevant to the claim in negligence as it may have obviated the need for the Claimant to place himself in an awkward position to see when reversing by placing his head outside the vehicle which, this court finds, contributed to his damage.

137. While the provision of the seat belts and mirrors may not have prevented the first incident they may have well mitigated the injury to the Claimant. The provision of seat belts could very well have prevented the Claimant from slamming against the frame. The court agrees with the arguments advanced by the Claimant that had it not been for the Defendant's failure to provide a safe working vehicle with adequate side mirrors and

seatbelts, the Claimant would have been facing forward in an upright position and secured by the safety belt at the point in time when the vehicle dropped into the pothole.

138. The failure of the Defendant to keep the premises pot hole free and equip the vehicle with a seat belt and mirrors resulted in the Claimant sustaining damage. The Defendant was therefore negligent by:

a) Failing to cover or repair the pot holes prior to the First incident and thereby failing to provide a safe place of work as required at common law and or;
b) Failing to provide adequate notice, caution or warning of the said pot hole;
c) Failing to provide adequate and suitable safety equipment and or devices, including a safety belt, despite the Claimant having made several complaints of same.

The Second Incident

139. With respect to the second incident the Claimant alleged that the Defendant was negligent by:

a) Failing to provide an adequately safe and functional trailer truck and thereby a safe system of work with adequate safety equipment;
b) Failing to service, maintain and or assess the said vehicle on a reasonably regular basis given the particular circumstances of this matter.

140. On the law discussed above, this court finds that the Defendant owed a duty to maintain the vehicles being used in the course of the Claimant's employment, in this case the trailer truck.

141. Whether there was a breach of this duty turns on the evidence. In this regard, the Claimant has set out that the vehicle cut off, the steering locked and the vehicle continued moving in it momentum and collided with containers. The Defendant's evidence on the mechanical functionality of the vehicle came from Mr. Duntin who gave evidence that

the only mechanical defect on the vehicle was the steering valve hose and reasoned that it was more than likely caused by the accident.

142. Counsel for the Defendant submitted that it was not a credible assertion that a truck with a stalled engine could have caused such an accident in such a manner. It was contended that the severity of the damage to the vehicle did not suggest that the engine cut off at all. Counsel offered that given the damage to the Haul Major Truck the Claimant may have more than likely been speeding, or not exercising due care when driving which led to the occurrence of the incident. This argument in effect is inviting the court to speculate in the face of no evidence in support of the contention. The evidence of mechanical functionality of the trailer truck or lack thereof at the time of the incident lies solely in the knowledge of the Defendant who was operating the truck on that day. Mr. Duntin's evidence cannot assist the court in that regard. The evidence of Mr. Duntin was that the steering valve was damaged. Mr. Duntin was not proffered as an expert witness in the appropriate field of mechanics as it relates to the specific truck or any truck. So that there is n evidence upon which this court could come to the conclusions advanced by the defence.

143. The Defendant also pleaded that even if the vehicle jerked and the engine switched off, the brakes of the vehicle were air brakes and would have continued working since its function is separate from the engine and would have been able to stop the vehicle and avoid the collision. However no evidence was brought to prove this averment and the court will make no such finding.

144. The court therefore accepts the Claimant's version of what occurred on that day. Additionally, the Defendant has failed to lead any evidence whatsoever of the maintenance schedule of the said truck. Consequently, this court finds that the Claimant has made out that the Defendant was negligent in failing to maintain the vehicle, in that the Defendant:

a) *Failed to provide an adequately safe and functional trailer truck and thereby a safe system of work with adequate safety equipment;*
b) *Failed to service, maintain and or assess the said vehicle on a reasonably regular basis given the particular circumstances of this matter.*

145. This failure is what would have ultimately resulted in the Claimant colliding with the containers and suffering damage. It is reasonably foreseeable that failure to adequately maintain the trucks may result in this particular type of incident, that is the stalling of the vehicle. To this extent the resulting damage is not remote.

Contributory Negligence in relation to both incidents

146. Where a defendant alleges contributory negligence on the part of the Claimant, he must so prove. The court finds that this has not been proven and therefore there has been no contributory negligence on the part of the Claimant.

147. In this respect, the Defendant has not given any evidence to prove that the Claimant was in fact negligent. The Defendant's witness, Ms. Maximim gave evidence that the injuries sustained by the Claimant after the first incident were as a result of an accident caused by the Claimant when he operated the equipment assigned to him without due care and attention. Ms. Maximim also summed up that the Claimant operated the vehicle in a reckless fashion and did not exercise due care and attention while operating the vehicle which resulted in the second incident. However, there were no witnesses to both incidents save and except the Claimant himself and his evidence does not give rise to inferences of negligence on his part. Ms. Maximim's evidence, in the court's opinion, is therefore not only unreliable but also provides no basis whatsoever for such an assertion. Further, the court is of the view that the credibility of this witness has been seriously undermined by her testimony. She initially testified that she had taken a statement from the Claimant when the second accident occurred but later when confronted in cross examination, hesitantly accepted that this was not so. So that this court will place no

reliance on her evidence as a whole. For these reasons and for those set out at paragraphs 132 to 137 above in respect of the first incident there can be no contributory negligence.

Breach of Statutory duty

148. Negligent failure to maintain safety standards by an employer may give rise to both liability for negligence and the tort of breach of statutory duty: ***Halsbury's Laws of England 5th Edn, Volume 78. Para 1.***

149. An action for breach of statutory duty is a common law action based on the purpose of the statute to protect the workman, and belongs to the category often described as that of cases of strict or absolute liability. It is sometimes described as statutory negligence as the claim is based on a breach of a duty to take care for the safety of the workman: ***Charlesworth & Percy on Negligence 11th Edn. Para 11-01; Caswell v Powell Duffryn Association Collieries Ltd [1940] A.C. 155 at 177, 178.***

150. The existence of a statutory duty does not necessarily relieve an employer of his common law duty of care to his workmen.

151. Although the claim in negligence and breach of statutory duty are different causes of action, the relief, that is damages, is the same. In ***London Passenger Transport Board v Upson [1949] A.C. 155 at 168*** Lord Wright stated:

> *The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty...*

152. If a right of action is found to exist the Claimant must prove that (1) he is a member of the class of persons whom the statute is designed to protect, that (2) the damage suffered is within the scope of the mischief against which the statute is aimed, that (3) the

Defendant is in breach of the statutory obligation (which may be strict, sometimes described as absolute, or simply a duty to use due diligence), and that (4) the breach of duty caused damage to the Claimant: ***Halsbury's Laws of England 5th Edn, Volume 1(1). Para. 186.***

153. The ***Occupational Safety and Health Act Chapter 88:08*** provides an employee with redress where an employer fails to comply with a duty or requirement under this Act. However, **section 83A** provides:

> *An aggrieved person may apply to the Industrial Court for redress and the Industrial Court may make an award in favour of the aggrieved person and impose any penalty, other than a term of imprisonment, that a summary Court may impose in respect of that contravention or failure to comply.*

154. "Court" is defined in section 4 as:

> (a) in relation to criminal proceedings, means a Court of summary jurisdiction; or
> (b) in relation to proceedings under sections 83A and 97A, means the Industrial Court;

155. A person relying on a particular statute for breach of statutory duty must prove that he is a member of the class of persons contemplated by the Act. In this regard, while the statute uses the description "an aggrieved person" in section 83A a definition of "an aggrieved person" is not set out in the interpretation section at section 4. This court is however of the view that applying its natural and ordinary meaning, aggrieved persons must refer to the class of persons whom the Act attempts to protect and therefore includes employees of the employer against whom a breach is alleged.

156. Further section 83(1) provides:

> *Subject to subsection (2), where a person contravenes a provision of this Act or any Regulations made thereunder or fails to comply with any duty, prohibition,*

restriction, instruction or directive issued under this Act or any such Regulations, he commits a safety and health offence ***and is subject to the jurisdiction of the Industrial Court unless otherwise specified****.[emphasis mine]*

157. What then is the effect of the Act having prescribed a particular tribunal to entertain applications for redress where there are infringements of the Act? This issue was considered in the recent case of ***Bobby Mungal (Trading as Best Choice Meats) v Eldorado Consumers' Co-operative Society Limited CV 2009-02781 (Trinidad and Tobago High Court)***.

158. In that case, Gobin J considered whether the court had the jurisdiction to hear and determine the matter. Before the court was an application to set aside a default judgment obtained against the Defendant in default of appearance. The Defendant was a Co-operative Society registered under the ***Co-operative Societies Act Ch 81:03*** and the Claimant a supplier of dry goods and meats which it sold to the Defendant in the course of its business.

159. Section 67(1)(f) of the ***Co-operative Societies Act (supra)*** provided:

"(1) If any dispute touching the business of a society arises—

… …

(f) Between the society and any of its creditors, the dispute shall be referred to the Commissioner for decision."

160. In concluding that the the Commissioner of Co-operatives is the proper person to hear the dispute, Gobin J considered the case of ***Sowatillal v Kalika Persaud et al [1971] 18 WIR*** where Crane JA concluded that a party was bound to access the procedure set out in the legislation. In the ***Sowatillal*** case, Crane JA had regard to the judgment of Asquith LJ in ***Wilkinson v Burting Corporation (1948) 1 All ER*** where, ***at page 567*** the learned judge enunciated:

"It is undoubtedly good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal and not to others. As the House of Lords ruled in Pasmore v. Oswaldtwistle Urban District Council (11), per EARL OF HALSBURY, L.C. ([189 A.C.394): 'The principle that where a specific remedy is given by statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law…

…

No act of parties, can create in the courts a jurisdiction which Parliament has said shall vest, not in the courts, but exclusively in some other body, and a party cannot submit to, so as to make effective, a jurisdiction which does not exist – which is, perhaps, another way of saying the same thing."

161. The position appears to be no different in the present case. The statute has prescribed that aggrieved persons are to have recourse to the Industrial Court for breaches under the Act. Further, the Act provides specifically for penalties which are to be imposed by courts of summary jurisdiction. These are the matters which fall under the category of specific exceptions to the general principle in the Act that breaches are a matter for the Industrial Court.

162. The court will therefore make no finding on the breach of statutory duty under the ***Occupational Safety and Health Act.*** In so doing, the court notes that the decision of Gobin J is under appeal. However, this court is of the opinion that until and unless the dicta of Crane JA in ***Sowatillal v Kalika Persaud et al*** (supra) is overruled it remains good law.

163. In any event, if this court is wrong on the point, the relief to which the Claimant is entitled would be the same for statutory breach as it is for breach of the common law duty, although the claim in negligence and breach of statutory duty are different causes of action. In other words the Claimant would not be entitled to a double compensation in damages.

Damages

164. The measure of damages is that insofar as money can compensate for loss and damage, which is not too remote, the Claimant is to be placed in the position he would have been had the tort not been committed: ***Charlesworth & Percy on Negligence 11th Edn. Para 4-35.***

General Damages

165. General damages are those which the law presumes to flow from the negligence alleged by the Claimant and the principles for assessing same are contained in the case of ***Cornilliac v St. Louis (1965) 7 W.I.R 491***. Wooding C.J in this case set out the now well known principles in assessing damages in personal injury cases for non-pecuniary loss as follows:

(a) The nature and extent of the injuries sustained;

(b) The nature and gravity of the resulting physical disability;

(c) The pain and suffering which had to be endured;

(d) Loss of amenities; and

(e) The extent to which pecuniary prospects were affected.

166. Although the Claimant sustained injuries from both the first and second incidents, this court considers that an award of damages is compensatory in nature. Thus, the court strives to compensate the Claimant for the loss, damage and pain suffered. In order to fully appreciate the extent of the injuries the Claimant sustained from both incidents a

holistic approach to damages must be taken in this case. The injuries from both incidents will therefore be considered together in order to establish a universal sum which is fair and reasonable

Nature and extent of the injuries sustained

The Casualty Card at Port of Spain General Hospital dated 17th May 2007 annexed to the Claimant's Statement of Case listed the injuries sustained by the Claimant after the First Incident as blunt head injury, headaches, dizziness and nausea. In the medical report of Dr. Ettienne dated the 20th February 2008, Dr. Ettienne, who saw the Claimant on the 17th May 2007 after the first incident, assessed the Claimant as having sustained mild traumatic brain injury (low risk).

The Casualty Card at Port of Spain General Hospital dated 18th July 2007 annexed to the Claimant's Statement of Case listed the injuries sustained by the Claimant after the Second Incident as dizziness, headaches, neck pains, mild cerebral contusion and mild whiplash injury. Dr. Varma assessed the Claimant as having:

Loss of cervical lordosis

Disc desiccation at all levels

C2-3 and C3-4 levels: mild disc bulge with no compromise of central spinal canal and bilateral neural foramina

C4-5 level: diffuse disc with posterior right paracentral propensity indenting thecal sac with no significant compromise of bilateral neural formina

C5-6 level: diffuse disc bulge causing mild compromise of left neural formamen

C6-7 level: diffuse disc bulge causing severe compromise of left neural foramen.

Dr. Mahadeo found that the Claimant's symptoms included severe neck stiffness with severe restriction of neck extension due to injury to the C4/C5 disc with resultant segmental instability. Dr. Mahadeo opined that the first incident would more than likely be the initiating event and that the second incident would have further aggravated the injury.

Nature and gravity of the resulting physical disability

Dr. Mahadeo concluded that the Claimant was in need of C4/C5 anterior cervical decompression and fusion.

The Claimant testified that he suffers continuing severe intermittent pain that appears in sudden waves and requires pain killers and treatment when the pain gets too intense to bear. He testified that he can neither sit more than forty minutes nor stand more than one hour without pain running through his neck. The Claimant also testified that he has disrupted and disjointed sleep, shortened sleeping hours as a result of the pain, he cannot use pillows and must sleep on a board and he can only sleep for approximately five and a half hours in an eight hour attempt as he wakes from sleep two to three times per night and must stretch and change position to alleviate pain. The Claimant maintained that he continues to be treated as an out-patient at Port-of-Spain General Hospital Physiotherapy Department and attends a chiropractor for further treatment and care.

Pain and suffering

The Claimant testified that immediately after the first incident the pain he experienced initially emanated from his neck and he began experiencing pain in his head as well. The Claimant gave evidence that on the occurrence of the second incident he instantly felt pain shoot from his neck, back and spinal region.

It would appear from the evidence that after the First Incident the Claimant was not left with lasting effects of the accident. However, the second incident appears to have left the Claimant with lasting effects. It is the Claimant's evidence that he still suffers from medium to sever pain as a result of the accidents.

Loss of amenities

It was submitted that from the Claimant's evidence it can be reasoned that the Claimant had been an active, physically fit, family-oriented man of twenty eight years prior to the Second Incident**.** He enjoyed working outside and had a healthy sexual

relationship with his common law wife which has now, according to the Claimant, been seriously affected. The Claimant testified that he is unable to perform sexually, the way he did prior to the accident. Prior to the accidents the Claimant testified that he would lift his four year old daughter and take her for walks, which he can no longer do.

Extent to which pecuniary prospects were affected

The Claimant's Attorney submitted that the Claimant has developed in his current career as an equipment operator/ driver employed with the Defendant. He has been promoted and has been recommended for further training since the two incidents occurred. The court will therefore not make an award under this head as there has been no evidence that the Claimant's pecuniary prospects have been affected.

167. In ***Nichola Rodriguez v Ansa Finance Merchant Bank Limited; Ashraf Ali; Trinidad and Tobago Insurance Limited; Gregory Morris; The Great Northern Insurance Company Limited H.C.3048/2008. CV.2008-03048*** Master Alexander explained that while ***Cornilliac*** is the seminal authority on assessment of damages, other principles need be considered. These are:

> "a. The words of Kangaloo JA in ***Munroe Thomas v Malachi Ford Civ App 25 of 2007*** that, "*[T]he assessment of damages for a personal injuries claim should be a straightforward arithmetical exercise …. [but] far too often sight is lost of two fundamental principles: first, that a personal injury claim must never be viewed as a road to riches and secondly, that a claimant is entitled to fair, not perfect compensation.* [emphasis mine]
>
> b. The caution of Lord Carswell in ***Seepersad v Theophilus Persad and Or [2004] UKPC 19*** that, " *It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for personal injuries is comparing like with like. The methodology of using comparisons is sound, but when they are of some*

antiquity such comparisons can do no more that demonstrate a trend in very rough and general terms."

c. The dicta of M A de la Bastide in ***Harrinanan v Pariag & ors CA No 239 of 1998*** at page 6 , "*I would recommend that the more traditional method of using cases that are relatively recent as the benchmarks by which to determine what is a proper award of general damages in a particular case. Whether those awards have been arrived at as a result of factorization of earlier awards is really immaterial. Awards, once made, must unless, they are upset, be regarded as providing some guidance in any new case.*"

d. The words of Lord Jauncey in ***Ruxley Electronics and Construction Ltd v Forsyth [1995] UKHL 8*** that, "*Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party, from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained."*

e. The principles that "*perfect compensation is hardly possible*" and compensation for injuries is a once and for all award. It was also borne in mind that the claimant has suffered a wrong at the hands of the defendants and should be fully and fairly compensated for her injuries."

168. This court must therefore be guided by cases similar to that of the Claimant. In this regard the court considered the cases submitted by Counsel:

Authorities on quantum submitted by the Defendant

Counsel for the Defendant relied on the following cases in submitting a range of **$30,000 and $40,000.**

- ***Dr. Emmanuel Griffith v Garth Cunningham Justice Smith HCA No. 839 of 1998*** page 9 as he then was awarded the Plaintiff on 23rd January 2001 the sum of $18,000 for injuries to his neck and face (reduced to $3,600 on account of 80% contribution). Smith J assessment was based on findings that these injuries were relatively mild to moderate, involving soft tissue injury in the region of the neck and back and swelling in the facial area
- ***Clifton Richardson and Ors. v Kiss Baking Company Limited HCA No. CV696 of 1996*** pages 9 to 11 dated 31st January 2000 where the Honourable Mr. Justice Jamadar (as he then was) awarded the sum of $35,000 [adjusted to $71,385.00 in December 2010] to the First named Plaintiff for minor to moderate injuries to his chest and head.
- ***Selwyn Charles v The Attorney General of Trinidad and Tobago HCA No. 2092 of 2002*** - the Claimant was awarded the sum of $50,000 to a Claimant whose injuries included left wrist, neck, chest and spinal damage.
- ***Damian Moreno v Anthony Brusco and Ors HCA No. 3130 of 2004*** see pages 2 to 3 and 11 to 14 the Claimant was awarded $35,000 as general damages on 7th October 2009 for personal injuries such as cerebral concussion, cervical muscular spasm, lacerations to the face, post concussion syndrome, thoracic spine strain with complaints of pain in the upper back and neck, inability to sit and stand for more than 20 minutes, headaches when exposed to sunlight, inability to concentrate, decreased memory and easily fatigued.

Authorities on quantum submitted by the Claimant

Counsel for the Claimant submitted the range of **$75,000 to $202,990.87** and relied on the following cases in support:

- In ***Evans Moreau v Port Authority of Trinidad and Tobago CV.2006-03958***, a judgment delivered in September 2010 in which the 43 year old Equipment operator Plaintiff was transporting a cargo of 20 feet containers when he entered a rough patch on the Defendant's roadway and bounced off the defective truck seat,

hitting his head. The Plaintiff therein pleaded his injuries as pains in the neck, radicular symptoms in both arms, cord and nerve compression of C4/5 and C5/6, cervical spondylosis, back pains, weakness in both arms, inability to stand and sit for short periods, difficulty in climbing stairs. An award of $200,000.00 was made.

- ***Anna Maria Hazell Peters*** ***v*** ***Andre Ramjohn and The New India Assurance Company Limited*** ***CV 2007-01972*** the Claimant therein suffered from post concussion syndrome, loss of cervical lordosis, disc dessication at C2-3 to C6-7 with reduced disc height at C5-6, mild disc bulge at C2-3 to C4-5 and diffuse disc bulge indenting at C5-6 and C6-7 but not compressing the spinal cord, and C5-6 narrowing which led to cervical spondylosis, restricted neck movements, low back pain. The Plaintiff testified that she could not sit for longer than 25 minutes as she would experience sharp spasms. An award of $90,000.00 was made.

- ***Wayne Wills*** ***v*** ***Unilever Caribbean Limited*** ***HCA CV 2007-04748*** a decision on the 26th of February 2010, the Honourable Court found that initially the Claimant was treated for acute lumbar strain but after further testing were done, it was found that the Claimant suffered L4/L5 disc herniation that necessitated surgery. Surgery was done some two and a half months after the injury and follow up treatment included physiotherapy and aquatherapy. In spite of the successful surgery and physiotherapy, the Plaintiff therein was not able to play football and hockey or have sexual intercourse with his wife as regularly as before the pain. He continued to feel back pain up to the date of hearing and could not do strenuous tasks even sweeping the floor at home would result in pain. The Court considered the sum of $75,000.00 as a fair award.

169. This court, in making its assessment, has considered all the authorities submitted by Counsel and finds that the authorities submitted by Counsel for the Claimant are more applicable to the Claimant's case than those relied on by the Defendant.

170. Additionally, the court finds assistance in the cases of:

- ***Carolyn Fleming v The Attorney General of Trinidad and Tobago H.C.2766/2007. CV.2007-02766. H.C.709/2005. H.C.S.387/2005.*** In this case the injuries sustained included intermittent pains on both upper and lower back radiating towards her legs. The medical evidence showed "Cervical Spine 9%; Lumbar Spine 8%; L4/5 S1 Nerve Root Impairment due to facet joint motion segment instability 8%. This patient has a 25% permanent impairment due to the injuries. The claimant was employed as a clerk at the time of the accident and as a result of her injuries she was declared medically unfit to work. An award of $80, 000 was given.

- ***Dexter Sobers v The AG CV2008-04393*** where Master Mohammed in May, 2011 awarded $80,000.00 for loss of lumbar lordosis, disc desiccation and annular tear at L4/% and L5/S1 levels; diffuse disc bulge with posterior central propensity indenting thecal sac with no neural compression, diffuse disc bulge with propensity to left and posterior left paracentral small disc protusion impinging on left S1 traversing nerve root. The claimant experienced back pains radiating down the left leg; her straight leg raising was greater than 90 degrees bilaterally, with a negative sciatic stretch test; power, sensation and reflexes were within normal limits and 20% permanent partial disability

171. The injuries in the additional cases considered by the court would seem slightly more severe than that suffered by the Claimant in the present case. Further the cases cited by Counsel for the Claimant offered injuries considered by this court to be less severe than that suffered by the Claimant. Consequently, this court finds the sum of **$60,000.00** to be a fair and reasonable award for **pain and suffering and loss of amenities** in the circumstances of this case.

Cost of Future Surgery

172. To the amount awarded for general damages the cost of Future surgery must be considered. As these sums were not already paid and are thus subject to change, they fall within the ambit of General Damage and must therefore be considered: ***Elva Dick-Nicholas v Jayson Hernandez and Capital Insurance Company Limited HCA No: S-1449 of 2004/ CV 2006- 01035.***

173. The Claimant claimed the sum of $59,800.00 as the cost of a future surgery.

174. Dr. Mahadeo recommended after having last examined the Claimant on the 14th January 2008 that the Claimant was in need of surgery in the form of C4C5 anterior cervical decompression and fusion. This is contained in his updated projection dated the 18 June 2009 annexed to the Claimant's Statement of Case.

175. No evidence has been offered that the Claimant no longer requires the surgery and in fact, Dr. Mahadeo testified that at his last assessment he did. On this evidence, the court shall make an award under this head in the projected sum of $59,800.00.

176. The **total General Damages** shall be the sum of **$119,800.00**.

Special Damages

177. Special damages must be pleaded, particularized and "strictly" proved: ***Grant v Motilal Moonan Ltd (1988) 43 WIR 372 per Bernard CJ***.

178. The Claimant has pleaded special damages in the sum of $64,000.00 representing his loss of earnings from the 12th March 2008 to 24th October 2008.

179. In relation to the Claimant's claim in special damages for loss of earnings during the period 12th March 2008 to 24th October 2008, the Defendant did not dispute that the Claimant was not paid after 12th March 2008. However, the Defendant argued that the Claimant did not report to work after 12th March 2008 until 24th October 2008 and therefore was not entitled to be paid earnings for the period of time that he did not report for work contrary to the Defendant company policy and was not on any valid leave from the Port.

180. With respect to the claim for loss of earnings, Counsel for the Claimant submitted that one of the Defendant's witnesses, Mr. Vallie could not properly identify for the Court what the proper policy for returning to work after a period of sick leave was, nor could he identify the source of that policy. It was also contended that it could not be confirmed whether the Claimant was aware that he had to bring in a certificate of fitness by 12th of March 2008. In such circumstance, it would be unfair to hold an employee to suffer from a policy that was perceived from documents, not provided with notice of this said policy nor made aware of pending deadlines.

181. The Claimant's evidence is that after the second incident he was given five days sick leave. This was set out in the Treatment of Injury form dated the 18th July 2007. The Claimant testified he was certified fit to return to work on the 3rd October 2008 and returned to work on the 27th October 2008. Between that period it would seem on the evidence that there was no correspondence with the Defendant for further sick leave.

182. The Defendant witness Mr. Vallie, testified that the Claimant was required to bring in to the Human Resource Department the Certificate of Fitness from the Defendant's doctors by 12th March 2008. As the Claimant did not do so, his payment of wages ceased.

183. By a letter 22nd October 2008, annexed to Mr. Vallie's witness statement, the Claimant informed the Defendant that he did not return to work for the period because he was seeking medical attention.

184. The Claimant's Attorney has contended that it would be unfair to hold the Claimant to suffer from a company procedure that he allegedly was unaware of because it was not in writing. This court is of the opinion that an employee cannot simply stay away from paid employment without more. It would seem obvious that some form of correspondence or request for further sick leave ought to have been forthcoming from the Claimant. Nevertheless the argument by the Defendant, that the Claimant was not entitled to be paid earnings for the period 12th March 2008 until 24th October 2008 because of the mere fact he did not provide a medical to the Defendant at the time and was therefore contrary to company policy, is not by itself sufficient to disentitle the Claimant for compensation for the period.

185. The main issue is not whether the Claimant has provided the Defendant with medical certificates for leave during that period or followed company procedure and report to the company doctor by the given date, 12th March 2008. Instead, the issue is whether the Claimant has proven his entitlement to the wages, that is, he did not report to work because he had been injured and was unfit to work. Although the Claimant stated that he did not return to work because he was seeking medical attention during that period, he has not provided the court any medical evidence in support of this contention. The basis on which the claim for loss of earnings would succeed is by proof that during the period the Claimant was not paid he was unfit to work. What is required is more than just the Claimant's word that he was unable to work, but also some medical evidence that during that period he was in fact unfit or unable to work. The absence of this evidence on the Claimant's case means therefore that his claim for loss of earnings must fail. The court will therefore not make an award for special damages in the circumstances.

Interest

186. Interest is awarded to a party as compensation for being kept out of money that ought to have been paid to him: ***Jefford v Gee [1970] 1 All ER 1202***. The sum awarded is entirely at the discretion of the court: **Section 25** of the ***Supreme Court of Judicature Act Chap 4:01***. The period from which such the interest runs and the applicable rates differ,

based on the category of damages being dealt with: ***Elva Dick-Nicholas v Jayson Hernandez and Capital Insurance Company Limited (supra)***.

187. A claim for a future sum carries no interest as it has not yet been incurred.

188. With respect to interest on the award for pain and suffering and loss of amenities interest runs from the date the claim is served to judgment. It was explained in ***Jefford v Gee (supra)*** at page 1209:

> *"Interest should be awarded on this lump sum as from the time when a defendant ought to have paid it, but did not: for it is only from that time that a plaintiff can be said to have been kept out of the money. This time might in some cases be taken to be the date of letter before action, but at the latest it should be the date when the writ was served. In the words of Lord Herschell LC ([1893] AC at 437), interest should be awarded 'from the time of action brought at all events'. From that time onwards it can properly be said that a plaintiff has been out of the whole sum and a defendant has had the benefit of it. Speaking generally, therefore, we think that interest on this item (pain and suffering and loss of amenities) should run from the date of service of the writ to the date of trial."*

189. Counsel for the Defendant submitted, and Counsel for the Claimant accepted the interest rate of 12% per annum on an award for general damages. Consequently, this court is minded to award this rate.

190. The claim was served on the 19th May 2011 by claim form. Thus the interest to be awarded is $8,100.00.

Costs

191. In calculating the costs of this claim this court notes the case of ***Leriche v Maurice Privy Council Appeal No. 25 of 2004 (St. Lucia)*** wherein the Judicial Committee laid

down that the total claim, which must include the interest awarded is used in calculating the costs to be awarded.

Disposition

192. The court therefore makes the following orders:

Judgment for the Claimant against the Defendant as follows:

i. The Defendant is to pay to the Claimant General Damages for negligence in the sum of **$119,800.00 together with** interest at the rate of 12% per annum from the 19th May 2011 to 2nd July 2012 on the award for pain and suffering and loss of amenities ($60,000.00) in the sum of **$8,100.00**.

ii. The Defendant is to pay to the Claimant Prescribed Costs in the sum of **$28,185.00.**

Dated this 2nd day of July, 2012.

Ricky Rahim
Judge