THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2016-00599

BETWEEN

VIDYA JAGLAL

Claimant

AND

THE UNIVERSITY OF THE WEST INDIES

First Defendant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Second Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. D. Bayley instructed by Ms. K. Sarran for the Claimant

Mr. D. Alexander instructed by Mr. D. de Peiza for the First Defendant

Ms. A. Alleyne instructed by Ms. N. Simmons for the Second Defendant

Judgment

The Claim

1. By Claim Form filed on the 2nd March, 2016, the forty-six year old claimant claims damages and consequential loss as a result of negligence of the first and second defendants. At the material time, the claimant was a student pursuing a Certificate in Social Work at the University of the West Indies Open Campus ("Open Campus"). The Open Campus was being run on the premises of a secondary school located at Graham Trace, Ojoe Road, Sangre Grande, namely North Eastern College ("the College"). The claimant alleges that Open Campus is an agent and/or sub-office of the first defendant and that the first defendant rented and/or leased and/or was allowed to utilize the said classrooms of the College.

2. The incident which gave rise to the claimant's claim occurred on the 5th March, 2012 at about 5:15 pm when the claimant, whilst sitting in a classroom of the College waiting for her class to begin, was struck at the back of her head with a cricket hardball (cork ball) which passed through one of the ventilation holes of the wall of the classroom. According to the claimant, the ball was hit by a student who was at the time playing cricket outside of the classroom. The claimant avers that this incident was caused by the negligence of the servants and/agents of the first defendant and/or the second defendant as legal representative of the State and owner and/or operator of the College. The claimant further avers that as a result of the incident, she has suffered personal injury, loss and damages.

The Defence of the first defendant

3. The first defendant admits that the claimant is a student of the Open Campus. The first defendant further admits that it utilized certain classrooms at the College to house the Open Campus classes. However, the first defendant denies that the incident (if it did occur) was caused by its negligence. The first defendant requires the claimant to strictly prove that the incident did occur and that she suffered injuries, damages and loss. According to the first defendant, if the incident did occur, it argues that the incident was an extraordinary incident for which it is not liable.

The Defence of the second defendant

4. The second defendant denies that it is the owner and/or operator of the College and avers that the College is a government school controlled by the Ministry of Education. The second defendant also denies that the claimant's injury, loss and damage (if same did occur) was caused by breach of any duty owed by the second defendant to the claimant. The second defendant requires the claimant to strictly prove that the incident did occur and that she suffered injuries, damages and loss.

Issues

5. The issues for determination in this case are as follows;

    i. Whether the incident occurred and if it did whether it occurred in the manner in which the claimant alleges;
    ii. Whether the first or second defendant owed a duty of care to the claimant and if so what was the extent of that duty of care;
    iii. Did either the first or second defendant breach its duty of care with resultant damage;
    iv. Whether the plea of res ipsa loquitur is available to the claimant; and
    v. To what damages, if any, is the claimant entitled.

6. The court and the parties visited the *locus in quo* after the close of the cases of all parties and witnesses presented themselves and pointed out certain spots to the court in relation to the evidence they have earlier given under oath. This exercise was particularly helpful in this case and provided the court with a complete understanding of the physical makeup of the school, the classrooms, the spot in which the claimant and her witness were sitting, the spot where cricket was being played and most importantly the area through which the cricket ball is alleged to have entered the classroom.

The case for the claimant

7. The claimant gave evidence for herself and called one other witness Ms. Rohani Subha ("Subha").

8. **The claimant** is a Clerk Typist I employed with the Ministry of Community Development, Culture and Arts. On the 5th March, 2012 at about 5:00 pm she arrived for classes and was directed by an administrative staff of Open Campus that her classes were being held at the College. The classroom wherein her classes were being held on this particular day was the second to last class on the ground floor of the block which housed forms one and two and is located at the eastern side of the College. Whilst walking over to the classroom, she noticed some students playing hard ball cricket in the carpark. The carpark was approximately forty feet from the classroom. The students were being supervised by an adult who appeared to be their coach. The claimant testified that this was a common occurrence notwithstanding the numerous concerns she had raised with the administrative staff of the Open Campus.

9. At about 5:15 pm, the claimant and her classmates were seated in the classroom awaiting the commencement of their class. The lecturer was not present. The claimant was seated at the front desk of classroom and Subha was seated in the row just behind the claimant. A wall of the classroom was made out of blocks with ventilation holes and so the claimant could have seen the students playing the hard ball cricket from the classroom. The court understands her evidence to be that when sitting in the classroom facing the class board and the teacher's desk, the ventilation wall would have been to the immediate left of the claimant and so was literally bounding with the spot in which she was seated. So too would be one of the entrances to the classroom except that that doorway would be on the same wall but a little way to the front of where she was seated. When entering the classroom through that door, if one was to stand at the threshold of the doorway the claimant would be to the immediate right of the person so entering the classroom.

10. The claimant turned her back to the wall of the classroom (it means that the back of her head was immediately next to the ventilation blocks on the said wall) and was speaking to

one of her colleagues who was seated to the side of her when she felt a sudden, shocking blow to her head. She felt an instantaneous whiplash and was in immediate excruciating pain. She also felt confused and a burning feeling emanating around her neck. She then saw a number of her colleagues around her and they began assisting her to see if she was alright as she was in extreme pain. Subha told the claimant that she saw that it was a cricket hard ball that struck her and that the ball flew through the ventilation holes. The claimant began to cry because the pain was unbearable. She then saw Subha holding what appeared to be a cricket hardball and she took the ball from Subha and realized that it was in fact a cricket hardball.

11. Having been assisted by her classmates, the claimant placed her head on the desk for a short while in order to compose herself. Throughout the entire time she was resting her head on the desk, she had a massive, painful headache and the pain in her neck was excruciating. One of her classmates then assisted her to the front of the College where she was parked. She testified that walking to her car was painful. She drove herself to the closest doctor's office she knew, Dr. Agustin Tantoco ("Dr. Tantoco"). Dr. Tantoco's office was located three minutes away from the College.

12. She waited approximately five minutes before being examined by Dr. Tantoco. Whilst waiting, in addition to feeling dizzy, her neck and head was in extreme pain. When she was finally examined by Dr. Tantoco, he prescribed painkillers for the pain. That evening when she returned home, the pain was so excruciating and unbearable that she was unable to sleep. She testified that all that she could have done was cry. She usually slept with a pillow under her neck for support but that night she could not so do resulting in her being unable to breathe properly.

13. In the days subsequent to the incident, she continued to take the prescribed painkillers. At times the pain killers eased the pain but for the majority of the time she was in severe, intolerable pain. She tried to continue her life as normal but although she was using pain killers, the pain persisted. On the 8th May, 2012 she decided that she could not take the pain

anymore and so went to the Hospital of the Seventh Day Adventists where she was examined by Dr. Richard Spann ("Dr. Spann").

14. Dr. Spann after examining her, diagnosed her with 1) pains and muscle spasms in the neck, 2) spasms of the para-vertebral muscles of the cervical spine and 3) chronic pain necessitating long term use of muscle relaxants. Dr. Spann therefore prescribed medications to relieve her pain which included nerve medication, muscle relaxants and sleep aid. After this visit, she visited Dr. Spann at regular intervals for check-ups and further treatment. Dr. Spann provided a medical report dated the 8th October, 2013 which set out in detail the claimant's medical condition.[1]

15. To date, the claimant continues to receive treatment from Dr. Spann. As such, she has continued to bear the financial burden of paying for her doctor visits and treatment.[2] Further, she is required to travel to attend her doctor's office which is located in Cocorite, Port of Spain because she cannot drive for long distances without experiencing discomfort and excruciating pain in her neck and head. Her doctor's office is a considerable distance from where she lives as she lives in Sangre Grande. As such, she has also been bearing her own transportation expenses since the incident.[3]

16. Since the incident, she has been unable to carry out basic household chores such as cooking, cleaning her home and playing with her children. Prior to the incident, she used to clean her house and yard and also was able to make her own groceries. It is now difficult for her to push the trolley in the grocery as she experiences a lot of pain in her neck and head.

17. She continues to work as a Clerk Typist I which requires her to type for long periods. She has however missed a lot of work because she is unable to sit and type for long periods without experiencing discomfort and severe pain in her neck and back. As such, she has

[1] The medical report is annexed to the claimant's witness statement at "V.J.1".
[2] Copies of the claimant's medical bills are annexed to her witness statement at "V.J.2".
[3] Copies of the receipts for the claimant's transportation costs are annexed to her witness statement at "V.J.3".

suffered financially since she has taken quite a number of days off of work which has been classified as sick leave without pay.[4] The claimant's net salary is $3,610.37.[5]

18. As part of her duties at work, she is required to locate files from various cabinets. She testified that she is unable to bend to reach the lower cabinets because she feels agonizing pains in her neck and head and she also feels dizzy. To this day the simple task of walking results in her experiencing excruciating pain in her neck and head. She is also unable to carry heavy things such as her groceries or bend down to pack the lower shelves in her kitchen. Apart from her usual job, she is also a masseuse. She is now unable to do that as the act of massaging people causes her neck and head to hurt and it is very painful. To date, she continues to purchase medication in order to relieve her pain and she is also on nerve medication, muscle relaxants and sleep aids. Further, she is almost always required to wear a neck brace to stabilize her neck which eases the pain only slightly.

Cross-examination of the claimant

19. During cross-examination, the claimant testified that she drove to class on the said date. That she parked in the official carpark of the College situate at the southern end of the College and then proceeded in a north-easterly direction to get to the classroom. No one played cricket in the official carpark. The area where the cricket was being played is situate east of the classroom. That area is rectangular in shape with the length of the rectangle running north to south. According to the claimant, the batsman is usually at the northern end of the area.

20. The classroom has two doors, one on the southern side of the classroom and one on the northern side of the classroom (the door referred to earlier on in this judgment). The claimant used the southern entrance of the classroom to enter same on the said date. She testified that when she entered the classroom, she was not fearful of being hit by the cricket ball. That she usually felt safe in the classroom.

[4] Copies of the claimant's letters of approval for sick leave without pay, sick leave certificates and notice of overpayment are annexed to the claimant's witness statement at "V.J.5".
[5] A copy of the claimant's pay slip is annexed to her witness statement at "V.J.4".

21. The northern and southern wall of the classroom were made out of bricks with ventilation holes. At the time of the incident, the claimant was seated in the front row to the extreme left of the teacher's desk (and the court will add, if one is facing the teacher's desk) with her back facing the northern wall of the classroom. As such, she testified that she did not see the direction in which the ball came from since her back was against the wall.

22. During cross-examination, she testified that she raised her concerns about two or three times with the Administrative Clerk of the Open Campus, Ms. Ann Marie. That although nothing was done, she continued to raise her concerns with Ann Marie as Ann Marie was the only person at the Open Campus available at that time for her to communicate her concerns. Further during cross-examination, she testified that her concerns were 1) a stationary classroom for the classes were not provided, in that it is only when they presented themselves for class that they would be told the class in which they were to sit 2) the dangers of being close to the area where the students were playing hard ball cricket and 3) as the students played the cricket at the end of the parking lot, it was risky to park in the parking lot as well as to walk from the parking lot to get to the classroom. Moreover, during cross-examination she testified that it was not a concern of hers that the playing of the cricket would be a problem when she was in her classroom.

23. During cross-examination, the claimant testified that a male colleague of hers held the ball and that he went to the coach of the cricket team to alert the coach as to what had happened. That the students did enter the classroom to retrieve the ball but that when her male colleague went to the coach, the coach came to the classroom and met with her. The coach thereafter gave her an icepack. When it was brought to her attention that in her witness statement she testified that Subha was holding the ball, she testified that both Subha and her male colleague held the ball at some point. That Subha would have picked up the ball and as her male colleague was familiar with the coach, he went to meet the coach.

24. During cross-examination, the claimant testified that she did write a letter to the Coordinator of the Open Campus a few days after the incident had occurred to inform the

Open Campus about the incident. She did not get any response to this letter. She further testified during cross-examination that after the incident her classes were moved to the form six block of the College which was far from where the cricket was usually played. The claimant completed her course.

25. On the visit to the *locus un quo*, the claimant demonstrated to the court that she would park in a car park to the south of the classroom and enter the classroom from the said southern entrance. She showed the court the area where cricket was being played which is not the said car park but a paved area that runs north to south to the east of the class block. That area itself is also a paved area as is the nearby carpark and is easily accessible by walking from the car park to the said area. It is matter of common sense that the paved area may also be used to park cars because it is suitably paved but it does not appear to be the official school carpark. The end of the class block (end of the building) is a solid wall. So that the area around the entire block appears to be continuously paved. The claimant demonstrated, that one could easily see the area in which cricket was being played from the position in which she was seated on that day. Her testimony was consistent with the matters pointed out at the visit.

The evidence of Subha

26. **Subha,** a Clerk Typist employed with the Ministry of Labour was also a student pursuing a Certificate in Social Work at the Open Campus. During cross-examination, Subha testified that she came to know the claimant when she started the course at Open Campus. On the said date, she arrived at the College at about 4:45 pm for classes. She also noticed that some students were playing hard ball cricket just outside the classroom. During cross-examination, she testified that she knew the students were playing hard ball cricket because she knows what a cork ball looked like and she heard the impact the ball made against the bat. She further testified during cross-examination that the students were not in uniform and so she did not know if they were all students. According to Subha, this was a common occurrence notwithstanding the numerous concerns she had raised with Ann Marie. During cross-examination, she testified that she raised her concerns orally with Ann Marie and that her concern was the persons playing cricket with a cork ball.

27. At about 5:15 pm Subha and her colleagues were seated awaiting the commencement of their class. She testified that the claimant who was seated in the row just in front of her was speaking to her and a couple colleagues when she (Subha) saw an object suddenly fly through the ventilation holes in the wall and hit the claimant behind her head. During cross-examination, Subha testified that she did not see the direction in which the ball came from. She heard a loud noise and saw the claimant move forward and backwards in a jerking motion. She testified that the claimant began to cry. Subha along with a few of her colleagues assisted the claimant. During cross-examination, Subha testified that she assisted the claimant by asking her if she was alright. Having assisted the claimant, Subha saw an object on the ground where the claimant was struck. When she picked up the object, she realized that it was a cricket hardball. She testified that the claimant took the ball from her and inspected it.

28. Around that time, a student entered the classroom to retrieve the ball. Subha testified that when the student realized that the claimant was struck by the ball, he left the classroom and immediately returned with his coach. Subha told the coach what had occurred and the coach told her that they should speak to the Principal of the College because he could not do anything about the situation. The coach and the student returned to the carpark where the cricket was taking place. Subha testified that at that point she was more concerned about the health of the claimant and so she did not follow up to see whether the students continued playing cricket.

29. Subha testified that having been assisted back to her desk, the claimant placed her head on the desk for a short while and then informed her (Subha) that she was going to seek medical attention on her own as she was not hopeful that she would receive proper treatment at the College or taken seriously.

30. During cross-examination, Subha testified that the lecturer, Mr. Peters entered the classroom after the incident had occurred and that she and her colleagues informed him of what had happened. That that was as far as she discussed the incident with anyone in authority. She further testified that about half an hour after the incident had occurred as the

claimant was crying and her head was hurting, Mr. Peters advised the claimant that she should go to a doctor. The witness appeared confused at times during her testimony but it was clear to the court that this was in no way because she was being untruthful but stemmed from a belief she appeared to have genuinely held that the questions were designed to confuse her.

31. At the visit to the locus she pointed out the spot in which she was sitting, where the claimant was sitting, and the ventilation blocks.

The case for the first defendant

32. The first defendant called one witness, Ms. Jesslyn Ramlal ("Ramlal"). This witness' evidence was of very little probative value to this case and the court is left in a quandry as to why someone from the Open Campus Porgram was not called to give evidence. Ramlal is the Acting Principal of the College. During cross-examination, Ramlal testified that when the alleged incident is said to have occurred, she was the Head of the College's English Department. She further testified during cross-examination that she could not remember if she was on the College's compound on the said date at or around 4:45 pm.

33. She testified that during her thirty-four years of being assigned to the College, she does not have any knowledge of any incident having occurred as such complained of by the claimant. She further testified that she is unaware of any complaint being made by the claimant to anyone in authority at the College at or around the time the incident was said to have occurred. She has checked the College's records and found no complaint or notification from the claimant prior to the institution of these proceedings. During cross-examination, Ramlal testified that it was possible for a complaint and/or report made to the Open Campus to not have been recorded in the College's records.

34. During cross-examination, Ramlal testified that the College has had a cricket program for a number of years during the time she was assigned to the College and that it was quite normal for cricket to be played on afternoons. This witness did not present herself at the *locus in quo* although all witnesses were required to have been present. This is however of

no moment as her evidence is of no relevance to this case and no objection has been taken to her absence from the visit.

The case for the second defendant

35. The second defendant called one witness, Mr. Ricky Singh ("Singh"). Singh is one of the two Deans of the College. He was appointed as Dean in November, 2013. Prior to his appointment as Dean, he held the position of Acting Dean from 2010 to November, 2013. Prior to his appointment as Acting Dean, he was a Teacher III. He was been assigned to the College since September, 2000. As Dean, his role included monitoring the academic progress of students and addressing cases of truancy and delinquency exhibited by students of the College. He also liaised with the Principal on issues relating to the day to day running of the College and further acts as Vice Principal on occasions when the Principal is absent.

36. Due to the length of time he has been assigned to the College, he is familiar with the classroom the claimant referred to in her evidence. He testified that that classroom is one of the form two classrooms in which the Open Campus would usually conduct its classes.

37. Singh testified that the College has a school cricket team. That the team is currently coached by Mr. Gibbs ("Gibbs"). However, Gibbs was not assigned to the College in 2012 when the alleged incident occurred. Singh could not recall who the assigned coach was in 2012.

38. Singh testified that a district cricket coaching program utilizes the College's grounds for practice and the coach of the district coaching program (who sometimes coaches the College's cricket team) coaches persons from around the Sangre Grande area and environs. Those persons participate in the secondary schools cricket league. The College's cricket team practice sessions usually commence from 3:00 pm and end at 4:30 pm. The district coaching program usually commences its practice between 4:30 pm and 5:00 pm. As such, Singh testified that as the claimant alleged that the incident occurred around 5:15 pm, it was likely that the cricket being practiced was that of the district coaching program.

39. According to Singh, on the southern side of the form two classroom utilized by Open Campus, there is a paved carpark. There is no cricket practice conducted in that area. On the northern side of the form two classroom, a wall separates the classroom from an open area. There is a covered walkway extending from the northern wall of the form two classroom. Singh testified that the walls on the northern side of the form two classroom comprise of solid and ventilation blocks. During cross-examination, he testified that the ventilation holes is approximately two and a half to three centimeters in width. He further testified that it is possible for a cricket ball to pass through the ventilation blocks. However, it was his testimony that that was unlikely as the area facing the northern wall was not an area where persons were likely to be playing cricket in a supervised setting. The court has had a full opportunity of viewing the said wall and ventilation blocks and will address this issue later on.

40. Singh testified that at the eastern end and perpendicular to the form two classroom, there is a paved area which is approximately 40 feet by 80 feet ("the practice area"). He further testified that the practice area is not a car park. The practice area is where the district coaching program periodically used for cricket practice when the playing field to the back of the College is soggy from rainfall. The wall that separates the practice area from the classroom does not have any ventilation holes. It is a solid wall.

41. According to Singh, within the practice area there is a smaller rectangular area which is demarcated by white painted lines which is often used as a batting crease. He testified that when one stands where the batsman would normally stand at the batting crease is about thirty feet from the northern side of the form two classroom. During cross-examination Singh testified that the northern side of the form two classroom is in front of where the batsman is positioned but to the right. That the entire northern wall of the form two block is visible from the batting crease.

42. As mentioned before, the classroom is perpendicular or at a right angle to the practice area. Singh testified that when one stands at the batting crease, the ventilation holes on the walls of the classroom are not apparent. That what one sees appears to be a solid wall. As such,

it was his testimony that if a ball was to go in that direction from the batsman, it would have to move at an acute angle and the ball would impact with the wall which forms the side of the ventilation block and bounce away. He further testified that this would slow the speed at which the ball is traveling. Consequently, he testified that it is very unlikely that a ball would enter the classroom from the practice area during cricket practice in the manner and with the force and impact the claimant's account suggested.

43. Singh has checked the records at the College and he has not found any record of an incident such as the claimant described ever happen at the College. He has also never heard of an incident such as this occurring at the College during his sixteen years assigned to same. Moreover, he has checked the College's records and has not found any complaint or notification from the claimant about the incident. As such, it was his testimony that the College could not have foreseen that an incident such as this would have occurred. During cross-examination Singh testified that if the claimant had made a complaint to the Open Campus, that complaint would not have necessarily been recorded in the College's records.

Further matters on the site visit

44. During the visit the claimant pointed the following out to the court;

    i. Where she parked on the date of the incident;
    ii. The door she used to enter the classroom in which she was seated at the time of the incident;
    iii. Where she was seated at the time of the incident;
    iv. Where the cricket was being played on the date of the incident;

45. After the claimant pointed out where the cricket was being played and the classroom she was seated in at the time of the incident, the court estimated and the parties agreed the distance between the two to be about one hundred and twenty feet.

46. Subha pointed out where she was seated at the time of the incident and Singh pointed the following out to the court;

i. Where cricket was usually played and the markings on the cricket pitch;
ii. In his view, where the batsman usually stands;
iii. His opinion as to the angle at which the ball could have possibly travelled towards the classroom;
iv. The view one gets of the ventilation holes of the northern wall of the classroom whilst standing at the batsman position; and
v. The Open Campus building, which is a wholly separate building located at a considerable distance away to the left of the college compound but outside the college walls.

Issue 1 – *whether the incident occurred and if it did whether it occurred in the manner in which the claimant alleges*

The submissions of the first defendant

47. The first defendant submitted that the claimant's account of how she was injured defies physics and logic. That for the court to find it liable in this action, the claimant must first prove on a balance of probabilities that a ball struck by a batsman some thirty to sixty feet away entered a classroom at an acute angle through a ventilation block in a wall.

48. According to the first defendant, neither the claimant nor her witness said or could have truthfully said that they saw a batsman at the batting crease strike the ball which came through the ventilation block and struck the claimant. As such, the first defendant submitted that the claimant's case is either a concoction or she is hoping that the court infers that her account of the incident is the only way it could have happened. The first defendant urged the court to accept the former view, that is, that the claimant's case is a concoction, since in its view, to infer what the claimant is suggesting is to accept an incredible allegation.

49. The first defendant submitted that the court ought to remember that there was no independent eyewitness testimony adduced at the trial; the claimant's witness, Subha, while being cross-examined became belligerent and uncooperative; and there was no evidence of the incident under consideration having been reported to the Open Campus or

to the College. As such, the first defendant submitted that this claim ought to be dismissed without more.

The submissions of the claimant

50. The claimant submitted that it is correct to state that she must prove her case. However, she submitted that should she provide evidence which on the balance of probabilities is found to have occurred, then she has proved that aspect of her case. According to the claimant, it should be noted that the first defendant failed to provide much assistance to the court by way of evidence, and its sole contribution was Ramlal, the Principal of College who simply said that she was unaware of another incident occurring such as the one that the claimant alleges. As such, the claimant submitted that there was no evidence by the first defendant which rebutted her evidence and the evidence of Subha in relation to whether or not the ball was (i) struck by persons playing cricket on the compound and (ii) that the ball struck the claimant.

51. According to the claimant, in the absence of any positive rebuttal evidence, the court should accept her evidence unless it is inherently improbable or incredible for example, if it was impossible for the ball to pass through the ventilation holes. The claimant submitted that during the site visit it was pellucid that 1) a cricket hard ball could have easily passed through the ventilation holes and 2) the northern wall of the classroom was situated at a thirty degree angle in front of the batsman which increased the likelihood that the ball would be struck in that direction.

52. The claimant submitted that she gave her evidence in a straightforward, candid and honest manner. That she remained unshaken during cross-examination and was consistent throughout. The claimant further submitted that although her witness, Subha became slightly unhinged during cross-examination, her evidence by and large was consistent with the claimant's evidence. As such, the claimant submitted that the court should accept her version of the events.

Findings

53. The evidence in this case is clear as daylight. The court therefore finds the following to be more likely than not;

    a. Cork ball cricket was being played on the school compound on that day some 100 feet away from the class in an area that was within a clear line of sight to the classroom and the ventilation blocks situated on the wall of the classroom.
    b. The ball entered through a ventilation block and struck the claimant in the back of her head/ neck area. At the time she was sitting with her back to the ventilation wall immediately next to it as she was turned speaking to a friend.
    c. If she was sitting facing the front of the classroom the left side of her body would have been next to and facing the said ventilation wall.
    d. The witness Singh was not present at the time of the incident and so could not say precisely where the batsman was standing. His evidence in that regard amounts to speculation.
    e. But of more fundamental importance is the fact that there is no evidence that the ball came from a batsman in this case. That is speculation. It may well be that the ball came from someone who threw it during the game, whether a fielder or a bowler. The point is that there is no evidence that the ball came off a bat and any attempt to base a conclusion on that purported fact is speculative.
    f. Further, the evidence of Singh that the ventilation wall appears to the eye to be flat and solid from the batsman position is not accurate for three reasons. Firstly, he did not know where the batsman was standing and whether the ball came off a bat and secondly the court having had a view of the premises the ventilation wall does not appear flat and solid when one is standing in the general cricket area. Thirdly, even if the wall so appears to the eye, it does not mean that a ball cannot go through the ventilation blocks. No such scientific evidence has been presented to this court and Singh's evidence which purports so to say is merely his opinion on an expert matter in respect of which he is unqualified. The court has therefore given no weight to these aspects of his evidence.
    g. Further, the ventilation blocks appear to be unusually large so that a cricket ball can easily fit through.

h. The court therefore does not accept the submission of the first defendant that it was impossible for the incident to have occurred in the manner that the claimant said it did.

i. The fact that both the Principal and Singh testified that there is no record of a report being made to the school is not inconsistent with the evidence on the part of the claimant that she made a report to the Open Campus personnel. Both defendants have chosen not to call anyone from Open Campus as witnesses and they have provided no explanation for so doing. It is reasonable to expect that on the issue of the report, a witness from Open Campus would have been in a position to assist the court as to whether a report was made to the institution or not. The court therefore draws an adverse inference against both defendants on this issue and finds that a report was in fact made to the Open Campus by the claimant.

j. It is also the finding of the court that the fact that the report was made shortly after the incident supports the evidence of the claimant that the incident did in fact occur.

k. Further, not only did the incident occur but it occurred in the manner that the claimant said it did and the court so finds.

l. Finally, the court finds that Subha was both a credible and reliable witness who appeared to be confused at the questions at times but tried her best to answer all. She also appeared to take a position of suspicion against the court process and so accused the lawyers and court personnel of laughing at her answers. This resulted in the trial judge offering an apology to her on behalf of everyone in the event that she was given that impression. However, the fact that she may have been super sensitive to the reactions of persons around her does not make her testimony untruthful or unreliable. Different people react differently to the court process which can be a very intimidating one and so a court must sift through reactions to determine whether the person is speaking the truth or is being reliable. In that regard the court is satisfied that she is a truthful and reliable witness. Her evidence is very plausible and is in keeping with all the other evidence in this case. It is plausible that she picked up the ball and

observed it and passed it to the claimant. It is also plausible that another male student would have taken the ball and looked at it. This is an extraordinary event which would occurred without warning so that the court is satisfied with her evidence.

Issue 2 & 3– *duty and causation*

54. A finding of negligence requires proof of (1) a duty of care to the claimant (2) breach of that duty and (3) damage to the claimant attributable to the breach of the duty by the defendants.[6] There must be a causal connection between the defendants' conduct and the damage. Further, the kind of damage to the claimant is not so unforeseeable as to be too remote.[7]

55. The court agrees with the submissions of the claimant that both defendants owed a duty of care to the claimant. That the first defendant had a duty to provide a safe environment for its students to attend classes and the second defendant in providing the classrooms for the use of the first defendant likewise had a duty of care to provide a safe environment for the students. The court further agrees with the submission of the claimant that both defendants satisfy the definition of occupier. Exclusive occupation is not required, and the test is whether a person has some degree of control associated with and arising from his presence in and use of or activity in the premises. Two or more persons may be occupiers of the same land, each under a duty to use such care as is reasonable in relation to his degree of control.[8]

56. The duty owed by an occupier of premises to his visitors is the common duty of care. This duty, except in so far as it is extended, restricted, modified or excluded by agreement or otherwise, is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he

[6] Charlesworth & Percy on Negligence Thirteenth Edition, Chapter 1, paragraph 1-19.
[7] Clerk & Lindsell on Torts Nineteenth Edition. Chapter 8, paragraph 8- 04.
[8] Halsbury's Laws of England, Volume 78 (2018), paragraph 30

is invited or permitted by the occupier to be. The relevant circumstances include the degree of care, and of want of care, which would ordinarily be looked for in the visitor.[9]

Causation

The submissions of the first defendant

57. According to the first defendant, the question of whether or not there was in existence a duty to take care which was owed to a claimant by a defendant depends on whether or not it was reasonably foreseeable that the acts or omissions of the defendant would result in the claimant suffering personal injury. The first defendant submitted that if the answer is yes, then there was in existence a duty of care which if breached by the defendant and causes damage to the claimant, the defendant is liable in negligence.

58. The first defendant submitted that the evidence in this case disclosed that it was not reasonably foreseeable that a cricket ball struck from the batting crease would somehow pass through a ventilation block with such force and hit the claimant causing her personal injury. That even the claimant herself in her evidence during cross-examination told the court that "*it was not a concern that playing cricket would be a problem whilst in a classroom*."

59. The first defendant further submitted that there was no evidence of a similar occurrence at the College since the 1960's to the present time. As such, the first defendant submitted that a duty to take care in those circumstances was not one for which it was responsible and therefore ought not to be held liable for failing to provide a safe and secure environment for the claimant.

60. The first defendant relied on the authority of ***Rugg and another v Marriott***[10]**,** wherein Otton L.J. placed reliance on the House of Lords decision in ***London Passenger Transport***

[9] Halsbury's Laws of England, Volume 78 (2010), paragraph 32
[10] All England Official Transcripts (1997 – 2008)

Board v Upson[11] in support of his view that for there to be a finding of negligence the test of reasonable foreseeability must be applied. At page 2, Otton L.J. had this to say;

"Both counsel accepted that the reasonable foreseeability test was the correct test. In the well-known decision of London Passenger Transport Board v Upson… At page 176 of the former report Lord du Parcq said:
"…The correct principle was stated by Lord Dunedin when he said: 'If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.' (Fardon v Harcourt Rivington (1932) 146 LT 391,392). I regard this statement and that of Lord Macmillan in the same case, which was to the like effect, as applying generally to actions in which the negligence alleged is an omission to take due care for the safety of others. It must follow that…'a prudent man will guard against the possible negligence of others when experience shows such negligence to be common.'..."

61. Otton L.J. proceeded to allow the appeal by considering the question in the case to be *"was it reasonably foreseeable that the respondent would suffer personal injury by driving into the appellant's parked car in the position in which it was?"* The Learned Judge in applying the dictum of Lord du Parcq concluded on the facts found that "*the possibility of danger emanating from the position of this parked vehicle was not reasonably apparent; it was only a mere possibility. Accordingly, there was no ground on which a finding of negligence could be founded*."[12]

The submissions of the second defendant

62. The second defendant submitted that its witness, Singh testified that a district coaching program utilizes the College grounds from 4:30 pm to 5:00 pm and that, therefore, any

[11] [1949] AC 155, [1949] 1 All ER 60
[12] See second to last paragraph of the judgment.

persons playing cricket at 5:15 pm, were likely to be the participants of the program. That the claimant's witness, Subha accepted under cross-examination that the persons that she saw playing cricket were not in uniform and she could not, therefore, properly identify them as students. The second defendant submitted that in light of that admission by Subha, Singh's evidence should be preferred.

63. As such, the second defendant submitted that it ought not to be held liable for the damage caused by the activities of a third party, the participants of the district coaching program, unless it could have reasonably foreseen that an unusual danger would be created by the participants in the program. According to the second defendant, the evidence before the court establish that the risk of the danger that allegedly caused injury to the claimant was not reasonably foreseeable.

64. According to the second defendant, the evidence of Singh supports and establishes its position that a reasonable person would not have found that the physical injury that was caused to the claimant was likely to happen in the circumstances. The second defendant submitted that in order to find liability, the probability of the risk must be obvious to a reasonable person and that the reasonable persons in this the situation were an average Principal and Dean of the College not an expert with scientific skill or knowledge which would cause him to contemplate the probability of the risk that a ball will travel in the direction and with the degree of force to cause which it is alleged that it did in this case. The second defendant relied on the case of ***Glasgow Corporation v Muir***[13], wherein Lord Thankerton stated that *"…all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man…".*

65. The second defendant submitted that the claimant's concerns regarding the cricket practice all related to what could occur outside of the classroom since once she entered the classroom she stated that she felt safe. The second defendant further submitted that the

[13] [1943] AC 448 at 454

claimant felt comfortable enough to turn her back to persons playing cricket and engage in conversation with her colleagues.

66. According to the second defendant, the evidence of Ramlal was that during her thirty-four years at the College, no such incident has occurred. The second defendant submitted that Singh's evidence coupled with the evidence of Ramlal provided evidence of the fact that the risk of injury in the manner that it occurred was not at all foreseeable. The second defendant further submitted that there is no duty in law to take steps to prevent an unforeseeable risk.

67. The second defendant submitted that it should be noted that the claimant was unable to provide evidence as to exactly how the alleged incident occurred. That as she was unable to state exactly how the incident occurred or who actually caused the incident or the circumstances in which the incident was caused, she cannot assert that the second defendant breached its duty of care (was negligent) merely by virtue of the fact that persons were practising cricket in the area identified. According to the second defendant in ***Glasgow Corporation v Muir***[14] supra, the manager of a tea house allowed customers to pass an urn filled with hot tea past a dozen children in the wider part of a narrow passage. The tea spilt on some of the children leading to injury but it was held that allowing the urn to be carried did not create an obvious danger. Alternatively, Lord Thankerton stated that even on the contrary view the respondents must fail since they did not prove what event caused the accident.

The submissions of the claimant

68. The claimant submitted that although she stated during cross-examination that she felt safe in the classroom, her subjective feelings is not an issue as the court must objectively determine whether having her in that classroom put her at risk of harm that was reasonably foreseeable. The claimant further submitted that the distinction the second defendant attempted to make between the third party using the College's ground and the students of

[14] At page 456

the College is irrelevant since whether it was the students of the College or a third party, both would have had the necessary permission to use the compound and so the second defendant would have had a duty to provide a safe environment regardless.

69. According to the claimant, the students playing hard ball cricket merely thirty yards away from the classroom was enough to establish that it was reasonably foreseeable that a student of the Open Campus could be struck by the ball. That the first point to note is that the ball was a hard ball and not a soft ball and the second point to note is that cricket balls are usually struck by a batsman with some force, enough for it to reach the boundary or clear the entire field for six runs. As such, the claimant submitted that that is why usually when cricket practice is taking place, areas such as the batting nets are utilised to prevent the ball from escaping.

70. The claimant submitted that the first defendant reliance on the case of ***London Passenger Transport Board*** supra in support of its view that it was not reasonably foreseeable that a cricket hard ball struck from the batting crease would pass through the ventilation block with such force and hit the claimant causing her personal injury is incorrect. That ***London Passenger Transport Board*** is clearly distinguishable from the instant case, and that though it may not have been foreseeable in that case, in the instant case, it was clearly foreseeable that cricket being played in such close proximity to a classroom could result in the Open Campus students being struck by the ball. In ***London Passenger Transport Board,*** a taxi-cab standing on a pedestrian crossing controlled by lights obscured the view of the driver of a bus approaching (at a speed of fifteen miles an hour), with the lights in its favour, so that the bus driver did not see a foot-passenger on the crossing until she emerged into the clear space nine feet in front of the bus, which struck and injured her.

71. The claimant submitted that in case of ***Bolton v Stone***[15], a cricket ball was struck out of a club's cricket ground, striking a passer-by and causing personal injury. The House of Lords found that the cricket club was not liable in negligence because it was unforeseeable in the circumstances. According to the claimant, the instinctive thought is that the Bolton case

[15] [1951] AC 850

mirrors what has occurred in the instant case and that it is a general proposition of law for (i) cricket balls striking passers-by are not foreseeable, and/or (ii) that the number of times a cricket ball was struck out of the ground is the sole determining factor as to whether or not the incident would be foreseeable.

72. However, the claimant submitted that the Bolton case is distinguishable from the instant case. In the Bolton case, their Lordships considered the distance of the pitch and the fence, the fact that the defendant had taken all practical precautions in the circumstances, and cricket's useful service to the community. The claimant submitted that in the instant case, there was no evidence of any precautions taken by the defendants to prevent risk of injury to the claimant. That during cross-examination, Ramlal admitted that the College has thirty-eight classrooms yet the claimant's class was conducted in a classroom in close proximity to where the cricket was being played.

73. Further, the claimant submitted that although she made two to three complaints to the Open Campus staff, nothing was done about it. According to the claimant, the evidence of the representatives of College that there was no report in their records must be viewed in light of the fact that no one from the Open Campus gave evidence as to whether there were any complaints on its records. The claimant submitted that the court should draw adverse inferences against the first defendant for failing to call a witness such as the teacher who was on duty at the material time, one of the students who was present on the day and/or any of its administrative staff who could have easily explained its record keeping procedure for complaints and further inform the court whether or not a complaint was in fact made by the claimant. As such, the claimant submitted that her evidence in this regard ought to be preferred as there is no evidence to rebut her evidence that she made prior reports to the Open Campus.

74. Moreover, the claimant submitted that it was clear from the evidence that the area in which the cricket was being played on the day in question was only utilized because the usual place was unplayable due to the weather. As such, the claimant submitted that in those circumstances, unlike the Bolton case, the decision not to play cricket so near to the

classrooms would not have resulted in cricket not being played at all. Additionally the claimant submitted that in the instant case if it is accepted that the distance from the batting crease to the classroom was approximately one hundred feet, which is approximately thirty-three yards, that is considerably closer than that of the pitch and passer-by in Bolton, which was approximately one hundred yards away.

75. The claimant further relied on the case of ***The Wagon Mound (No 2),***[16] wherein it was held that small risks cannot be ignored, but rather that the risk must be balanced against the defendant's purpose in carrying on its activities and the practicability and cost of taking precautions. At 643-4, Lord Reid stated as follows;

"…If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense".

76. The claimant submitted that prevention of the risk in this case would have been simple. That it would have entailed either the Open Campus utilizing a classroom that was farther away from the area used to play cricket, or it would have been more prudent for other activities to be undertaken on days when the weather did not permit use of the designated area, such as fitness training and classroom sessions with the cricketers.

Findings

77. The court finds that on the facts of this case it was reasonably foreseeable that someone sitting in the classroom close to where cricket was being played could be hit by the cork ball and could sustain serious injuries therefrom. To that end the court agrees with the claimant that the facts of the case of ***Bolton v Stone*** are distinguishable from the facts of this case. In that regard several things can be said.

[16] [1967] 1 AC 617

78. Firstly, cricket was being played merely within 100 feet of the classroom with a clear line of sight to the large ventilation blocks. It is accepted that almost the entire wall consists of these ventilation block. The first and second defendants have given no evidence whatsoever as to the steps or measures they may have put in place to secure the area in which cricket was being played so that the classroom essentially formed part of the open field as it were.

79. Secondly, the fact that the claimant may have felt safe in the classroom does not necessarily mean that it was not reasonably foreseeable that a ball could travel from the cricket area into the classroom through the ventilation blocks of the closest classrooms. In fact it is also the evidence on the part of the claimant that several complaints were made to Ann Marie of the Open Campus about hosting the classes close to the cricket area at times when cricket was being played (whether by school children or outsiders with permission is irrelevant). These complaints demonstrate that the claimant and her classmates had come to the realization that the playing of cricket so close to the class presented a danger to them, hence the complaints. It does not therefore lie with the defendants to rely on what may be termed a false sense of security within the classroom as accepted by the claimant as negating an objective assessment of foreseeability.

80. Thirdly, the defendants have failed to lead any evidence from the Open Campus personnel as to whether such complaints were in fact made in circumstances where it is expected that those witnesses would assist the court on such a crucial issue. They have also provided no proper basis for failing to call such witnesses. As a consequence the court draws an adverse inference against them on this issue and finds that complaints were in fact made. The court also finds that the complaints were made because it was reasonably foreseeable that a cricket ball could hit someone while in class causing serious injury.

81. Additionally, the Open Campus refused to treat with the complaints thereby moving the classes to those further away from the unsecured cricket area although there were some thirty eight other classrooms available. Further, the second defendant failed in its duty to adequately secure the area in which cricket was being played or to stop persons from playing cricket on the secured paved area during the class times of the Open Campus

students. The actions of both defendants occurred in circumstances in which it was reasonable foreseeable that a cricket ball could enter the classroom and do damage to the occupants therein during class time.

Issue 4 - *whether the plea of res ipsa loquitur is available to the claimant*

The law

82. As to the doctrine of res ipsa loquitur, ***Halsbury's Laws of England***[17] provides as follows;

"64. Under the doctrine res ipsa loquitur a claimant establishes a prima facie case of negligence where: (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the claimant's safety.

There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

65. The maxim res ipsa loquitur applies only where the causes of the accident are unknown but the inference of negligence is clear from the nature of the accident. If the causes are sufficiently known the case ceases to be one where the facts speak for themselves and the court has to determine whether or not, from the known facts, negligence is to be inferred. Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine."

[17] Volume 78 (2018), paragraphs 64 & 65

The submissions of the claimant

83. The claimant submitted that should the court accept the defendants' submissions that she has failed to show what caused the ball to hit her, then this clearly plunges into the realm of *res ipsa loquitur*. According to the claimant, although she was unable to show what caused the alleged negligence that is whether the ball was struck by a student or cricketer, she has gone as far as showing that a ball did hit her on the compound of the College.

84. The claimant submitted that it should be noted that neither defendant provided evidence from any person who was actually present on the day such as the coaching staff who was present, a nearby cleaner, the claimant's teacher who was present, or any of the claimant's classmates. That she has provided a set of facts which raises a *prima facie* inference that the incident was caused by the negligence on the part of the defendants, and the defendants have failed by their evidence to provide some answer which is adequate to displace the *prima facie* inference. The claimant further submitted that for her to be seated in her classroom and be struck by a cricket hardball in the head, there must have been some negligence or the absence of care on the part of the defendants.

85. The claimant therefore submitted that should the court find that she was struck by a cricket ball on the College's compound and that the compound was under the defendants' management, it stands to reason that if she is not in a position to prove precisely what was the relevant act or omission which set in train the events leading to the incident then, the only probable explanation is that her injury was the result of some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.

The submissions of the second defendant

86. The second defendant submitted that the doctrine of *res ipsa loquitur* is not applicable. That on the claimant's own submissions, cricket practice has taken place on the material area for at least twelve years without incident. According to the second defendant, by their evidence the claimant and her witness, Subha never anticipated that such an incident might

have occurred. As such, the second defendant submitted that in such circumstances it cannot be said that the claimant has set up *a prima facie* case.

87. The second defendant submitted that the claimant was required to prove what event caused this incident and that she has not done so. According to the second defendant, it was not sufficient for the claimant to say that if the classroom had been moved the incident would not have happened as that would have made the defendant an insurer.[18]

Findings

88. The court agrees with the submissions of the second defendant which bears no repeating. As a consequence the court finds that the doctrine does not apply to this case.

89. The court therefore finds liability as follows;
    a. In respect of the first defendant it;
        i. Failed to provide proper and safe facilities for the conduct of classes;
        ii. Failed to take reasonable care for the claimant's safety and exposed her to a foreseeable risk of injury;
        iii. Failed to ensure that proper precautions were taken to avoid injury to students;
        iv. Caused or permitted classes to occur in an unsafe environment; and
        v. Failed to take any or any reasonable care to prevent injury or damage to the claimant from unusual dangers on the said premises of which it knew.

    b. In respect of the second defendant it;
        i. Failed to provide proper and safe facilities for the conduct of classes;
        ii. Failed to take reasonable care for the claimant's safety and exposing her to a foreseeable risk of injury;
        iii. Failed to ensure that proper precautions were taken to avoid injury to students;

[18] Glasgow Corporation v Muir [1973] AC 488 at page 456, per Lord Thankerton.

iv. Caused or permitted classes to occur in an unsafe environment;

v. Failed to ensure that the cricket practice was conducted in a safe and proper area or at a time when it was safe to do so;

vi. Allowed cricket practice to take place at a time when there was a foreseeable risk of harm to the claimant;

vii. Allowed cricket practice to take place in close proximity to classrooms with ventilation blocks that a cricket ball can pass through at a time when students were in the classroom and could be injured;

viii. Caused or permitted hard ball cricket to be played in close proximity to the classroom when students were being taught or were in the classroom;

ix. Failed to take any or adequate or effective precautions to ensure that visitors were not exposed to the risk of being struck by a cricket ball; and

x. Failed to take any or any reasonable case to prevent injury or damage to the claimant from unusual dangers on the said premises of which it knew.

Issue 5 – Damages

Special Damages

90. Special damages must be specifically pleaded and proved.[19] The burden is, therefore, on the claimant to prove her losses.

91. The claimant claimed the sum of $72,293.60 as special damages. This sum is comprised of the following;

i. Transportation expenses in the sum of $6,300.00;

ii. Medical expenses in the sum of $26,653.00;

iii. Loss of earnings in the sum of $39,340.00

The submissions of the first defendant

[19] Established in Grant v Motilal Moonan Ltd (1988) 43 WIR 372 per Bernard CJ and reaffirmed in Rampersad v Willies Ice Cream Ltd Civ App 20 of 2002.

92. From the sum of $26,653.60 for medical expenses, the first defendant is asking for a deduction of the sum of $10,020.00 which consists of the costs of the three MRIs as indicated on receipts dated the 5th June 2012 for $3,800.00, the 20th December 2012 for $3,800.00 and the 18th December 2015 for $3,420.00. The first defendant submitted that it is asking for this because no MRI report was exhibited in evidence and the two MRIs claimed for in June 2012 and December 2012 were done within a period of six months without any satisfactory reason for so doing.

93. There is on the evidence no basis for such a request on the part of the first defendant who chose to lead no medical evidence at all in opposition to that set out by the claimant. The court will not accede to the submission.

94. Further, the first defendant is asking for the transportation costs claimed to be reduced by one-half to the sum of $3,150.00 because of the very frequent visits by the claimant to her doctor, almost once per month from 2012 to 2015. According to the first defendant, in some cases, the visits were twice per month while the only medical report provided is dated the 8th October 2013. The first defendant submitted that the claimant should have provided some reason for having to visit her doctor so frequently.

95. Again this argument appears to be somewhat illogical for reasons of common sense which are obvious. The court will not accede to this submission.

The submissions of the second defendant

96. The second defendant submitted that the claimant's claim for medical expenses has not been proven since she has not stated in evidence or provided any documentary evidence to prove that the medication listed in those receipts was prescribed by a doctor for her use. According to the second defendant, the report from Dr. Spann on which the claimant relies, does state that she will require regular medication but does not state the medication, if any, that was actually prescribed. Further, the second defendant submitted that in her witness statement, the claimant refrained from stating that the medication listed in receipts attached

at *"V.J.2"* was prescribed by Dr. Spann or any other doctor for her injuries that she allegedly sustained as a result of the incident.

97. According to the second defendant, it should be noted that the items listed on the receipts are not generally well known or obviously related to pain. That it was therefore incumbent on the claimant to provide evidence that the medication was prescribed for her in order to deal with the injuries.

98. The second defendant submitted that a perusal of the receipts for medical expenses at *"V.J. 2"* revealed that there are instances of replication of receipt numbers.[20] The second defendant further submitted that certain receipts are undecipherable.[21]

99. Moreover, the second defendant submitted that although the claimant has claimed a total of $6,300.00 in transportation costs representing fifty-two visits to Dr. Spann, she has not produced corresponding receipts from Dr. Spann to account for all of those visits. That the necessity for those frequent requirement for transport, in some cases twice per month, has not been explained. As such, the second defendant submitted that the claimant has not discharged the burden of proving that she is entitled to the total amount claim. The second defendant suggested that the claimant's claim for medical and transportation expenses be reduced.

The submissions of the claimant

100. In response to the first defendant's submissions that the costs of the two MRI scans be deducted, the claimant submitted that it is obvious that she would have been under continuous care and treatment by Dr. Spann. That the various MRI scans would have been done by Dr. Spann for his continued observation of her the progress and prognosis. According to the claimant, it cannot reasonably be expected that she would have had one

[20] Including but not limited to receipt number 769389 at pages 981 to 983 of the Trial Bundle and receipt number 13795 at page 1007 of the Bundle.
[21] Including but not limited to receipt numbers 806369 to 808710 at pages 1027 to 1031 of the Trial Bundle and receipts numbers 815626 to 812286 at pages 1033 to 1047 of the Bundle.

single MRI scan only. That there must have been follow up action and updated information upon which Dr. Spann could have treated her.

101. The claimant submitted that her evidence in relation to special damages was left untested and uncontested by the defendants during cross-examination and as such, should be accepted by the court. According to the claimant, the defendants cannot now seek to challenge her evidence in their submissions, having not cross-examined her on those points. The claimant submitted that counsel for the first defendant merely questioned her as to why she did not claim for transportation paid to take her to her work place, but claimed for the cost of transportation to her doctor and Counsel for second defendant only questioned whether or not the claimant's doctor prescribed the wearing of the neck brace.

102. Consequently, the claimant submitted that any aspect of her evidence which was not subject to challenge, and was left untested, should be treated by this court as being accepted by the defendants.

Findings

103. In relation to the medical expenses claimed, the court finds that the claimant has sufficiently proven same. The court further finds that it was not necessary to have a doctor testify or say that he prescribed the particular medication purchased. That if that was the case, the defendants should have led evidence in opposition to that set out by the claimant. The court agrees with the submissions of the claimant that her evidence in relation to her medical expenses was left untested and uncontested by the defendants during cross-examination and as such, the defendants are deemed to have accepted that evidence where they have not challenged and the court so finds.

104. The court upon perusing the medical receipts did however find that some receipts were duplicated and undecipherable. Be that as it may, it is clear that the second defendant did not undertake the task of calculating the receipts because if it did so it would have realized that the claimant's calculation of her medical expenses did not include those receipts that were duplicated and undecipherable. Consequently, the court will award the

claimant her entire claim to medical expenses in the sum of $26,653.60. To simply make such a submission without doing the necessary preparation was simply disingenuous.

105. In relation to the claimant's claim for transportation expenses, the court finds that she has also proven same. The court disagrees with the submission of the second defendant that the claimant has not produced corresponding receipts from Dr. Spann to account for her visits. Again if the second defendant had properly and carefully scrutinized the claimant's documents, it would have realized that most of the transportation receipts corresponded with those receipts from the Community Hospital of Seventh-Day Adventists. The court therefore finds that on a balance of probabilities, the claimant has made out for claim for transportation expenses. As such, the court will award the claimant her claim for transportation expenses in full in the sum of $6,300.00.

106. The claimant provided her pay slip which showed that she earned a net salary of $3,610.37 per month. The claimant also provided the following letters from her employer, Ministry of Community Development;

i. Letter dated the 18th July, 2013 which stated that the claimant was given an extension of sick leave with full pay for the period of the 2nd May, 2013 to the 12th June, 2013 and with half pay for the period of the 13th June, 2013 to the 29th June, 2013;
ii. Letter dated the 23rd August, 2013 which stated that the claimant was given an extension of sick leave with half pay for the period of the 21st June, 2013 to the 11th July, 2013 and with no pay for the period of the 12th July, 2013 to the 18th July, 2013;
iii. Letter dated the 13th October, 2013 which stated that the claimant was given an extension of sick leave with no pay for the period of the 19th July, 2013 to the 12th September, 2013;
iv. Letter dated the 24th October, 2013 which stated that the claimant was given an extension of sick leave with no pay for the period of the 13th September, 2013 to the 10th October, 2013;

v. Letter dated the 20th November, 2013 which stated that the claimant was given an extension of sick leave without pay for the period of the 11th October, 2013 to the 7th November, 2013;

vi. Letter dated the 13th January, 2014 which stated that the claimant was given an extension of sick leave without pay for the period of the 8th November, 2013 to the 10th November, 2013;

vii. Letter dated the 26th January, 2016 which stated that the claimant was given an extension of sick leave with full pay for the period of the 30th December, 2015 to the 26th January, 2016;

viii. Letter dated the 25th February, 2016 which stated that the claimant was given an extension of sick leave with half pay for the period of the 27th January, 2016 to the 23rd February, 2016; and

ix. Letter dated the 4th May, 2016 which stated that the claimant was given an extension of sick leave without pay for the period of the 24th February, 2016 to the 6th March, 2016.

107. The court therefore finds that the claimant has provided adequate documentary proof of her claim for loss of earnings. The court will therefore award the claimant the sum of $39,340.00 for loss of earnings.

General Damages

108. The relevant principles for assessing general damages, in a personal injuries claim were set by Wooding CJ in ***Cornilliac v. St. Louis***.[22] They are as follows;

i. the nature and extent of the injuries sustained;

ii. the nature and gravity of the resulting physical disability;

iii. the pain and suffering which had to be endured;

iv. the loss of amenities suffered; and

v. the extent to which, consequentially, pecuniary prospects have been materially affected

[22] (1966) 7 WIR 491

The nature and extent of the injuries sustained

109. The claimant was born on the 19th February, 1972. She was forty years of age at the time of the incident and is currently forty-six years of age. As a result of the incident, the claimant has experienced and continues to experience the following injuries and effects[23];

i. Pains in her neck radiating into the arms with varying severity;
ii. Pains and muscle spasms in the neck requiring medication to provide some comfort;
iii. Spasms of the para-vertebral muscles of the cervical spine with some varying degrees of nerve root irritation in the upper limbs;
iv. Chronic pain necessitating long term use of muscle relaxants to alleviate the pains;
v. Prone to periods of relapse associated with sitting long periods; and
vi. 20% permanent partial disability.

The nature and gravity of the resulting physical disability

110. Since the incident, the claimant has been unable to carry out basic household chores such as cooking, cleaning her house and playing with her children. Prior to the incident the claimant used to clean her house and yard, and was able to make her own groceries. She testified that it is now difficult for her to push the trolley as she experiences a lot of pain in her neck and head. She further testified that she struggles to drive long distances because the discomfort and pain in her neck and head becomes unbearable.

111. It was the testimony of the claimant that as part of her work duties, she has to locate files from various cabinets. She testified that she is unable to bend down to reach the lower cabinets because she feels excruciating pains in her neck and head and she also feels dizzy. According to the claimant, the simple task of walking results in her experiencing excruciating pain in her neck and head. She is also unable to carry heavy things such as her groceries or to bend to pack the lower shelves in her kitchen. Apart from her usual job, the

[23] See Medical report of Dr. Richard Spann MB, BS(UWI), FRCS, (G) FRCS (NEURO SURG) of the Community Hospital of Seventh Day Adventists dated the 8th October 2013:

claimant is also a masseuse but she is now unable to do so, as the act of massaging persons causes her neck and head to hurt.

The pain and suffering which had to be endure

112. When the claimant was struck with the cricket hard ball, she testified that she experienced a sudden whiplash and was in immediate excruciating pain. She felt confused and felt a painful, burning feeling emanating around her neck. Further, she began to cry because she was in unbearable, excruciating pain. She had a massive, painful headache during the entire ordeal. Additionally, whilst waiting to be examined by Dr. Tantoco, she was feeling dizzy and had extreme pain her neck and head.

113. The evening of the incident, the claimant was in excruciating pain. It was so unbearable, she could not sleep and all she could do was cry. That night, as she could not use a pillow to support her neck whilst sleeping, she was unable to breathe properly. After the incident, the claimant used painkillers which eased the pain at times, however, for the majority of the time she was in excruciating, unbearable pain.

114. Since the incident, the claimant continues to be affected by her injuries as she continues to experience pains in her neck and head. Further, the claimant wears a neck brace in order to stabilize her neck which eases the pain only slightly.

The loss of amenities suffered

115. According to the claimant, since the incident, she has been unable to carry out basic household chores such as cooking, cleaning, and shopping for groceries. She testified that she finds it difficult to play with her children and she cannot clean her yard nor can she continue her job as a masseuse due to the pain in her neck and head.

The submissions of the first defendant

116. The first defendant submitted that a reasonable sum for general damages in this case is $50,000.00. In so submitting, the first defendant relied on the following authorities;

i. ***Dexter Sobers v The Attorney General of Trinidad and Tobago***, Master Margaret Mohammed (as she then was)[24] - a claimant suffered loss of lumbar lordosis, disc desiccation and an annular tear at L4/5 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 protrusion impinging on the left S1 traversing nerve root. The claimant also experienced back pains radiating down the left leg, his straight leg raising was greater than 90 degrees bilaterally, with negative sciatic stretch test, power sensation and reflexes were within normal limits and 20% permanent partial disability. The claimant was awarded general damages for pain and suffering in the sum of $80,000.00. The first defendant submitted that those injuries appear to be more serious than those of the claimant in the instant matter.

ii. ***Selwyn Charles v The Attorney General***,[25] Rajkumar J (as he then was) – the claimant suffered injuries to his left wrist, neck, chest and spine. The claimant underwent surgery for the spinal injury approximately five months after the injury was sustained. He was warded for five days at hospital and had to wear a neck brace form the date of the accident. The court found that although after surgery there appeared to be some limitation of movement, there was little evidence of pain and suffering and no evidence that at the time of trial the claimant was suffering from pain. Judgment was delivered some seven years after the injuries were sustained in the sum of $50,000.00; updated to December, 2010 to $61,924.00. The first defendant submitted that the injuries sustained by this claimant appear far more serious than those sustained by the instant claimant.

[24] Claim No. CV2008-04393
[25] HCA No 2092 of 2002

iii. ***Ann Marie Redman v Hilary Samuel***[26], Stollmeyer J. awarded the claimant general damages in the sum of $65,000.00 for serious injuries such as L3 4 midline, L4 5 more on the right, and L5 S1 mid line disc degeneration and protrusions. This claimant also spent seven days at the Port of Spain General Hospital.

The submissions of the second defendant

117. The second defendant submitted that the claimant should be awarded general damages between the ranges of $20,000.00 to $60,000. Further, that the she should be placed close to the bottom of that range at $25,000.00. In so submitting, the second defendant relied on the following cases;

i. ***Theresa Daly v Attorney General,***[27] Boodoosingh J – The Claimant fell down eight flights of steps and sustained swelling and an edema in the Quadratas Lumborum Musculature resulting in limitations to the flexion 50%, rotation 65% and lateral bending 50%, a disc bulge in the L4/L5, L5/S1 lumbar complex and associated myospasms. She experienced significant pain in the early stages, some loss of amenities and diminution in her capacity to perform all the tasks she ordinarily did for some time. She still experienced pain and restriction in what she could do going forward. She was awarded $80,000.00 in general damages.

ii. ***Paul Harradon v Yorke Structures Ltd,***[28] Dean-Armorer J. – The Claimant sustained injury to his back and suffered a herniated disc. He underwent two surgeries. The first was a lumbar disc excision surgery where he was hospitalized for three days. Thereafter he complained of intense pain and observed fluid emanating from the incision. He was again admitted to hospital and given further treatment for four days. He began experiencing seizures and lost consciousness and was diagnosed with brain and spinal cord infection. He underwent further surgery spending a total of thirteen days hospitalized. After discharge he still suffered from debilitating pain and muscle spasms. His gait and balance was affected. His employment was terminated on the grounds of medical incapacity. His permanent

[26] Claim No. CV2007-02664
[27] CV2010 –05291
[28] CV 2010 –02701

partial disability was assessed at 30 percent. He was awarded $80,000.00 in general damages

iii. ***Ferosa Harold v ADM Import and Export Distributors Ltd,***[29] Master Alexander- The Claimant slipped and fell on the defendant's premises. She was diagnosed with soft tissue injury to the neck, lumber spine and left shoulder. There was no assessment of disability in this case. However, the evidence was that she was left with persistent, debilitating pains that restricted how she was performing her daily activities and affected her enjoyment for life. Her pain was so enfeebling that on occasions she needed her husband to help her dress. She was also unable to use the stairs to gain access to the upper level of her home and had to abandon the upper level of her house altogether, a scenario that was expected to persist for the rest of her life. She was also diagnosed with loss of cervical and lumbar lordosis which was linked to the injury that she sustained. She was awarded $60,000.00 in general damages.

iv. ***Corneal Thomas v The Attorney General***,[30] Charles J - The Claimant was beaten by two police officers on his head, neck and upper back until he was unconscious. He was given a cervical collar, placed on IV and remained bed ridden for two days. He was diagnosed with soft tissue injury to his neck, left shoulder with muscle spasms, pain and stiffness to those areas. He was awarded $35,000.00 in general damages.

v. ***Judson Mohammed v The Attorney General***[31], Mohammed J - The Claimant was assaulted and battered by police officers and sustained injury. He was diagnosed with neck pain due to damaged muscles and limitation of movement, cerebral concussion or post-concussion syndrome, amnesia, post traumatic headaches, dizziness, loss of balance, soft tissue injuries, wound above the right eye and pain in the right ear. He was rescued by his colleagues in a semi-conscious state. He endured pain in his right ear and neck area which lasted months. He suffered from headaches. There was no evidence of loss of amenity. Scans of his head and cervical

[29] CV 2009 – 03728
[30] CV 2012 – 05160
[31] CV 2015 – 00123

spine showed that there was no long-term resulting injuries. He was awarded $30,000. 00 in general damages.

118. The second defendant submitted that the claimant's injuries in this case was clearly not as extensive as that demonstrated in the ***Theresa Daly*** and ***Paul Harrandon*** supra in which very specific diagnoses were made of injury to specific parts of the claimants' spinal cord as a result of the trauma. According to the second defendant, in the instant case no such specific diagnosis has been made despite months of visiting Dr. Spann, a neurosurgeon. The second defendant further submitted that in the instant case, Dr. Spann's medical report lacks the precision that is normally associated with a medical report and appears to be based on the claimant own reports.

119. According to the second defendant, in the cases of ***Ferosa Harold***, ***Corneal Thomas*** and ***Judson Mohammed*** supra, there were no specific diagnoses of injury to the spinal cord but they all suffered trauma to their spinal area (back and neck) and they all suffered muscles spasms and headaches as a result. The second defendant submitted that this category of injury more closely resembles the clinical diagnoses in the claimant's medical report of spasms of the para-vertebral muscles of the cervical spine with some varying degrees of nerve root irritation in the upper limbs or more simply muscle spasms in the neck and arm pains but that the claimant's case is less severe than that of ***Ferosa Harold*** who was also diagnosed with loss of cervical and lumbar lordosis as a result of the injury.

120. The second defendant submitted that although the claimant's injuries are similar to those of ***Corneal Thomas*** and ***Judson Mohammed***, it should be noted that she did not experience the type of violent trauma that they did which resulted in both claimants losing consciousness. That both claimants (Thomas and Mohammed) also suffered additional injuries due to, and in keeping with, the nature of the trespass. According to the second defendant, the claimant experienced only a single impact after which she was still able to drive home and, unlike Thomas and Mohammed, she never experienced the apprehension of the impending assault being totally unaware of the likelihood of same occurring.

The submissions of the claimant

121. The claimant submitted that a fair award of general damages is the sum of $60,000.00. In so submitting, the claimant highlighted the following cases;

i. ***Ferosa Harold v ADM Import and Export Distributors Limited***,[32] Master Alexander - The claimant, forty-four years of age, visited the business place of the defendant and on approaching the cashier, slipped on a mixture of blood and water and fell on the concrete floor. The bloody water was emanating from an unattended trolley on which meat was defrosting. The claimant was diagnosed with soft tissue injury to the neck, left shoulder, left wrist, back, right thigh and left limb, and was ascribed initially a 10% permanent partial disability. By the time of the filing of the re-amended statement of case, some three years later, her injury, as pleaded and particularized, was substantially the same, save for her claim of being significantly disabled and unable to work from the date of the injury. The claimant was awarded $60,000.00 in general damages.

ii. ***Raquel Burroughs v Guardian Life of the Caribbean Limited***,[33] Master Alexander - the claimant was awarded $78,000.00 in general damages. Dr. Toby diagnosed her with tenderness along the whole spine and neck along with some restriction of neck movement and ascribed a 25% permanent partial disability. He also noted that ten months post injury, the claimant, who was still experiencing pain, may have been approaching maximum medical improvement and was in a chronic state.

iii. ***Isaac v Solomon and Motor and General Insurance Company Limited***,[34] Des Vignes J (as he then was) - The claimant suffered from objective cervical muscle spasm and cervical spine tenderness on the lower spinous processes. She had a normal gait. Lumbar spine flexion was reduced. Straight leg raising was 90 degrees bilaterally with a weakly positive sciatic stretch test on the right. No neurological abnormalities were demonstrable on either upper or lower limbs. New MRI scans of the whole spine on the 9th July, 2008 showed loss of the cervical lordosis and anterior osteophytic lipping at C5/6 and C6/7. Some L5/S1discs degeneration was

[32] CV2009-03728
[33] CV2011-04315
[34] CV 2007-04400

noted. These findings were not significantly changed from her previous MRI. The claimant had chronic neck and back pains secondary to her whiplash injuries. Her permanent partial disability remained at 20%. The award in respect of general damages was $40,000.00 in December 2009.

iv. ***Marchong v T&TEC and Galt & Littlepage Limited***[35], Jones J – the claimant, while at work, fell from a swivel chair and sustained injury and was diagnosed as suffering from lumbar spasm and soft tissue injury. Further tests revealed a narrowing of the lateral recess at the L4-L5 with possible impingement of the traversing L5 nerve root and disc degeneration at the L5-Slevel. Jones J (as she then was) found that the claimant was entitled to general damages in the sum of $60,000.00 for pain and suffering and loss of amenities as a result of the injury.

Findings

122. Although the injuries sustained by the claimant (as set out above) were not as serious as those in the cases highlighted by the defendants, in the view of the court it is clear on the evidence that the claimant did suffer long term chronic pains and discomfort which seriously affected her lifestyle. The court therefore finds that $60,000.00 is a fair and reasonable sum under this head.

Interest

123. The claimant submitted that the proper rate of interest to be awarded on general damages is 2.5% from the date of service of the Statement of Case on the defendants to the date of judgment and 5% thereafter. In so submitting, the claimant relied on the case of ***The Attorney General of Trinidad And Tobago v Fitzroy Brown and others,***[36] wherein at page 18, line 25 of the transcript, the Honourable Chief Justice stated as follows;

[35] HCA 4045/2008
[36] CA No. 251 of 2012

"With regard to the rate of interest on general damages, the pre-judgment rate of interest on general damages, it is our view that the correct approach should be to align it with the short term investment rate or, I should say, the rate of return on short term investments of which there is some evidence before the Court. And so, accordingly, that rate of pre-judgment interest is reduced from 9 per cent to 2.5 per cent."

Findings

124. The court agrees with the submission of the claimant that the proper rate of interest to be awarded on general damages is 2.5% from the date of service of the Statement of Case on the defendants to the date of judgment.

Disposition

125. The court will therefore dispose of the claim as follows;

a. Judgment for the Claimant against the First and Second defendants for negligence.
b. The First and Second defendants shall pay to the Claimant, general damages for negligence in the sum of $60,000.00 together with interest at the rate of 2.5% per annum from the date of service of the claim on the defendants to the date of judgment.
c. The First and Second defendants shall pay to the Claimant, special damages in the sum of $72,293.60.
d. The First and Second defendants shall pay to the Claimant the prescribed costs of the claim.

Dated the 22nd day of May, 2018

Ricky Rahim

Judge