THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2016-04662

BETWEEN

ALLAN JOEFIELD

Claimant

And

ANIL OUDIT

First Defendant

TRINIDAD AND TOBAGO ELECTRICITY COMMISSION

Second Defendant

TRINIDAD AND TOBAGO INSURANCE LIMITED

Co-Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: November 27, 2018

Appearances:

Claimant: Mr. D. Burris instructed by Ms. J. Benjamin

Defendants: Mr. R. Nanga instructed by Ms. A. Bissessar

JUDGMENT

1. By Claim Form filed on December 30, 2016 the thirty-nine year old claimant claims general damages for pain and suffering and loss of amenities as a result of negligence of the first and second defendants. The claimant further claims special damages in the sum of $108,700.00.

2. The claimant is and was at all material times a member of the Trinidad and Tobago Special Reserve Police Service. He is attached to the San/Juan Municipal Police Service. As a Special Reserve Police Officer ("SRP"), the claimant is authorized to operate a marked police service vehicle during the course of his duties. The claimant was also at the material time employed with Same-Time Protection Company Limited as a Security Officer.

3. According to the claimant, on January 11, 2013 ("the said date") about 12:55 pm during the course of his duties he was driving a marked police service vehicle registration number, PBY 9738 ("the police vehicle") in a northerly direction along Maraj drive towards the intersection of Maraj drive and the Churchill Roosevelt Highway ("the highway") in a bid to access the westbound lane of the highway. The area in which the collision occurred has since changed with the advent of the Grand Bazaar interchange and the construction of other roadways leading to Grand Bazaar. Whilst driving, the claimant observed a service vehicle owned by the second defendant with registration number PBY 6771 ("the truck") parked on the shoulder of the highway in the vicinity of the intersection of Maraj drive and the highway, facing west. On the tray of the truck were metal street light poles ("poles"). The evidence shows that the men

employed by T&TEC were changing light poles on that day along the southern boundary of the highway, on the westbound lane.

4. At the material time, the first defendant who is an employee of the second defendant was the driver of the truck. According to the claimant, as he was turning left to proceed to the westbound lane of the highway

5. past the truck, which was parked on the shoulder of the highway to his left, one of the metal poles on the tray of the truck penetrated the police vehicle through the top left hand corner of the windshield and made contact with the left side of the claimant's face causing a large gaping wound near to his ear and a minor laceration to his left fourth finger.

6. The claimant avers that the incident was caused by the negligence of the first defendant who at the material time owed to him a duty of care and breached that duty of care when he (the first defendant) failed and/or neglected to adopt certain procedures in the execution of his duties on behalf of the second defendant. The claimant further avers that as a result of the negligence of the first defendant, he has suffered pain, injury, loss and damage. According to the claimant, the second defendant as the employer of the first defendant is vicariously liable for the acts of the first defendant who was at the material time acting in the course of his duties.

7. The particulars of negligence are as follows;

i. Failing and/or neglecting to properly secure and/or strap down the metal light poles to the tray of the vehicle;

ii. Failing to have necessary cones and signs on the site;

iii. Failing to put in place and/or attach the necessary warning flags to the protruding part of the light poles;

iv. Failing and/or neglecting to have on site at the material time any police officers present and directing traffic;

v. Failing and/or neglecting to undertake reasonable and/or practicable steps to ensure that persons not in the employ of the second defendant were not exposed to risk to their safety or health, in light of the fact that the worksite at the material time had become the second defendant's premises as defined by the Occupation Safety and Health Act ("the OSH Act") and as such the second defendant was resultantly in clear breach of section 7 of the OSH Act.

8. By Defence and Counterclaim filed on May 24, 2017 the defendants admit that the truck was parked on the shoulder of the highway in the vicinity of the intersection of Maraj drive and the highway, facing west and that on the tray of the truck there were metal poles. The second defendant's employees were undertaking the removal and/or the uprooting of the poles to facilitate the expansion of the highway.

9. The defendants deny that the pole fell from the truck. According to the defendants, on the said date, the first defendant acting as the servant and/or agent of the second defendant was lawfully parked and at a standstill on the shoulder of the westbound lane of the highway west of the intersection of Maraj Trace and the highway when the claimant so negligently drove and/or managed and/or controlled the police vehicle while attempting to turn left onto the highway that he caused the police vehicle to collide violently with the poles on the truck. The defendants claim that the collision caused one of the poles to be bent at an almost

ninety degree angle and another pole to be dragged for several feet whilst sticking through the windscreen of the police vehicle the claimant was driving. As such, the defendants deny that the incident was caused and/or contributed to by the negligence of the first defendant acting as the servant and/or agent of the second defendant.

10. The defendants claim that at the time of the incident, five poles were already uprooted and securely strapped to the tray of the truck. Three of the poles were securely fastened to the left side of the tray and two on the right side of the tray. According to the defendants, despite the force of collision, the poles to the left of the tray of the truck remained securely fastened and did not fall to the ground nor did the two poles which were hit, bent and dragged by the claimant become dislodged and fall to the ground after the collision albeit the two poles were now shifted from its original position. The defendants intend to rely on the aforementioned as evidence that the poles were securely fastened.

11. According to the defendants, the dragging of one of the poles several feet after the collision as well as the bending of the metal pole to an almost ninety degree angle is evidence of the substantial speed the police vehicle was travelling at the material time.

12. The defendants aver that at the commencement of the job, safety cones were placed at the front, behind and to the right of the truck. Men at work signs were also placed ten feet behind the truck. After the first pole was uprooted and it was securely fastened to the left side of the tray of the truck, the cones and the signs were removed whereupon the truck would be driven along the shoulder of the highway to the site of the next pole. According to the defendants, this process was repeated along the

shoulder for each light pole with the safety cones and the men at work signs being repositioned when the truck stopped to commence removal of another pole. The defendants aver that given the weight of the individual poles, had same not been securely fastened, it would have slipped off the truck immediately upon being placed on the truck and it would have been impossible for the truck to be driven to the next location without the poles falling off.

13. The court pauses here to observe that the evidence both viva voce and photographs demonstrate that although the bed of the truck appeared to be a flatbed, the poles which were longer than the bed were not fastened to the flat bed in a lying or flat position but were placed at a gradient with the tops being tied above the cab of the truck with the top of the pole in line with the leading edge of the cab and the bottom of the pole protruding some way beyond the back end of the tray.

14. According to the defendants, since at the time of the incident the first defendant was preparing to move to the site of the next pole approximately one hundred and fifty feet west, the safety cones and signs had been removed in order to facilitate the truck moving forward to the next location. The defendants claim that at the completion of the removal of all the poles, warning flags would have been affixed to the poles when the truck was about to leave the shoulder to move onto the highway in keeping with the second defendant's practice and procedure and that there was no need to place a warning flag while stationary or whilst driving along the shoulder executing the works.

15. The defendants' further claim that there was no need to have police officers present directing traffic as the second defendant was performing

works on the shoulder and not on the highway and that the second defendant's employees were on the site to ensure that the works were conducted safely.

16. The defendants admitted that the pole made contact with the left side of the claimant's face which caused a laceration near to his ear and a minor laceration to his left fourth finger. However, the defendants require the claimant to strictly prove his other claims of injuries, damages and consequential losses.

17. The second defendant claims that as a result of the collision and in particular the negligence of the claimant, it has suffered loss and damage and has been put to expense. As such, the second defendant counterclaimed for the cost of the two poles in the sum of $8,300.70, damages, costs and interest.

THE CO-DEFENDANT

18. The co-defendant is a body corporate carrying on the business of Insurance in Trinidad and Tobago. The second defendant is insured by the co-defendant. The claimant pleaded that the co-defendant is sued by virtue of Section 10(A) of the Motor Vehicles Insurance (Third Party Risk) Act Chapter 48:51 as amended by the Motor Vehicles Insurance (Third Party Risks) (Amendment) Act 1996 ("the Act") and is therefore liable to satisfy the amount of any judgment obtained against the second defendant and/or its servants and/or agents. However, the claimant did not serve any notice of these proceedings on the co-defendant pursuant to the Act. Further, there was no evidence of any liability against the co-

defendant. Consequently, the claimant's claim against the co-defendant will be dismissed.

ISSUES

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

i. Whether the incident 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 there was contributory negligence on the part of the claimant;
v. To what damages, if any, is the claimant entitled.

CASE FOR THE CLAIMANT

20. The claimant gave evidence for himself. He has been a SRP for the past eleven years. His rank is that of Constable and his daily duties include but are not limited to accepting reports from victims of crime, interviewing persons, serve Process and conduct enquiries in accordance with the reports made to him or as instructed by his seniors.

21. He receives his salary payments from the San Juan/Laventille Regional Corporation ("the corporation"). At the material time, he was in receipt of a gross monthly salary of $5,934.25 from the corporation, which has

been increased incrementally over the years since then.[1] During cross examination, the claimant was referred to letter dated March 6, 2015 annexed to his witness statement at "A.J.1". This letter set out that the claimant's salary increased to a monthly remuneration of $7,459.00. The claimant accepted that he received an increase in his salary.

22. The claimant was also employed as an Operations Manager with Same-Time Protection Company ("the company") situate on the Southern Main Road, Curepe. He reported directly to the Managing Director of the company, James Samaroo ("Samaroo"). He was in receipt of a fortnightly salary of $4,500.00 from the company. He testified that he was paid in cash from the company as he had an informal arrangement with Samaroo. During cross-examination, the claimant testified that he did not ask the company to write a letter on his behalf stating the salary he received from it because he is no longer employed at the company. He further testified that he did not file taxes in relation to the salary he received from the company.

23. During cross-examination, the claimant agreed that he failed to mention what were his duties as the operations manager of the company. In his statement of case filed on December 30, 2016 the claimant pleaded that he was a security officer with the company. However, during cross-examination he testified that he became the operations manager in 2012 and that an operations manager is higher in rank than that of a security officer.

24. On January 11, 2013 at about 12:55 pm during the course of his duties, the claimant was driving police service vehicle registration number PBY

[1] The claimant attached a pay slip from the corporation dated December, 2013 and a job letter from the police service dated March 6, 2015 to his witness statement at "A.J.1".

9738 (“the police vehicle”). He was travelling in a northerly direction along Maraj Street towards the west bound lane of the Churchill Roosevelt Highway (“the highway”). He testified that as Maraj Street is a short street and there was construction taking place along the street at the time, he was travelling at a normal rate of speed of about twenty to twenty-one kilometers per hour. Upon reaching the vicinity of Maraj Street and the highway, a left turn was required to merge onto the west bound lane of the highway.

25. As he approached the intersection, he recognized that there was a T&TEC truck registration number TBY 6771 (“the truck”) parked on the shoulder of the west bound lane with the front of the truck facing west and the rear towards Maraj Street. The rear of the truck was approximately fifteen to twenty feet away from the intersection. The claimant also observed that the truck had metal light poles on the tray. During cross-examination, the claimant testified that he did not observe how many poles there were on the truck. The poles were placed in an inclined position with the front part of the poles ascending to the front, over the brow of the truck and descending all the way pass the tail of the tray of the truck. He further observed workmen in uniform standing around as if there were some works going on or about to happen.

26. The claimant came to a stop at the corner of Maraj Street and looked right to ensure that the road was clear to proceed onto the west bound lane of the highway. During cross-examination, the claimant testified that when he was at the corner of Maraj Street, the truck was approximately two to three feet away from the police vehicle. As he was about to pass the rear of the truck, he heard a crashing sound and he saw a metal pole coming towards the police vehicle. The pole entered the police vehicle

through the left top side of the windscreen. The claimant immediately pushed his upper body as far back as possible to avoid being hit by the pole. However, due to the limited space and the timing of the incident, he could not get out of the way of the pole in time. Consequently, the pole collided with the left side of his face near his left ear.

27. At that time, the police vehicle was still in motion and so the pole was dragged for a brief moment before the claimant was able to bring the vehicle to a complete stop. He testified that this resulted in the pole causing a gaping wound on the left side of his face.[2]

28. The claimant immediately felt a sharp pain to his head and he realized that he was bleeding profusely from the wound. He was disoriented and was pinned to the driver's seat of the police vehicle. Shortly thereafter, the emergency services attended the scene and he was assisted from the vehicle and transported to the Eric Williams Medical Sciences Complex ("the hospital"). At the hospital he was admitted and received treatment.[3]

29. Acting Inspector Collins was assigned to carry out the investigations into the incident. The claimant was given a copy of Acting Inspector Collins' findings in the form of a final report and the photographs of his injuries and the scene of the incident.

30. After the claimant was released from the hospital, he was unable to return to his job as a SRP and as the Operations Manager of the

[2] Photographs of the scene of the incident were annexed to the claimant's witness statement at "A.J.2".

[3] A copy of the medical certificate from Dr. R. Ramoutar dated July 13, 2015 was annexed to the claimant's witness statement and marked "A.J.3".

company. He was placed on protracted sick leave from his job as a SRP. He was an outpatient at the Eric Williams Medical Sciences Complex, Police Hospital and a patient of Dr. Mark Pounder and Dr. Earl Ramdoo where he attended for regular check-ups, medication, prescriptions and updated sick leaves.[4] The claimant returned to his job as an SRP around December 2013 and was given light desk duties.

31. At the time of the incident, the claimant was pursuing a Master's Degree in Business Administration ("MBA") from the Australian Institute of Business ("AIB") at the School of Higher Education. He had already expended a considerable amount of funds on this venture for tuition and related expenses. Due to the incident, he was unable to attend the remainder of his classes and had to withdraw from the programme and all the fees paid were non-refundable.

32. Since the incident, the claimant is in considerable pain and also suffers from severe back pain, migraines and blurry vision. He is unable to sit or stand for long hours at a time as he would feel as though he is going to black out. Those constant pains keep him up at nights and he is on a steady diet of pain killers.

33. He is in a common-law relation and is the father of children ages twelve, sixteen and seventeen. He is unable to partake in any recreational outdoor activities with his children. When he attempts any such activities, the sharp pains and blurry vision would creep up on him. He is also an avid lover of the all fours card game and used to attend the movies regularly before the incident. However, due to the recurring feelings, he is unable to partake in any social activities.

[4] Copies of sick leaves for the period under review along with medical reports from Dr. Gyan-Tota Maharaj and Dr. Mark Pounder were annexed to the claimant's witness statement at "A.J.4".

34. He used to "lime" and play cards with his friends for hours during his down time but he can no longer participate in such activities. He is also afraid to drive on the road as he would panic whenever he sees trucks approaching him, especially if the trucks are heavily laden with anything such as logs, poles and any other items that could fall off. He would sometimes come to a complete stop in the middle of the road out of fear and/or pure confusion. This sometimes led him to be ridiculed by other motorists which is sometimes embarrassing to him and his family. During cross-examination, the claimant testified that he was driven to court. He further testified during cross-examination that he has not sought any treatment in respect of his fear of driving nor did he call any doctors to give evidence in court.

35. Subsequent to the incident and for about two years after, he stopped picking up his children from school as he was incapacitated due to the injuries from the incident and the fear of driving brought on from the incident.

36. The claimant has attended several doctors and were given referrals. He underwent several tests such as x-rays, a CT scan and a MRI to determine a prognosis of his injuries suffered from the incident. Those procedures incurred further costs which he offset through the offices of his attorneys.[5] During cross-examination, the claimant testified that as he did not have the necessary funds at the time to pay for some of the costs in relation to the several tests he underwent, his attorneys assisted him to pay for same.

[5] Copies of medical reports from Dr. Vidya Gyan-Tota-Maharaj, Dr. Deans S. R. Baiju and the receipts from the CT scan, MRI and general charges were annexed to the claimant's witness statement at "A.J.6".

37. The claimant still suffers from impromptu sharp headaches, blurry vision and lower back pains. He is also still unable to participate in any physical activities. As he cannot exercise as he would like to or at all, he has gained weight.

38. His monthly earnings from both of his jobs have been significantly reduced. He further testified that as his skill-set is that of a security background, it is difficult or almost impossible for him to find any job in that field that does not require long standing.

39. During cross-examination, the claimant was referred to the second page of photographs at "A.J.2". He was then directed to look at the second photograph. The claimant agreed that there was a cone in the photograph. He further agreed that from this photograph two poles were bent.

40. During cross-examination, the claimant denied that he was travelling at a fast speed out of Maraj Street. He testified that he was unaware of the second pole that was bent to an almost ninety degree fashion. Accordingly, he denied colliding with two poles that were strapped on the truck. He further denied that he caused two of the poles to be bent.

THE CASE FOR THE DEFENDANTS and the COUNTERCLAIM

41. The defendants called two witnesses, the first defendant, and Varune Maharaj.

42. The first defendant has been employed with the second defendant for the past twelve years. He is attached to the second defendant's Public

Lighting Department as a Driver/Operator. On January 11, 2013 when the first defendant arrived at the site, he parked the yellow ISUZU 10 ton truck to the east of the Grand Bazaar entrance and on the shoulder of the west bound lane. He was working with his colleagues, Collin Guevara ("Guevara") who is a lorryman and Michael Griffith who is a foreman. They were extracting eight planted twelve metres street light poles to facilitate the expansion of the highway.

43. The other workmen and the first defendant got out of the truck and before the first pole was uprooted and loaded, safety cones were placed behind, in front and to the right side of the truck. Additionally, men at work signs were placed about ten feet away from the back of the truck.

44. After the first pole was uprooted, it was loaded onto the left side of the truck with the bottom of the pole facing west (above the cabin) and the top projecting approximately five feet from the back of the truck. The pole was then secured using a strap. The truck was then moved about one hundred and fifty feet west and another pole was removed and secured in similar fashion with the cones and signs being moved simultaneously. The first defendant and his crew moved from extracting one pole to the next along the shoulder of the highway in a westerly direction. Each pole was securely fastened onto the tray of the truck.

45. During cross-examination, the first defendant testified that the length of the truck was approximately twenty-five feet and the length of the tray was approximately eighteen to twenty feet. He further testified during cross-examination that the length of the poles that were placed on the tray of the truck was approximately thirty to thirty-two feet. In the absence of any other evidence to the contrary, it therefore more likely

than not that the poles were extended beyond the back of the truck by some seven feet.

46. The first defendant testified that after they had completed the removal of all the poles, in keeping with the second defendant's standard practices and procedures, warning flags would have been attached onto the poles when the truck was about to leave the shoulder to move onto the highway. He further testified that he has done this type of job before and that in all instances when he was involved, the second defendant's standard practices and procedures were followed.

47. After five poles were loaded in the manner set out above, the truck's location was approximately eight to ten feet west of the back entrance to Grand Bazaar. It appears to the court that the inference to be drawn from the evidence is that Maraj Street led to the back entrance of Grand Bazaar. By that time there were three poles on the left side of the truck and two on the right side, all secured.

48. Between 2:30 pm and 2:45 pm, the first defendant and his crew began preparations to move to the next pole. One of the first defendant's fellow workers picked up the cones and the men at work sign and the first defendant entered the driver's seat of the truck to drive to the next pole which was further west about one hundred and fifty feet away.

49. Whilst sitting in the truck and preparing to leave to go to the next pole, the first defendant heard a bang, the entire truck began to shake and he heard a loud noise. When he looked out of the truck, he saw part of a pole inside of the police vehicle. The first defendant testified that the police vehicle had collided with the protruding poles. The collision took

place at approximately 2:40 pm. The first defendant further testified that the weather was sunny and bright and that the poles were clearly visible. During cross-examination, the first defendant agreed that he did not see when the collision occurred.

50. According to the first defendant, on the said date, he had driven the truck for approximately seven hundred and fifty feet with the first and then the second pole and eventually with the five poles strapped to the cabin of the truck. The pole numbers were 77 to 81. He testified that the poles did not move. That even after the incident, the poles were securely strapped together and to the cabin of the truck save and except pole number 77 which had penetrated the windscreen of the police vehicle and pole number 81 which was bent to an almost right angle.

51. The first defendant testified that the force of the collision with the police vehicle had caused pole number 81 to bend to an almost right degree angle as the police vehicle continued to drive after the collision and was dragging the pole.[6]

52. After the collision, the first defendant exited the truck and went to assist the claimant where he saw the claimant sitting on the driver's side holding his left cheek. When the first defendant called out to the claimant, he did not answer. During cross-examination, the first defendant testified that the claimant was unconscious for approximately ten to fifteen minutes. The first defendant got some water for the claimant and saw that he was responding thereafter.

[6] Copies of photographs showing that the remaining poles were still fastened to the cabin were annexed to Oudit's witness statement at "A.O.2".

53. The Emergency Health Services ("EHS") along with the police were contacted. The police and the EHS arrived sometime thereafter and the EHS took the claimant to the hospital. The first defendant later went to the St. Joseph Police Station to give his statement and to make his report.

54. Varune Maharaj ("Maharaj") is an Electrical Engineer employed with the second defendant. He has been employed with the second defendant for the past eighteen years. He is currently a Senior Engineer. He is a graduate of the University of the West Indies with a B.Sc in Electrical Engineering.

55. In March, 2013 he was a Senior Engineer attached to the second defendant's Public Lighting Department. His duties included the planning, development and monitoring the implementation of projects. He also provided technical engineering support and reports, coordinated, monitored and analyzed operational reports.

56. He is aware of the incident that occurred on January 11, 2013 at the back of Grand Bazaar involving the police vehicle which collided with two poles which had been secured to the back of the truck. After the incident, EC Sattish Rampersad while in the process of conducting investigations into the incident, requested the cost of installation of the damaged poles.

57. As a result of the request, Maharaj made enquiries from the Estimating Clerk of the Public Lighting Department in relation to the Survey and Estimating Programme ("the programme") which is part of the second defendant's operations in order to calculate the said costs. The programme used by the Public Lighting Department allows the second defendant to calculate the cost of its installations. At the time when the

incident occurred, the amount provided by the programme was $3,609.00 VAT exclusive.

58. As the Senior Engineer at that time, Maharaj was familiar with the programme and how it worked. He used the programme in the course of his duties. The programme works by inserting the distance (that is from the Public Lighting department to the location of where the pole is to be placed) and the estimated cost will be generated. The estimated cost includes transport costs and miscellaneous costs, which comprise staff and crew travel costs as well as subsistence costs. The cost for the two poles was $7,218.00 plus 15% VAT which totaled to the sum of $8,300.70.

ISSUE 1 - *whether the incident occurred in the manner in which the claimant alleges*

The submissions of the defendants

59. The defendants submitted that the first defendant's evidence that whilst sitting in the truck and preparing to leave to go to the next pole, he heard a bang, the entire truck began to shake and he then heard a loud noise was more consistent with a collision as opposed to the pole slipping off. According to the defendants, if the pole had slipped off of the truck, it was reasonable to assume that the first defendant being inside the truck at the time of the incident would have felt the truck vibrate as opposed to hearing the bang.

60. The defendants submitted that when the photographs of the incident are examined, it can be seen that the four poles on the truck were basically lined up. That there was no evidence of slippage. The defendants further submitted that from the photographs it can be seen that even after the

collision, the poles stayed in place. According to the defendants, had the poles been slack and if the collision further slackened the poles, all the other poles would have slid down as well.

61. The defendants submitted that there is no direct evidence that at the material time the claimant was travelling at a substantial speed but that based on the bent poles, it can be inferred that the claimant was travelling at a substantial speed. According to the defendants, if the claimant was driving at a reasonable speed, the pole would not have bent in the manner in which it did since it would have taken some significant amount of force for the pole to bend in that manner.

The submissions of the claimant

62. The claimant submitted in his evidence that as he was about to pass the rear of the truck, he heard a crashing sound and he saw a metal pole coming towards the police vehicle and that the pole entered the police vehicle through the left top side of the windscreen is consistent with the photographs of the incident. The claimant further submitted that there seemed to be some five feet allowance at the brow of the truck so that that five feet allowance could have been the portion of the slippage. That there was no evidence that the poles were tied together.

63. The claimant also submitted that there is no evidence that the police vehicle collided with the second pole (the bent pole). That the evidence of the first defendant was based on an assumption since he did not actually see when the incident occurred. The claimant also submitted that consideration ought to be given to the fact that the pole that entered the police vehicle was not bent. The claimant further submitted

that if the police vehicle had made such an impact on the bent pole, there would have been significant damage to the left side of the police vehicle. Moreover, the claimant submitted that there was no direct or inferential evidence that he was speeding.

FINDINGS

64. The court must be careful not to fall into the realm of speculation when weighing the evidence in this case. The submissions of all parties appear to call upon the court to speculate on material matters which would have required some form of expert evidence.

65. Firstly, the only direct viva voce evidence of the manner in which the incident occurred came from the claimant himself. There is no other such evidence.

66. Secondly, the defendants have submitted that the inference can be drawn that it was the claimant who collided with the pole. But with the greatest of respect to Counsel this argument holds no merit and is in fact one calling upon the court to speculate. The defendant argues that the pole would have been dragged by the vehicle when the claimant collided with it. The court does not agree with this assessment. Firstly, it is clear that the pole went some distance into the vehicle through the windscreen and across to the driver's side. This does not appear, in the absence of expert evidence, to be consistent with the vehicle colliding with the pole as opposed to the pole colliding with the vehicle. Secondly there is no evidence whether from experts or otherwise of the weight of the pole and the likelihood of movement across the inner front of the vehicle should the claimant have collided with the pole and dragged it in

the process. To so find would be an exercise in speculation on the part of the court.

67. Thirdly, the defendants have asked the court to find that it was in fact the police vehicle that would have dragged the other pole and bent it but there is no evidence of this having occurred either through witness testimony or through any physical damage to the police vehicle. So that the inference that the police car dragged the second pole faces an equal and opposite inference that the pole was already bent and had been earlier removed and placed on the truck. In the circumstances the court will not draw the inference that the police vehicle crashed into and dragged the second pole in the absence of evidence to that effect.

68. The court accepts the only viva voce evidence in this case as to how the incident occurred and that comes from the claimant. The court finds that the pole slipped into the police vehicle while the claimant was about to turn onto the highway.

69. Further, the court does not find that the claimant was travelling at an excessive speed on that day as submitted by the defendant. The defendant submitted that the claimant must have been travelling at a high rate of speed seeing that the second pole was bent. This really makes no sense in the court's view as the pole which penetrated the vehicle and which was also dragged for some way was unbent. In any event the court having ruled that it is not satisfied that the police vehicle came into contact with the second pole and bent it, the issue of the claimant's speed cannot be reckoned by regard to the bent pole.

ISSUES 2 & 3 – *Duty, breach and causation*

70. A finding of negligence requires proof of (1) a duty of care owed to the claimant by the defendant; (2) breach of that duty and (3) damage to the claimant attributable to the breach of the duty by the defendant.[7] There must be a causal connection between the defendant's conduct and the damage. Further, the kind of damage suffered by the claimant must not be so unforeseeable as to be too remote.[8]

Duty

71. Lord Wright in ***Aaron Jairam v Trincan Oil Ltd.***[9] set out as follows;

> *"The establishment of that duty of care calls for a close examination of the relationship between persons to determine whether an obligation can be imposed for the benefit of the other to take reasonable care in the circumstances. Lord Wright in Grant v Australian Knitting Mills Limited [1936] AC 85 identified the need to define the precise relationship from which the duty can be deduced: "All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is deduced. It is however essential in English Law that the duty should be established the mere fact that man is injured by another's act gives in itself no cause of action if the act is deliberate the party injured will have no claim in law even though the injury is intentional so long as the other party is merely exercising a legal right if the act involves a lack of due care against no case of actionable negligence will arise unless the duty to be careful exists."*

[7] Charlesworth & Percy on Negligence Thirteenth Edition, Chapter 1, paragraph 1-19.
[8] Clerk & Lindsell on Torts Nineteenth Edition. Chapter 8, paragraph 8- 04.
[9] CV2010-04153 at paragraphs 101 &102.

In the well-known line of authority that examined the need to establish a legal framework in defining that relationship from which the duty is to be deduced beginning with Donoghue v Stevenson (supra), Anns v Merton London Borough Council [1978] AC 728, Yuen Kum Yeu v Attorney General of Hong Kong [1988] AC 175 to Caparo Industries Plc v Dickman [1990] 2 AC 605 the general theme has been to establish a framework of balancing foreseeability, proximity and policy considerations."

FINDINGS

72. It is pellucid that the first defendant owed a duty of care to fellow road users. The duty is to take reasonable care to avoid causing damage to persons using the roadway, vehicles or property of any kind on or adjoining the road. The standard of care which road-users must exercise is that of the reasonable road-user. The reasonable driver is not entitled to assume that other road-users will exercise the appropriate degree of care, and if their conduct is within the realm of foreseeability they will be liable for injury.[10]

73. Further, a driver ought not to carry a load in such a manner as to obstruct, endanger or interfere with traffic.[11]

74. The second defendant is liable for the torts of the first defendant so long as they are committed in the course of the first defendant's employment. The nature of the tort is immaterial.[12]

[10] See Common Law Series: The Law of Tort. Chapter 13, paragraphs 13.53.
[11] See Motor Vehicle and Road Traffic Regulations Part VII, Section 38(15).
[12] See Clerk & Lindsell on Torts Twentieth Edition, Chapter 6, para 6-28.

75. The First Defendant was acting in the course of his duty by driving the truck upon which the light poles were stored. Such a function is that of a service to the users of the roadway in that the purpose of removal of the poles was for continued construction of the highway. Highways are very busy roads. The exit from the Grand Bazaar Shopping Mall via Maraj Street would have been at the time the only exit way to the north of the mall and it can be inferred that Maraj Street would have been subject to average traffic exiting the mall at the time. So that it is pellucid in the court's view that the first defendant owed a duty of care to fellow road users of Maraj Street and the highway. The first defendant would have certainly owed a duty to the users of Maraj Street exiting on to the highway as this is the area in which he was required to operate the truck. It would have been foreseeable to him that cars would be exiting from Maraj Street unto the highway in the vicinity of where he was parked and loading steel poles unto the truck. He was therefore duty bound to take reasonable care in the circumstances, to ensure that the poles were properly secured so as to not cause risk or danger to the users of the roadway.

76. It is clear to the court that metal poles of such length ought to have been carried in a lay flat position on a flatbed tray. That is the purpose of a flatbed tray. And there is good reason for this as a matter of common sense. The placing of poles of such length and presumed weight at a gradient is downright dangerous as poles may slip even though they are tied at the head. This much is obvious. Such carriage or stowage on the public road must amount to carrying a load in such a manner as to obstruct, endanger or interfere with traffic. This is compounded by the fact that the tray of the truck was simply too short for the poles and the

poles were extending some seven feet beyond the end of the truck in the proximity of a junction from which cars were expected to exit.

77. The actions of both defendants on that day were therefore the cause of the injury to the claimant and the court so finds.

78. Further, the court finds that the first and second defendants failed to properly secure the metal light poles to the tray of the truck, failed or neglected to undertake reasonable and/or practicable steps to ensure that persons not in the employ of the second defendant was not exposed to risk to their safety or health.

ISSUE 4 – *Contributory negligence*

79. Contributory negligence means some act or omission by the injured person which constituted a fault, in that it was blameworthy failure to take reasonable care for his or her own safety and which has materially contributed to the damage caused.[13]

80. ***Halsbury's Laws of England, Volume 78 (2010), paragraphs 76, 77, 78 & 80,*** provides the following in relation to contributory negligence;

> *"76. In order to establish contributory negligence the defendant has to prove that the claimant's negligence was a cause of the harm which he has suffered in consequence of the defendant's negligence. The question is not who had the last opportunity of avoiding the mischief but whose act caused the harm. The question must be dealt with broadly and upon commonsense*

[13] See Munkman: Employer's Liability at Common Law, Fifteenth Edition, Chapter 6, paragraph 6.10

principles. Where a clear line can be drawn, the subsequent negligence is the only one to be considered; however, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the person secondly negligent might invoke the prior negligence as being part of the cause of the damage so as to make it a case of apportionment. The test is whether in the ordinary plain common sense the claimant contributed to the damage.

77. The existence of contributory negligence does not depend on any duty owed by the claimant to the defendant and all that is necessary to establish a plea of contributory negligence is for the defendant to prove that the claimant did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.

78. The standard of care in contributory negligence is what is reasonable in the circumstances, and this usually corresponds to the standard of care in negligence. The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent person, he might hurt himself …As with negligence, the standard of care is objective in that the claimant is assumed to be of normal intelligence and skill in the circumstances...If the negligence of the defendant puts the

claimant in a position of imminent personal danger then conduct by the claimant which in fact operates to cause harm to him, but which is nevertheless reasonable in the agony of the moment, does not amount to contributory negligence.

80. Knowledge by the claimant of an existing danger or of the defendant's negligence may be an important element in determining whether or not he has been guilty of contributory negligence. The question is not whether the claimant realised the danger but whether the facts which he knew would have caused a reasonable person in his position to realise the danger. It is a question of fact in each case whether the knowledge of the claimant in the particular circumstances made it so unreasonable for him to do what he did as to constitute contributory negligence… On the one hand, the claimant must act reasonably with regard to the dangers which he knows, or ought to know, exist, and to any regulations or other precautions imposed for the purpose of avoiding them. On the other hand, he is entitled to rely on reasonable care and proper precautions being taken…"

81. The defendants submitted that if the court finds in favour of the claimant, the claimant should be held 10% liable for the incident mainly because he saw the truck, the poles and was aware that the construction was going on so he should have been paying attention.

82. The claimant submitted that if the court is persuaded to make a finding of contributory negligence, the percentage should be bare minimum such as 5%.

FINDINGS

83. Having regard to the manner in which the injury occurred, there was nothing that the claimant may have done that would have prevented his injury. To that end he in no way contributed to his injury and the court so finds. Although he saw the trucks, the poles and the work going on, it is the finding of the court that he was in fact paying attention and would have had to stop near to the truck to turn onto the highway when the incident occurred through no fault of his.

ISSUE 5 – *Damages*

Special Damages

84. Special damages must be specifically pleaded and proved.[14] The burden is, therefore, on the claimant to prove his losses. The claimant claimed special damages in the sum of $108,700.00. This sum is comprised of the following;

i. Medical Expenses:

a) Dr. Vidhya Gyan:-Tota Maharaj

$ 700.00

[14] 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.

b) Dr. Dean S R Baiju

$1,800.00

c) MRI

$3,800.00

d) CT Scan

$1,500.00

e) General Charges – Re: MRI

$1,900.00

ii. Loss of Earning from Same-Time Protection Company Limited (4,500 per fortnight by eleven months)

$99,000.00

85. The claimant annexed to his witness statement at "A.J.6" receipts to prove his medical expenses totaling to the sum of $9,700.00.

The submissions of the defendants

86. The defendants submitted that the receipts annexed to the Statement of Case should be disregarded as no Hearsay notice was issued in respect of them, nor were those sums itemized in the claimant's witness Statement. According to the defendants, the pleading of the items of special damage in the Statement of Case was not sufficient as it is trite law that they must not only be specifically pleaded but must also be proven.

87. According to the defendants, in the case of ***Kelly Boyer-Hurdle v Merlin Harroo, Letus Mannette (wrongly sued as Keltiis Mannette) and Motor and General Insurance Company Limited***[15], Master Mohammed (as she then was) found that she was unable to make an award for medical

[15] CV2010-02607

expenses as the claimant had annexed the receipts but had not served any Hearsay Notice. At paragraph 22 the following was stated;

"…the claimant has failed to place before me any evidence which addresses the truth of the sums claimed for her medical expenses. The documents referred to in Tab 3 of her list of documents were admitted into evidence for the fact that they were received by the claimant. However, in the absence of the maker of the documents giving evidence on the truth of their contents or the appropriate hearsay notices being filed to explain the failure of the maker of the documents being able to give evidence I am likewise constrained to make no award for this loss. My difficulty in accepting the truth of the information in these documents is there is no primary evidence of the incurring of the expense and the claimant merely sought to tender a bundle of receipts…"

88. The defendants submitted that in the instant case none of the claimant's receipts were agreed to by the defendants and the claimant is not the maker of those documents so though the receipts have been admitted into evidence, no weight should be attached to them by the court. The defendants further submitted that all of the receipts are in the name of the claimant's Attorneys-at-law. The claimant in his witness statement testified that the costs of those procedures were offset through the offices of his attorneys. According to the defendants, there was no statement by the claimant that he is under an obligation to repay these sums to the Attorneys-at-law. As such, the defendants submitted that no sum should be awarded for the medical expenses.

89. The defendants submitted that there was no documentation and/or witness statement from a member of the company verifying that the

claimant was in receipt of a fortnightly salary in the sum of $4,500.00 from the company. The defendants further submitted that the claimant contradicted himself by saying in his witness statement that his monthly earnings from both jobs had been significantly reduced, since he admitted in cross-examination that his monthly salary from the Police Service had increased since the incident. Consequently, the defendants submitted that the evidence is too unreliable for the court to make an award for any loss of earnings, as the claimant has failed to prove that he in fact suffered any such loss.

The submissions of the claimant

90. The claimant submitted that the mere fact that he pleaded and particularized his medical expenses is a tacit acceptance that he incurred those expenses through his attorney's office. The claimant relied on the case of ***Donnelly v Joyce***[16] wherein the Court of Appeal had the following to say at pages 462 & 463;

"…merely because someone else has provided to, or for the benefit of, the plaintiff - the injured person - the money, or the services to be valued as money, to provide for needs of the plaintiff directly caused by the defendant's wrongdoing. The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant…"

[16] (1974) QB 454

91. As such, the claimant submitted that the court should find no difficulty in awarding the amounts tallied in the receipts provided.

92. The claimant submitted that he was never challenged on the fact that he was employed at the company. That the main challenge was whether he returned to the company after the incident. According to the claimant, he admitted that he did not return to the company and has pleaded that this was due to the need for long standing and the regular blackouts which he was experiencing. When asked about tax returns and documents in support of this, the claimant gave evidence that his arrangement with the company's General Manager was an informal one and that he was paid cash. He further gave evidence that he did not file any taxes for those additional earnings. The claimant submitted that the issue of his non-compliance with the Tax Laws of Trinidad and Tobago should not be considered as a credibility issue and the question is therefore whether the question asked by Counsel for the defendants should be allowed or considered having regards to issues of reprehensible behavior which could only be allowed with leave of the court through an application by Counsel for the defendants. The claimant further submitted that the real questions to be answered are as follows;

i. Whether on a balance of probability, the claimant was employed with the company;
ii. If so, was the salary $4,500.00/fortnight; and
iii. Whether in Trinidad and Tobago society today there is informal arrangements such as this, especially in the context of second employment.

93. The claimant relied on the case of the ***Great Northern Insurance Company Limited v Johnson Ansola***[17] wherein Mendonca JA at paragraph 97 stated as follows;

"…it seems clear that the absence of evidence to support a plaintiff's viva voce evidence of special damage is not necessarily conclusive against him. While the absence of supporting evidence is a factor to be considered by the trial Judge, he can support the plaintiff's claim on the basis of viva voce evidence only. This is particularly so where the evidence is unchallenged and which, but for supporting evidence, the Judge was prepared to accept. Indeed, in such cases, the Court should be slow to reject the unchallenged evidence simply and only on the basis of the absence of supporting evidence. There should be some other cogent reason."

The defendants' submissions in response

94. The defendants submitted that while ***Donnelly v Joyce*** supra is an authority for the proposition that sums can be awarded for gratuitous payments without any legal obligation to repay, the claimant has merely said *"further costs which I offset through the offices of my Attorney".* According to the defendants, the claimant has not said that he intends to repay those sums to his Attorney-at-law.

95. The defendants submitted that although a court can award special damages based on viva voce evidence, the court must look at all the circumstances to determine whether it ought to so do. The defendants

[17] Civil Appeal No: 169 of 2008

relied on the authority of ***Hector v Bhagoutie & Anor***[18], wherein Kokaram J refused to award a sum for a claim in respect of an excess under a policy of insurance where only viva voce evidence was adduced and stated that *"The Plaintiff's simple assertion is not sufficient to prove his claim to excess in the sum of $6,000.00 whenever creditable evidence could have been obtained."*[19]

96. The defendants submitted that the claimant could have easily obtained a letter from the company as he did in respect of his job as a SRP to confirm his alleged loss of earnings from the company. As such, the defendants submitted that this court should find his evidence unreliable and refrain from making any award for loss of earnings.

FINDINGS

97. Medical expenses were pleaded and particularized. Receipts were also provided in the sum of $9,700.00. The defendants objected to those receipts during the trial of this matter and the court exercised its discretion to allow the receipts into evidence although a hearsay notice was not filed because the medical expenses were set out in the Statement of Case and copies of the receipts were annexed to the Statement of Case. The court therefore finds that the claimant has sufficiently proven his loss of medical expenses of $9,700.00.

98. However, in relation to the claimant's claim for loss of income, the court finds that the claimant has failed to sufficiently prove same. In the court's view, where proof of losses is available, it should be provided to obtain

[18] No. 1115 of 2000
[19] See page 4, para 2.5

compensation. The court finds that it was incumbent upon the claimant to obtain some sort of documentary proof from the company to prove that he earned a salary of $4,500.00 per forth night fortnight.

General Damages

99. The relevant principles for assessing general damages, in a personal injuries claim were set by Wooding CJ in ***Cornilliac v. St. Louis.***[20] 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.

The nature and extent of injuries

100. The claimant was born on September 18, 1979. At the time of the incident he was thirty-three years of age. He is currently thirty-nine years of age. Immediately after the incident, the claimant was taken to the Eric Williams Medical Sciences Complex, where he was examined by Dr. R. Ramoutar, House Officer, Adult and Emergency Department. Dr. R. Ramoutar's medical report stated as follows;[21]

i. The claimant complained of pain and bleeding to the left side of his face;

ii. A physical examination revealed a twelve centimeter laceration over left maxillary region, extending to the tragus of left ear with

[20] (1966) 7 WIR 491

[21] Dr. R. Ramoutar's medical report was agreed to and was annexed to the claimant's witness statement at "A.J.3".

exposed muscles and a small superficial laceration to left fourth finger.

iii. The claimant was diagnosed with laceration to the left side of face and was given analgesia and antibiotics and referred to the plastic surgeon.

101. According to the evidence of the claimant, he was referred to several medical practitioners. On August 14, 2013 Dr. Earl Ramdoo ("Dr. Ramdoo") indicated that as a result of the severe laceration to his left cheek and ear, the claimant had been experiencing syncopial attacks, severe headaches, pain in the C-spine and thoracolumbar spine. Dr. Ramdoo ordered a CT scan of the brain and a MRI of the Lumber spine. On June 1, 2015 Dr. Ramdoo indicated that the claimant was still experiencing severe headaches and lower back pains and recommended a CT scan of the brain and a MRI of the lumbosacral. On August, 2015 Dr. Ramdoo stated that he has managed the claimant from February 24, 2013 to June 20, 2015 and that the claimant is still experiencing severe headaches.[22]

102. On August 19, 2015 the claimant was examined by Dr. Mark Pounder ("Dr. Pounder"), Police Medical Officer, Police Hospital. Dr. Pounder's report provided as follows;[23]

i. The claimant was involved in a motor vehicle accident and sustained injuries to his head, neck and back;

ii. He also sustained a severe laceration to face;

iii. The claimant's recovery was slow and painful with symptoms of post-concussion syndrome.

[22] Copies of these documents were annexed to the claimant's witness statement at "A.J.4".

[23] Dr. Pounder's medical report was not agreed to and was annexed to the claimant's witness statement at "A.J.4".

103. The claimant also exhibited a medical report from an Orthopaedic doctor, Dr. Dean S. R. Baiju ("Dr. Baiju") dated November 3, 2016. This medical report provided as follows;[24]

i. At the time of the incident, the claimant's injuries were;
   a) A few minutes of loss of consciousness;
   b) Left facial laceration – treated with suturing;
   c) Head injury – treated with observation;
   d) Left ring finger laceration;
   e) Pain in left arm and hand.

ii. The claimant presently suffers from;
   a) Frequent headaches and migraines – treated with regular Excedrin;
   b) Pain in the centre and his lower back. No neurology. Bladder and bowels – normal
   c) Frequent blackouts and Blurry vision.

iii. Past medical history – hypertension

iv. On Examination –
   a) Spine – No deformity. Claimant tender along his upper thoracic and lumbar spine. Back movements were normal. No objective neurology.
   b) Left face – Healed ten cm laceration extending from the maxillary region to the left ear. C-shaped scar anterior to the left ear. No facial neurology / loss of movement.
   c) Left 4th finger – Healed superficial laceration. All movements and sensation – normal.

[24] Dr. Baiju's medical report was annexed to the claimant's witness statement at "A.J.6"

d) MRI scan of Thoracic and Lumbar Spine: L3-L5 dessication. L3/L4 disc bulge with contact of the L4 nerve root, L4/L5 disc bulge with impingement of the L5 nerve root.

e) Normal Thoracic spine.

f) CT Scan of his brain – normal.

104. Dr. Baiju's report also stated that the claimant regularly takes analgesia for his headaches and has had physiotherapy but his improvement has plateaued. Under treatment and recommendations, Dr. Baiju stated as follows;

i. The claimant's finger has recovered with no deficiency;

ii. His facial laceration has healed with no neurology or weakness. The anterior ear scar can be revised by a plastic surgeon if desired.

iii. He still has headaches, blackouts and blurry vision from his head injury. He may benefit from a referral to a neurologist to see whether his symptoms can be controlled.

iv. With respect to his back pain, he has obvious muscular back pain with subjective neurology. He needs analgesia, antispasmodics and core stabilization physiotherapy. He can benefit from a caudal epidural to aid in settling his symptoms. No further active Orthopedic input necessary at this point.

v. Temporary partial disability – 0% at present.

The nature and gravity of the resulting physical disability

105. Since the incident, the claimant testified that he is in considerable pain and also suffers from severe back pain, migraines and blurry vision. He is unable to sit or stand for long hours at a time as he would feel as though

he is going to black out. Those constant pains keep him up at nights and he is on a steady diet of pain killers.

106. Prior to the incident, the claimant used to lime and play cards with his friends for hours during his down time and attend the movies regularly but he can no longer participate in such activities. He is also unable to do any recreational outdoor activities with his children. When he attempts any such activities, the sharp pains and blurry vision would creep up on him. Further, he is unable to participate in any physical activities and as he cannot exercise as he would like to or at all, he has gained weight.

107. Subsequent to the incident and for about two years after, he stopped picking up his children from school as he was incapacitated due to the injuries from the incident and the fear of driving brought on from the incident. It was his testimony that he is afraid to drive on the road as he would panic whenever he sees trucks approaching him, especially if the trucks are heavily laden with anything such as logs, poles and any other items that could fall off. He would sometimes come to a complete stop in the middle of the road out of fear and/or pure confusion. This sometimes led him to be ridiculed by other motorists which is sometimes embarrassing to him and his family. During cross-examination, the claimant testified that he has not sought any treatment in respect of his fear of driving.

108. At the time of the incident, the claimant was pursuing a MBA from the AIB at the School of Higher Education. Due to the incident, he was unable to attend the remainder of his classes and had to withdraw from the programme and all the fees paid were non-refundable.

109. The claimant testified that his monthly earnings from both of his jobs have been significantly reduced. He further testified that as his skill-set is that of a security background, it is difficult or almost impossible for him to find any job in that field that does not require long standing.

The loss of amenities suffered

110. According to the claimant, since the incident he has been unable to do any recreational outdoor activities with his children. He testified that he can no longer participate in social activities such as attending the movies or playing cards. He is also unable to participate in any physical activities. Further, he is afraid to drive on the road.

The extent to which, consequentially, pecuniary prospects have been materially affected

111. On his return to work as an SRP, the claimant was given light desk duties. He testified that his monthly earnings from both of his jobs have been significantly reduced. He was unable to return to the company because he is still unable to stand for long periods at a time. According to the claimant, as his skill-set is that of a security background, it is difficult or almost impossible for him to find any job in that field that does not require long standing.

The submissions of the defendants

112. The defendants submitted that the documents exhibited as "A.J.4" and "A.J.6", whilst they have been admitted into evidence on the basis that they had been disclosed, the court ought not to attach any weight to the truth of the information contained in those documents as the defendants

have been deprived of the opportunity of testing the credibility of the makers of those documents.

113. In so submitting, the defendants relied on the case of ***Kelly Boyer-Hurdle*** supra wherein Master M. Mohammed (as she then was) found that although documents had been disclosed *"…the effect of the third defendant's plea was to put the claimant's injuries and expenses which she has suffered as a result of the accident in dispute and the onus was therefore on the claimant at the Assessment of Damages to adduce evidence to prove that she has indeed suffered the injuries pleaded, the effects of her injuries and the expenses incurred."*[25]

114. Further, Master Mohammed (as she then was), on the issue of allowing the use of a medical report of Dr. Blackburn where no hearsay notice had been filed, ruled as follows at paragraph 8;

"….The claimant has no medical expertise and cannot give evidence on the opinions of Dr Blackburn. In my view only Dr Blackburn can give expert medical evidence on the medical condition of the claimant. The claimant cannot do so. Dr Blackburn was not called to give evidence on behalf of the claimant neither was any hearsay notice filed by the claimant seeking to have the report admitted into evidence under the hearsay rule. In this regard, the medical report of Dr Blackburn dated June 30, 2006, having been disclosed can be admitted for the fact that it was made. However, since the maker of the document did not give evidence and no hearsay notice was filed this court cannot attach any weight to truth of the information contained therein."

[25] See paragraph 6

115. According to the defendants, in their Defence and Counterclaim they specifically pleaded that they did not admit the medical reports of Dr. Pounder and Dr. Ramdoo and put the claimant to strict proof that the injuries and effects set out in those reports were attributable to the incident. In respect of Dr. Baiju, the defendants admitted so much of his report which was based on clinical evidence namely that there was no deformity of the spine with no objective neurology, no facial neurology or loss of movements, all movements and sensation in the fourth finger normal, CT scan Brain normal, no deficiency of finger and a temporary partial disability of zero percent.

116. The defendants submitted that in addition they specifically pleaded that they wished to cross-examine Dr. Baiju and denied that the findings in relation to the lumbar spine were as a result of the incident. Consequently, the defendants submitted that as they have demanded that the claimant strictly prove his claim and applying the dicta of Master Mohammed (as she then was), the onus was therefore on the claimant to adduce evidence to prove that he had indeed suffered the injuries pleaded, the effects of his injuries and the expenses incurred.

117. The defendants submitted that the only reliable evidence before the court of the injuries of the claimant is the agreed particulars of injuries of a twelve centimeter laceration over the left maxillary region extending to the tragus of the left ear with exposed muscles and a left fourth finger laceration verified in the agreed report of Dr. Ramoutar from Eric Williams Medical Sciences Complex ("EWMSC"). According to the defendants, it is significant that the claimant's blood pressure and pulse were normal. The defendants submitted that if the claimant was in severe pain when he was at EWMSC his blood pressure and pulse would

not be normal, as it is expected that the body would react to such alleged severe pain. The defendants asked the court to have regard to the fact that at EWMSC the claimant was given only an analgesic and antibiotics. That he was not given any pain killers so he certainly was not in severe pain nor was the injury a severe one.

118. The defendants submitted that despite the alleged steady diet of painkillers and reference to prescriptions, no receipts have been produced nor special damages claimed for any medication since the incident. The defendants asked the court to take note that the claimant sat in court for most of the day whilst the court dealt with evidential objections and then heard the evidence and did not show any signs of discomfort, did not black out nor complain of any migraine or severe back pain.

119. The defendants submitted that in the event the court is minded to have regard to the exhibits of "A.J.4" and "A.J.6**"** it is to be noted that the reports from Dr. Ramdoo are on letterheads of Dr. Gyan-Tota Maharaj and without the benefit of cross-examination the court is unaware whether Dr. Ramdoo is a qualified medical doctor, whether he has any specialty, how many years he is in practice or whether he is authorized to use Dr. Gyan-Tota Maharaj's letterheads. The defendants further submitted that though receipts have been produced which show payments were made for the CT scan and MRI, those reports have not been exhibited. As such, the defendants submitted that in all those circumstances the court should place no reliance or at best, very little reliance on those medical reports and sick leave certificates.

120. According to the defendants, the medical report of Dr. Pounder addressed to the National Insurance Board stated that the claimant's recovery was *"slow and painful with symptoms of post-concussion syndrome"*. The defendants submitted that the Court of Appeal has cautioned against accepting the assessments of experts without the "scientific criteria" of same being provided to the court.[26] The defendants further submitted that there was neither factual details nor scientific criteria for the diagnosis of symptoms of post-concussion syndrome. That the doctor has not condescended to even particularize what those symptoms were, nor is he a neurologist. Moreover, the defendants submitted that such a finding was inconsistent with the agreed medical report that was prepared shortly after the incident. Consequently, the defendants submitted that the court should be slow to accept or attach any weight to the report of Dr. Pounder as it clearly was not meant for the purposes of an assessment of damages but merely to meet the statutory requirement to allow the claimant to access his National Insurance benefits.

121. The defendants submitted that in the event the court is minded to consider Dr. Baiju's medical report as instructive, Dr. Baiju put the claimant temporary partial disability ("t.p.d") at zero percent. According to the defendants, it is important to note 1) there was no objective neurology with the claimant's spine, 2) no facial neurology nor loss of movements, 3) his finger has recovered with no deficiency, as has his laceration with no neurology or weakness and 4) his CT brain was normal. The defendants submitted that the injuries of headaches, blackouts, blurry vision were really a recital of the claimant's complaints and not as a result of the application of any objective testing or medical expert

[26] Kangaloo J.A. in *Moonsammy v Ramdhanie*; *C.A. Civ. 62 of 2003*

opinion, as Dr. Baiju is a Surgeon in Trauma and Orthopaedics, and such a finding is within the province of a Neurologist, as admitted in the report.

122. Moreover, the defendants submitted that as Dr. Baiju was not presented for cross-examination, it would be unsafe for the court to fill the gaps in the claimant's evidence to find that the alleged headaches, blackouts and blurry vision are as a result of this incident or that they actually are present, especially in light of a normal CT brain scan, as (in keeping with the dicta in ***Moonsammy*** *supra*) there was simply no scientific criteria for such a finding. The defendants further submitted that there are no medical reports between the years 2014 to 2016 and then there was the report of Dr. Baiju which was paid for by the claimant's Attorneys-at-law, and which was clearly for the purposes of litigation, as opposed for the purposes of treatment for a patient claiming to be suffering. As such, the defendants submitted that the court is invited to infer that this, together with the failure to produce any receipts for medication throughout the period and his zero percent t.p.d. that the claimant has in fact fully recovered from the effects of the incident and that such a finding will be consistent with the agreed medical report of Dr. Ramoutar.

123. The defendants submitted that an award of $15,000.00 for general damages is reasonable on the basis that the claimant suffered a facial laceration and a fourth finger laceration (which have healed), as those injuries are best described as minor. The defendant relied on the case of ***Reid v The Attorney General of Trinidad and Tobago & Ors.***[27] wherein the claimant following an assault, suffered from a broken finger; two cuts at the back of his head; cuts and bruises over his body; broken left middle index finger; head trauma and post-concussion syndrome. His body

[27] CV2006-02496

became swollen and he continued to bleed for two days, during which he did not have access to painkillers, before being transferred to the hospital where he stayed for five days. He also suffered from blackouts, headaches and head pain at the time of the trial. There was no evidence of his loss of amenities and pecuniary prospects and he was awarded $65,000.00 (which included an element of aggravation of $45,000.00) in June 2007. The $20,000.00 award updated gives a figure of $34,547.05 as at April 2015. The defendants submitted that the injuries in the present case are less severe.

124. The defendants submitted that in the event the court is minded to take into consideration the sick leave certificates as well as the medical reports of Dr. Ramdoo, Dr. Pounder and Dr. Baiju the claimant would have suffered in addition to the facial laceration and fourth finger laceration, being on sick leave for 324 days' (approximately 10½ months), continuing back pain, headaches, blurry vision and backaches. According to the defendants, if the court accepts that the injuries were more severe, an award of $50,000.00 for general damages is reasonable.

125. The defendants reiterated that there is no medical indicating that the back pain is as a result of the incident and not as a result of pre-existing lumbar conditions as revealed by the MRI. The defendants further submitted that the CT of the brain was normal as were his back movements and Dr. Baiju has put his t.p.d. at zero percent. That the findings were not even severe enough to ascribe a permanent partial disability rating, they were so minor that the Doctor could only ascribe a temporary partial disability rating of zero percent which suggests that the claimant is operating at 100%, and has suffered no residual disability.

126. Moreover, the defendant submitted that the claimant has also been deemed fit to return to work, has returned to work and continues to work and has even received an increase in wages as well as a promotion in his second job (moving from a security officer when the Claim Form and Statement of Case were filed, to an Operations Manager thirteen months later when the witness statement was filed), which does not support the allegation of severe headaches, blurred vision and weekly blackouts. Further, the defendants submitted that although the claimant claimed that he was unable to complete his MBA, there was no evidence to support this and certainly no medical evidence to suggest that this was as a result of injuries he received from the accident.

127. The defendants relied on the cases of ***Darren Roome & Mathew Tambie v Motor One & Another***[28] and ***Moreno v Brusco & Ors.***[29]

128. In the ***Mathew Tambie*** supra, Tambie was thrown from his bicycle, into a drain face down and was dragged as the defendant's vehicle continued, resulting in mild head injuries and multiple soft tissue injuries. He claimed to have suffered loss of memory, headaches and weakness in his left arm. Medical reports described him as being irritable and abusive towards his mother since the accident and diagnosed him with post-traumatic headache and psychological issues, for which he was prescribed analgesia and to seek psychological counselling. His injuries left scars on his body and face. A psychiatrist found him to have been suffering from Post-Traumatic Disorder and cerebral irritability secondary to the head injury. He claimed to suffer continuous pain since the accident including mild and constant pains in his neck and headaches, inability to continue working and to have lost interest in socialising and

[28] *Claims Nos. CV 2015-02990 and CV 2015-02989*
[29] *HCA 3130/2004*

cycling due to the accident. In that case decided in May 2018 the court noted that the claimant had not produced any recent receipts for medication for his headaches nor attempted to seek psychological counselling after 2012 and awarded general damages in the sum of $52,694.00.

129. In the ***Moreno*** supra**,** the plaintiff suffered from post-concussion syndrome, thoracic spine strain, a 2cm laceration to his right cheek and multiple abrasions to the left cheek. He experienced pain over his T3 spine and headaches, dizziness, intolerance to bright lights and loud noises as well as a lack of concentration and was diagnosed with post-concussion syndrome. He was assessed as having a 25% permanent partial disability. The Court did find that the plaintiff had exaggerated his claim and did not accept that he had severe lancing pain which required him to take painkillers every day. The Court took into consideration that no receipts were produced for medication for over seven years between the date of the accident and the trial in deciding not to believe the plaintiff's claim of continuing severe pain. He was awarded $35,000.00 in October 2009 which when updated to April 2015 is $50,657.32.

The submissions of the claimant

130. The claimant submitted that notwithstanding the objections raised by the defendants, the court exercised its discretion and allowed the medical reports as they were properly pleaded and disclosed to the defendants. According to the claimant, the defendants argued that they did not get an opportunity to challenge the maker of those reports, so the court should add little weight to those reports but in the same breath agreed

with some of the findings in those reports and wish to rely on the findings of Dr. Baiju's report of 2016.

131. The claimant submitted that the court has sole discretion to allow the reports, which are sufficiently explicit and are consistent with the injuries received by him. That the court is equipped with the requisite competence to make a determination as to the causal connections between the injuries received by him, the pleaded pain and suffering and symptoms that followed and the medical reports provided.

132. The claimant relied ***on Munkman on Damages for Personal Injuries and Deaths, Butterworths, Seventh Edition,*** wherein the learned author, John Munkman at page 967 paragraph 54.4 stated as follows;

"Typically, expert evidence will satisfy the first requirement if it addresses a matter of art or science beyond the experience of the tribunal of fact…..The rule is that if the matter is outside the ordinary experience of the tribunal of fact, expert evidence is admissible, and the converse is also true, that the tribunal of fact cannot reach a decision on matters without the assistance of an expert because the court needs to act on evidence.

133. The claimant further relied on the case of ***Karen Tesheira v Gulf View Medical Centre Ltd and Crisen Jendra Roopchand,***[30] wherein Kokaram J at paragraph 19 stated as follows;

"As a starting point in analysing this claim, I think it is useful to set out a brief overview of some of the medical terminology and medical facts in this case. Indeed, in the management of this case I granted permission to

[30] CV2009-02051

the parties to adduce expert evidence as it was obvious that there were basic medical terminology, procedures and human physiology which were matters of science beyond the experience of this Court. I am however mindful of the foundational rule on expert evidence: "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven fact a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it's given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves but there is a danger that they may think it does." per Lord Mansfield Folkes v Chadd [1783]3."

134. Accordingly, the claimant submitted that this case can be determined without the need for the expert evidence of Dr. Baiju, Dr. Ramoutar and Dr. Mark Pounder's expertise and opinion.

135. According to the claimant, the only reasonable conclusions to be drawn from the report of Dr. Baiju who has had the benefit of perusing all the reports and treatment given to the claimant prior to his prognosis and findings is that the resulting pain and suffering was as a direct result of the incident endured throughout. The claimant submitted that the findings and reports of Dr. Ramoutar, Dr. Mark Pounder and Dr. Gyan Tota-Maharaj were consistent with each other. The claimant further submitted that it should be noted that the initial report of Dr. Ramoutar was profound and had little or no chance of concoction and should be considered under the principles of *res gestae* evidence.

136. The claimant submitted that the court heard evidence from him that he did not return to the company after the incident, when he was fit enough to resume light desk duties as a SRP. According to the claimant, he was unable to resume duties with the company as a result of his constant headaches and blackouts and mainly because of the requirement for long standing. According to the claimant, the position as Operations Manager was never a promotion from that of a Security Officer. The claimant submitted that there was no evidence from which any reasonable inference can be drawn to conclude that he was promoted to Operations Manager from a security officer.

137. The claimant submitted that a figure between $175,000.00 to $200,000.00 is a reasonable award for general damages. In so submitting, the claimant relied on the following cases;

i. ***Kim Karan & Ors v Boodoo & Ors***[31] – wherein the plaintiff sustained a facture to the right zygomatic molar and injury to the right ankle which was placed in a cast for six weeks. There was also bruising to the left big toe, chest, left knee, and fracture to the right wrist. The plaintiff was unconscious for ten to fifteen minutes and was diagnosed with Post-concussion syndrome. On January 28, 1998 Stollmeyer J (as he then was) awarded the sum of $45,000.00 which as adjusted to December 2010 is $100,514.00.

ii. ***Scobie v Nelson***[32]– the plaintiff sustained injuries to the head and left ankle, and was unconscious for a day, and his left ankle was placed in a cast for three weeks. He complained of headaches

[31] HCA 1493 of 1996
[32] HCA 1442 of 1994

and pain in his ankle due to stiffness, he was unable to tolerate noise after returning to work and was diagnosed five years after the accident with post-traumatic amnesia and post-concussion syndrome. Master Paray-Durity awarded $42,000.00 for non-pecuniary loss, which as adjusted in December 2010 is $101,472.00

iii. ***Mohammed v Bellamy & Ors***[33] – Rampersad J awarded a plaintiff $150,000.00 for facial scarring; a seriously damaged eyelid requiring skin graft; three chipped incisors; two fractured ribs; ruptured spleen; debilitating knee pain; self-consciousness about appearance making socializing difficult. The sum of $150,000.00 was adjusted in December 2010 to $171,293.00. Notwithstanding the chipped incisors, fractured ribs and ruptured spleen suffered by the plaintiff, the considerations in the adjustment in the award were really for the facial scarring, knee pain and his self-consciousness which affected his social life.

iv. ***Roger Gangadeen v Helen Reyes, Mark Durham and Capital Insurance Limited***[34] - Master Alexander awarded the claimant general damages in the sum of $220,000.00 with interest at the rate of 9% per annum from March 13 2009 to March 29, 2012 for a cut under the eye, a broken jaw and lacerations to the right face complained of numbness to the face consequent on the accident. On examination of the claimant on December 10, 2007 and on review of radiographs, the doctor diagnosed him with a flattened right zygoma; reduced muscle tone causing a lazy eyelid and upper lip; laceration to the face and permanently damaged maxillary branch of the facial nerve.

[33] H.C.11/2002
[34] CV.2009-00906

v. ***Bullock v AG & Ors***[35]- Master Paray-Durity awarded $130,000.00, inclusive of aggravated damages, to the claimant (a prisoner) who was assaulted by four prison officers and suffered facial and other injuries requiring his jaw to be wired and causing loss of six teeth after delayed medical attention. The sum of $130,000.00 as adjusted to December 2010 is $150,263.00.

vi. ***Evans Moreau v Port Authority of Trinidad and Tobago,*** Best J[36] - following a lash to the head a forty-three year old claimant suffered pains in the neck, radicular symptoms in both arms, cord and nerve compression of C4/5 and C5/6, cervical spondylosis, back pains, weakness in both arms, inability to stand and sit for short periods, and difficulty in climbing stairs. For those injuries, general damages in the sum of $200,000.00 was awarded. The sum of $200,000.00 adjusted to December 2010 is $212,487.00.

vii. ***Wayne Wills v Unilever Caribbean Limited***[37]- a claimant suffered an acute lumbar strain, and a L4/L5 disc herniation that necessitated surgery two and a half months after injury. Immediately following the injury, the claimant suffered pain in the neck and along the left side of his body, which intensified over the next few days. After surgery, the claimant progressed well but had some episodes of pain including one severe spasm. His prognosis was continued intermittent pain. The claimant experienced an inability to play football and hockey, to have regular sexual intercourse or sweep and was in pain up to the date of hearing. He was initially awarded $75,000.00; which was upgraded by the Court of Appeal to $200,000.00.

[35] H.C.1766/2007
[36] CV2006-03958
[37] Civil Appeal No. 56 of 2009

The defendants' submission in reply

138. According to the defendants, the claimant's submission that there was no evidence to the effect that Operations Manager was a promotion from that of a Security Officer is incorrect. The defendants submitted that during cross-examination the claimant admitted that an Operations Manager would be ranked higher than a Security Officer. The defendants further submitted that whilst they never disputed that the claimant worked at the company they put him to strict proof of his loss.

139. The defendants submitted that as the claimant is alleging continuing and new effects from the incident some three years after the incident occurred, it was clear that expert evidence would be needed by a court to determine whether the alleged effects and/or complaints complained of by the claimant so long after the incident were in fact caused by the incident. That the court should not have to infer same.

140. According to the defendants, there was no proof that the claimant suffered any loss of pecuniary prospects.

141. The defendants submitted that in all the cases referred to by the claimant in support of an award between $175,000.00 to $200,000.00, the injuries were more severe than in the present case. As such, the defendant submitted that an award of between $175,000.00 to $200,000.00 in the present circumstances would be excessive. Accordingly, the defendants maintained that a reasonable sum would be $50,000.00.

Findings

142. The defendants have made heavy weather over the fact that they have been deprived of the opportunity of testing the credibility of the makers of the medical reports. At trial, notwithstanding the objections raised by the defendants, the court exercised its discretion and allowed the medical reports as same were properly pleaded and disclosed to the defendants. The court finds that the medical reports of Dr. Ramoutar, Dr. Mark Pounder and Dr. Gyan Tota-Maharaj were clear and that the findings were consistent with each other. The court further finds that injuries listed within those reports were consistent with the injuries received by the claimant and not grossly overstated.

143. Although the injuries sustained by the claimant (as set out above) were not as serious as those in the cases highlighted by the claimant, in the view of the court it is clear on the evidence that the claimant did suffer long term pains and discomfort which seriously affected his lifestyle. The court therefore finds that $100,000.00 is a fair and reasonable sum under this head.

INTEREST

144. The Court of Appeal in the case of the **Attorney General v Fitzroy Brown and others**[38] set out that the pre-judgment interest rate on general damages should be aligned with the short term rate or the rate of return on short term investments of which there is some evidence before the court. Further, the Court of Appeal in that case reduced the rate of pre-judgment interest rate on general damages from 9% to 2.5%. There being no evidence of the rate of return on short term investments before the court, the court will award 2.5% interest on general damages.

[38] CA 251/2012

DISPOSITION

145. 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 counterclaim of the second defendant is dismissed.

c) The first and second defendants shall pay to the claimant, general damages for negligence in the sum of $100,000.00 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.

d) The first and second defendants shall pay to the claimant, special damages in the sum of $9,700.00.

e) The first and second defendants shall pay to the Claimant the prescribed costs of the claim.

f) The second defendant shall pay to the claimant the prescribed costs of the counterclaim.

g) The claim against the Co-Defendant is dismissed.

h) The Claimant shall pay to the Co-Defendant 55% of the prescribed costs of the claim.

Ricky Rahim

Judge