REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-01897

BETWEEN

IRVING WILLIAMS

Claimant

AND

MIC INSTITUTE OF TECHNOLOGY

(formerly METAL INDUSTRIES COMPANY LIMITED)

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: December 5, 2019

Appearances:

Claimant: Mr. L. Murphy and Mr. J. Sookoo instructed by Mr. S. Patience.

Defendant: Mrs. F. Wilson.

JUDGMENT

1. This claim is for damages for personal injury suffered by the claimant during the course of his employment.

THE CLAIM

2. The claimant was employed by the defendant as a training instructor working at the defendant's premises situate at Century Drive, Trincity Business Park, Macoya ("defendant's premises").

3. On May 23, 2013, whilst acting in the course of his employment, the claimant sat on a chair in the staff lunchroom in the defendant's premises, at which point the chair fell backwards, causing him to fall.

4. The claimant's case in negligence, is that the defendant as his employer, owed him the ordinary employer's duty of care at common law to provide and maintain a safe system of work together with adequate equipment and breached that duty by failing to supply a suitable chair in the workplace causing him to sustain damage. The pleaded particulars against the defendant are that it;

   i. Failed to provide a suitable seat for the claimant in his workplace;
   ii. Failed to ensure that the work equipment, namely the chair, was suitable for the purpose for which it was used or provided;
   iii. Failed to ensure the above work equipment was maintained in good repair;
   iv. Provided for use by the claimant a chair that was defective and/or dangerous;

v. Failed adequately or at all in time or at all to examine, inspect or maintain the chair which was defective and/or dangerous;

vi. Caused, permitted or suffered the chair to be or to remain in use though defective, dangerous or when it was otherwise unsafe to do so;

vii. Caused, permitted or suffered the claimant to use the chair when it was unsafe to do so;

viii. Failed to warn the claimant of the dangerous condition of the chair or of the dangers of using it or otherwise prevent his use thereof;

ix. Exposed the claimant to a danger or a trap and a foreseeable risk of injury;

x. Failed to provide or maintain for the claimant a safe system of work and without prejudice to the generality of this allegation in particular failed devise, institute or operate or ensure the institution or operation of any or an adequate system of routine preventative inspection of seats provided for use in the premises;

xi. Failed to provide or maintain for the claimant safe or adequate plant or equipment ; and

xii. Failed to take any or any adequate care for the safety of the claimant.

5. As a result of the injuries, the claimant suffered pain, injury, loss and damage. Further, the claimant who carried on a personal business as a self-employed electrician has been unable to obtain gainful post-retirement employment, either as a self-employed electrician or otherwise.

THE DEFENCE

6. The defendant accepts that as the employer of the claimant, it owed a common law duty towards him to ensure a safe system of work. However, the defendant denies that the claimant's injuries were caused by its

negligence and/or breach of duty and avers that the incident was caused by the negligence of the claimant as he used the chair improperly. Further, upon its inspection of the chair, no damage or defect was found. Moreover, the defendant claims that the claimant continued to use the said chair prior to his retirement from the company in January 2015.

7. According to the defendant, any injuries sustained by the claimant was caused by or contributed to by his own negligence. The particulars of negligence pleaded by the defendant against the claimant are as follows;

    i. Wrongly using the chair in a manner for which it was not designed to be used;
    ii. Failing to maintain an appropriate and/or safe posture while sitting in the chair;
    iii. Leaning backwards in the chair in such a manner as to expose himself to a risk of injury;
    iv. Placing his legs aloft on a table/desk while leaning backwards in the chair in such a manner as to expose himself to a risk of injury;
    v. Failing to take any or any adequate care for his own safety and thereby exposing himself to an unnecessary risk of injury;

8. The defendant averred that osteoarthritis of the claimant's right knee is attributable to a previous knee injury.

9. The defendant pleaded that they neither admit nor deny that the claimant carried on a personal business as an electrician. The defendant denied that the claimant was forced to retire from the defendant's employ having reached the mandatory retirement age of 60 years.

10. The defendant contends that the claimant is not entitled to interest as he suffered no pecuniary loss it having paid the claimant, his full month salary whilst on injury leave totalling $150,648.96. Further, the defendant has paid the claimant $55,243.27 as workmen's compensation.

REPLY

11. The claimant denied that the incident was caused or otherwise contributed to by his negligence due to improper use of the chair as alleged in the incident report and statement of Mr. Pedro Brito, senior instructor and averred that Mr. Brito was not present at the time of the incident.

12. Further, the claimant did not lean backwards in the chair nor was his feet on the desk but firmly placed on the floor behind the desk.

ISSUES

13. There being no dispute that the claimant was owed a duty of care by the defendant and there being no dispute about the general nature of that duty (a duty to take reasonable care for the safety of the claimant by instituting and maintaining a safe system of work), the issues for consideration by the court are as follows: -

i. Did the defendant's negligence cause the incident, namely was there a breach of the duty of care which resulted in injury to the claimant;

ii. Whether there was contributory negligence on the part of the claimant;

iii. If the defendant was negligent, what is the extent of its liability for the injuries, loss and damage suffered by the claimant as a result of such negligence; and

iv. If it is so found, what is the measure of damages is the claimant entitled to.

14. The evidence in this case is somewhat voluminous but it was necessary to set out most of it as most of the evidence is highly relevant to all of the issues presented.

THE CASE FOR THE CLAIMANT

Irving Williams

15. The claimant who was 58 years old at the time of the incident, called two witnesses, namely Dylan Baptiste and Dr. Renwick Musai in addition to his own testimony.

16. According to the evidence of the claimant, he has been an electrician by trade since 1980 and has been employed with the defendant since 2007. The claimant was initially employed as an assistant instructor in electrical installation and by 2013 he was promoted to a training instructor earning a gross monthly salary was approximately $7,063.50. The claimant also carried on a personal business as an electrician earning approximately $12, 500.00 per month.

17. Sometime between March and April 2013, the defendant outfitted its staff lunchroom with reclining and rollable armchairs which were not particularly assigned to any staff member. It is the claimant's testimony

that he observed incidents whereby persons had issues with the chairs being off-balanced.

18. On May 23, 2013, the claimant went to the lunchroom in the defendant's premises, sat by a desk on a chair, with his feet placed on the floor at which time the chair toppled over and he fell backwards unto the floor. He immediately felt severe pain in his back, shoulder and neck.

19. He righted himself and later on completed the defendant's Accident Incident Form and informed the supervisor, one Mr. Fleville Tinto. The claimant testified that the defendant never provided instructions or warnings in relation to utilization of the chair until after the incident when Mr. Pedro Brito, the senior instructor informed the claimant that there were three adjustments on the chair, hard, soft and medium.

20. Thereafter, the claimant visited the St. Augustine Private Hospital and was examined by Dr. Renwick Musai, an orthopaedic specialist. He was administered painkillers, was instructed to return to the hospital for further treatment and was given a referral letter to a physiotherapy and rehabilitation clinic. An x-ray scan was also performed.

21. He claims that following the incident and up to present, he suffers daily from pain in his back, neck and shoulder. Further, he is unable to bend, lift heavy objects or move about freely without experiencing severe pain.

22. Within a few days of the incident, he provided the referral letter to the defendant's Human Resources Department who instead referred him to the company's doctor, Dr. Kieron Nisbet. On or around May 28, 2013, he visited Dr. Nisbet, but was not physically examined. He was in fact

administered an injection for the pain he was experiencing. He returned to Dr. Nisbet sometime in June 2013 after experiencing belly pains and discomfort in his groin area. He was not satisfied with the treatment he was receiving, therefore he wrote to the defendant and asked to be referred to a specialist[1]. As a consequence he received treatment from Dr. Musai and Dr. Sonia Robinson, both doctors to whom he was referred to by the defendant. An MRI scan was performed on his back on December 9, 2013 and another was performed on his shoulder on January 24, 2013.

23. The claimant relies on the medical report of Dr. Musai dated October 26, 2015[2] wherein he diagnosed the claimant with the following injuries;

"Lumbar spondylosis;
Cervical spondylosis;
Multi-level disc herniation at L3/L4, L4/L5 and L5/S1 levels with nerve root compression;
Impingement syndrome of his left shoulder;
Osteoarthritis of his right knee, (related to a prior existing injury)[3]; and
A hernia".

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1. [1] Letter wrongly dated 7th June 2017 annexed as "I.V.4"; *"In or around June 2013, I learnt that Dr. Nisbet was not a specialist in dealing with back injuries and/or pain there from and I made a complaint by letter wrongly dated the 7th June, 2013 to Ms. Taramatee Badal, Human Resource Manager at the Defendant and requested to be allowed to see a specialist for proper diagnosis and treatment. On or around the 17th June 2013, Dr. Nisbet referred me back to Dr. Musai for further treatment"*.

[2] Annexed as "I.V.7"
[3] By way of letter dated April 18, 2018 the claimant indicated his intention to no longer pursue the knee injury.

24. Dr. Musai assessed the claimant as having a permanent partial disability of 30%.

25. It is the case for the claimant that his treatment required him to rest, use ice-packs on his back and modify his activities to avoid straining his back. Further, between May 2013 and January 2015, he was administered steroid injections by Dr. Musai and given no less than eleven prescriptions. The defendant has reimbursed the majority of the claimant's medical expenses.

26. It is the evidence of the claimant that as part of his treatment he attended twelve sessions of physiotherapy at the Total Rehabilitation Centre Limited. The claimant relies on the report of MPT Chanol Ottley dated September 18, 2013[4], wherein she recommended that the claimant initiate hydrotherapy, once per week for six weeks.

27. The claimant testified that despite the prescribed analgesics and physiotherapy, he continued to experience severe pain and his quality of life deteriorated due to his inability to perform basic physical actions. He was referred by Dr. Musai to seek further treatment in the form of laminectomy and/or decompression surgery and also a specialist for further pain management.

28. The claimant made a complaint in writing to the Public Services Association (PSA) Shop Stewart, Mr. Jagdeo Moonsar that he received no response from the defendant regarding the referral letters he delivered to them.

[4] Annexed as "I.V.9"

29. On or around May 21, 24 and 28, 2013, the claimant visited Dr.Udit who administered epidural steroid injections. The claimant also relies on the medical report of Dr. Kumar dated June 16, 2014 who diagnosed that there was no indication for any surgical procedure at that time and the mainstay of treatment was physiotherapy[5].

30. The claimant testified that the defendant informed him that upon his retirement at 60 years in January 2015, it would cease payment for his medical expenses. In January 2015, the claimant signed an agreement in which he accepted the sum of $55,243.27 as Workmen's Compensation which he received sometime in February 2015.

31. The claimant has set out the sums of money he expended in seeking treatment to relieve his pain[6].

32. The claimant testified that he continues to suffer from chronic pain and has been unable to continue his personal business as an electrician. Further, he is unable to participate in physical activities and his sex life has significantly deteriorated causing him stress and embarrassment.

Cross-examination

33. In a letter of June 7, 2013[7] written by the claimant to Human Resources, the claimant stated, *"……I was sitting in the staffroom when the chair on which I was sitting toppled over backward throwing me to the floor….."*. The claimant however maintained that as he sat on the chair it toppled over.

[5] Annexed as "I.V.14"
[6] See paragraphs 40, 42, and 43 of the claimant's witness statement.
[7] Annexed as "I.V.4"

34. In a letter of April 8, 2014[8] written by the claimant to the PSA, the claimant said, *"I am writing to let you know the neglect that I am going through with respect to the injury which I got on the 23 of May 2013 at the Omera Centre when the chair on which I was sitting toppled over backwards throwing me to the floor, hurting my back and shoulder….."*. Once again the claimant maintained that he was toppled over.

35. Paragraph 3 of the statement of case which reads; *"On 23rd of May, 2013, while acting in the course of his employment, the Claimant sat upon a chair in the staff lunchroom in the premises, whereupon the chair fell backwards causing him to fall to the floor"* was also put to the claimant who testified that he did not see much difference between any of three statements.

36. He was referred to paragraph 3 of the Reply which avers, *"The Claimant further avers that his feet were placed firmly upon the floor while attempting to sit upon the chair which immediately fell backwards"*. The claimant testified that averment was incorrect and that he sat on the chair with his feet placed firmly on the ground and it threw him backwards.

37. The claimant also testified that there were seven desks in the staff room but that he would normally sit at the same desk on each occasion. The chairs were reclining and rollable and of the same colour. He did not place his name on any of the chairs and he would usually sit on any available chair which at times had to be adjusted to his comfort.

38. The claimant accepted that the chair upon which he sat was about eighteen to twenty-four inches from the ground and he did not observe whether the back of the chair was in an erect position. After he fell, he was

[8] Annexed as "I.V.11"

on his back and his legs were up in the air. However, he did not notice the chair when he fell. He remained on the ground for approximately fifteen minutes to half hour when after which he eventually got up on his own. He did not look at the chair or notice if anyone picked up the chair. Thereafter, the claimant descended ten flights of stairs accompanied by Marvin Mars to file a report.

39. The claimant testified that he spoke with the senior instructor Mr. Pedro Brito about his observations in relation to persons being off balanced on the chairs but admits that he did not plead same anywhere in his case.

40. The claimant was shown the Incident /Incident Form and the statement signed by Marvin Mars[9] which states, *"I was upstairs in the staff room around 1:45 pm by my desk sitting when I heard a noise and I saw Mr. Williams on his back and a little while after I came to the office"*. He testified that the supervisor, Mr. Fleville Tinto would have had his own report relating to the incident but he by no means saw his report.

41. In an undated report of Mr. Tinto, under the head note Unsafe Action, he stated; *"leaning backwards in chair"*. The claimant maintained that what he stated in his report, *"While sitting on chair in staff room I was sitting and topple over and I fell hurting my back and my leg"* occurred on the date of the incident. However, he agreed with counsel for the defendant that on the date of the incident when he made the report, he did not state that he hurt his shoulder, or his leg and which leg was injured.

[9] Annexed as "I.W.2"

42. The claimant also agreed with counsel for the defendant that the medical report of Dr. Renwick Musai dated October 26, 2015 did not mention injuries to his shoulder, his neck or which leg he injured. The claimant also testified that at that time, he did not feel pain in his shoulder or neck.

43. The medical report of Dr. Anil Kumar dated June 16, 2014, states, *"He stated that he fell off the chair when the back rest suddenly gave away causing him to fall backwards on his buttocks"*[10]. The claimant disagreed with the statement and testified that he informed Dr. Kumar of the details of the incident and *"he reported it in his own way"*.

44. The claimant testified that after the incident, he visited the St. Augustine private hospital but no record was submitted. He could not recall whether the referral letter given by Dr. Musai was given to him or sent directly to the defendant's Human Resources department. Paragraph 14 of the statement of case which reads, *"Within a few days after the accident, I gave the referral letter to the Human Resources Department of the Defendant and I was sent to the Company's doctor, Dr. Kieron Nisbet"* was also put to the claimant. He testified that he was not given the referral letter and there must have been a typographical error in his witness statement.

45. He testified that when he visited Dr. Nisbet, he did not examine his x-rays but gave him twelve days sick leave. Further, when he returned on June 7, 2013, Dr. Nisbet instructed him to stop the medication he was taking.

[10] Annexed as "I.W.13"

46. The claimant did not know whether Dr. Robinson was a specialist but testified that she had been the company's doctor for some time and she was out of the country at the time of the incident.

47. Counsel for the defendant referred the claimant to the report of Dr. Ottley dated September 18, 2013 which states,

"Irving's perceived disability as a result of his back pain has decreased from 55% to 42% since his initial evaluation. This is a significant improvement in how he perceives his quality of life has been affected by his pain. Despite Irving's subjective rating of pain as only being moderately improved, objectively he has increased ROM and strength and is able to perform more challenging exercises in therapy. I have discussed with Irving the importance of complying with his home exercise program in order to maintain the benefits he has gained in therapy, I am still unsure of how compliant he is with these exercises".

48. The claimant accepted that there was improvement from July to September, 2013 but denied that he was not doing the home exercises.

49. Counsel for the defendant then referred the claimant to another report of Dr. Ottley dated November 21, 2013, which states*, "When questioned about his compliance to his home exercise programme (HEP) Irving reported that he was not adhering to the recommendation of performing his HEP daily"* and the claimant asserted that he performed all the exercises given by Dr. Ottley.

50. It was the testimony of the claimant testified that after he retired, the defendant no longer funded his doctor's visits therefore; he visited various doctors hoping to get relief for his pain. That while he carried on his

personal business after work and on weekends and was able to earn twice his salary he did not have any receipts and had destroyed documents after a number of years.

51. The claimant testified that at age 50, he still played football almost every evening as a form of exercise. One year before the incident he continued to play twice per week, run around the Savannah, do push-ups and sit-ups and he can no longer do same.

52. When questioned by counsel for the defendant whether he sought counselling for the sexual problems he was experiencing he replied that he did not and it cost money.

Dylan Baptiste

53. Baptiste has been employed with the defendant since around 2004 as a training instructor in welding. Prior to May 2013 the defendant outfitted the staff lunchroom with reclining and rollable chairs, the chairs were not assigned to any particular staff member and once available, they would be used by any member of staff. Further, when he sat on a chair, it was usual to adjust it to a recline position to suit his preference.

54. Further, prior to May 2013, he observed a number of incidents in which persons who sat on the chairs had issues with them being off-balanced. Baptiste asserted that sometime before the incident of the claimant, he almost fell from a chair due to the same issue with it being off-balanced.

55. On the date of the incident he was in the lunchroom in the defendant's premises along with Marvin Mars. He did not observe Mr. Brito at that time. He observed that when the claimant entered the room and saw when

he sat on one of the chairs behind a desk. Further, when the claimant sat on the chair in a *"normal manner"*, the chair toppled over and the claimant fell backwards on the floor.

56. It is his evidence, that at no point before the incident did he observe an agent of the defendant give instructions or warnings to members of staff. Moreover, he did not observe that the claimant had his feet on the desk or sat in a manner that would cause a regular chair to be topple. Baptise does not know what eventually became of the chair upon which the claimant sat.

Cross-examination

57. Baptise testified that on the date of the incident, he was seated at his desk which was in the middle of the staff room. He did not have a particular chair and would sit at whatever chair was by his desk. He would have to adjust the said chair each time. He maintained that the claimant was sitting on the chair with his feet on the ground. He could not recall if prior to the incident he saw the claimant with his feet on the desk.

58. When questioned by counsel for the defendant if he was aware that someone reported that the claimant had his feet on the desk, his response was *"Yes"*.

Dr. Renwick Musai

59. Dr. Musai is an orthopaedic specialist for a period exceeding six years. The claimant visited him several times, approximately twenty-five visits to the Orthopaedic Clinic at the St. Augustine Private hospital from May 2013 to October 2015.

60. He evaluated him and prepared a report in respect dated October 26, 2015. He also provided an expert report, pursuant to the directions of the Honourable court dated January 5, 2019. The expert report states;

"Mr. Irving Williams was seen in the orthopaedic clinic at SAPH on 29/06/2013 with a history of lower back pain, intermittent, radiating down his legs, aggravated by sitting and bending and relieved by analgesics. The pain was associated with numbness, paraesthesia and mild weakness of his legs. The patient also complained of pain in his left shoulder and knee pain. The patient claimed he fell down from a chair at work in 23rd May 2013 after which the symptoms started and his job sometimes involve repetitive bending and lifting objects.

In his past medical history there was nothing of significance. In his past surgical history he had knee arthroscopy for meniscus tear. In his past drug history and social history there was nothing of significance.

On examination of his back there was no swelling or deformity but tenderness along the midline and paravertebral muscles from L1 to S1 vertebra level with painful forward and lateral flexion and extension. Straight leg raise of his both legs was positive at 70 degrees. Reverse Lasegue test was positive. Faber test was negative.

On examination of his central nervous system there was normal tine, reflexes and sensation with normal power= 5/5 of all limbs.

X-ray examination of the lumbar spine revealed lumbar spondylosis with decreased disc spaces L4/L5 and L5/S1.

X-ray of his cervical spine showed cervical spondylosis. On examination x-ray of his right knee showed severe tricompartmental osteoarthritis dessication with multilevel disc protrusion from L3/L4 to L5/S1 levels with normal spinal cord and vertebral bodies. At L3/L4, L4/L5 and L5/S1 levels there was disc herniation with mild narrowing of spinal canal and bilateral neutral foramina.

MRI scan of his level left shoulder revealed osteoarthritis of acromio-clavicular joint and supraspinatus tendinopathy.

Mr. Williams was assessed as having lumbar spondylosis and multi-level disc herniation at L3/L4 and L4/L5 and L5/S1 levels with nerve root compression, cervical spondylosis, impingement syndrome of his left shoulder and osteoarthritis of his right knee.

He was advised rest, ice-packs to his back, activity modification, weight loss, referred for physiotherapy of his spine, shoulder and knee at total rehabilitation center and prescribed analgesics patient.

Mr. Williams was followed up in orthopaedic clinic from June 2013 up to present time, whilst he continue his physiotherapy of his back at home and physio clinic. The patient had approximately 25 office visits at regular intervals during this time.

On his last visit on 05/01/19 he continued to experience lower back pain, neck pain which radiated down his legs and arms associated with numbness and parathesiae. The patient said he experiences the pain on a daily basis and it limits his function. On examination of his spine there was tenderness along L3-S1 level with painful range of motion and straight leg raise test was positive. Femoral stretch test was positive. On examination of his cervical spine there was tenderness C5-C7 levels with painful range motion and Spurlings's test was positive.

Mr. Williams was diagnosed with cervical spondylosis and lumbar disc herniation. Mr Williams has been referred to neurosurgeon Mr. Dave Ramnarine for laminectomy and discectomy to alleviate his symptoms. The cost of surgery is $150,000 TT. The patient has been unable to return to his work at MIC as a technican and teacher due to his neck and back pain. He has been advised that his condition is chronic and his pain may be exacerbated by bending and lifting heavy objects. He has been advised that a change of position to work of a lighter character would be beneficial to

avoid future exacerbations of his condition. He has been given a permanent partial disability of 40%".

Cross-examination

61. Dr. Musai testified that he could not recall if he saw the claimant on June 29, 2013. Further, as a result of the complaints made by the claimant, he referred the claimant to Dr. Ramroop for an x-ray. The x-ray report states;

"REPORT:

L/S spine:

L4/L5 disc space narrowing with vertebral osteophytes consistent with lumbar spondylosis.

The remaining lumbar vertebrae and disc spaces appeared normal

No fact narrowing.

No compressive collapse or bony infiltration of the lumbar vertebrae.

Left shoulder:

No bony or joint abnormalities seen.

No evidence of rotator cuff or other soft tissue calcification.

C-spine:

Normal alignment of the cervical spine.

No disc space or facet joint narrowing.

No compressive collapse or bony infiltration of the cervical vertebrae.

Mildly displaced anteroinferior osteophytic fragment of T6 vertebral body.

Findings consistent with mild cervical spondylosis".

62. In the October 2015 report, Dr. Musai states, *"The patient also complained of pain in his left shoulder and knee pain"*. He agreed with counsel or the defendant that the statement did not indicate which knee the claimant injured.

63. He noted that the complaints made by the claimant were probably in relation to injuries sustained before June 29, 2013. He agreed with counsel for the defendant that Dr. Ramroop's x-ray report examined the claimant's lower back, his tail bone, his left shoulder and his cervical spine which was his neck.

64. A separate x-ray was done for the claimant's knees which revealed that the claimant suffered from arthritis to his knees.

65. Dr. Musai referred the claimant for an MRI scan of his lumbar spine. He explained that the difference between an x-ray and a MRI scan in that an x-ray will show the alignment of the vertebra, disc spaces and the curvature of the spine and any difference in height in the bones in the vertebra. In contrast, the MRI scan is a more detailed examination for soft tissues and spine, and as such, it would show a detailed picture of the soft tissue structure of the spine, especially the disc spaces, any narrowing of the canal, disc herniation in the canal, nerve root compression, any tumours, infections, lesions in the bones.

66. The findings in the x-ray report revealed abnormalities in the claimant's joint. Further, the reading showed that the claimant had lumbar spondylosis and there was a disc space narrowing at the lower vertebra, L4/L5. Also that the claimant had a mild cervical spondylosis meaning that there was degeneration in the lower back and upper back near the neck. He explained that *"lumbar spondylosis is a broad medical term to encompass degenerative changes of the lumbar spine which may mean narrowing, degeneration of the disc, the bones, arthritis changes etcetera"*.

67. According to Dr. Musai, an x-ray could show whether there were bony or joint abnormalities but it cannot show any evidence of rotator cuff abnormality as one cannot see rotator cuff muscles or ligaments and that can only be seen with an MRI scan. Moreover, an x-ray is unable to show any soft tissue calcification like a calcium deposit in the left shoulder.

68. Dr. Musai testified the results were not a form of arthritis but could be from gout, high uric acid or from degenerative changes leading to calcium deposit in the supraspinatous tendon; and that an inflammatory disease could cause calcium deposit like gout leading to inflammation in the tendon which could be a sign of degeneration of the tendon.

69. Dr. Musai explained the findings in the MRI report of Dr. Martin Peters dated December 9, 2013. The report states;

"*Sagittal images demonstrate normal vertebral body height and alignment. End plate discogenic marrow reactive changes at the inferior endplates of L4/5 superior endplates of L5 and S1 (tye II modic changes) disc deciccation and disc space narrowing most marked at L4/5 and L5/S1. The spinal cord terminates at T12/L1 level with normal morphology of the conus demonstrated". Axial images through the intervertebral disc spaces L1/2 and L2/3 demontrate normal concavity of the posterior disc margins. Normal appearance of the sac, lateral recesses, nueral foramen, no evidence of nerve root impingement or compression.*

At the L3/4 level mild diffuse bulge of the annulus causing effacement of the anterior epidural fat and narrowing of the lateral recesses, potential site for nerve root irritation on the traversing L4 nerve roots, exit neural foramina are patent.

At the L4/5 level diffuse of the bulge of the annulus again noted, effacement of the epidural fat and flattening of the anterior aspect of the thecal sac with narrowing of the lateral recesses bilaterally, potential site for the nerve root irritation on the traversing L5 nerve roots.

At the L5/S1, diffuse bulge of the annulus with the central posterior disc protrusion indenting the central anterior aspect of the thecal sac and narrowing of the lateral recesses, potential site for nerve root irritation on the traversing S1 nerve roots, the exit neutral foramina are patent.
Normal paravertebral musculature.

<u>IMPRESSION:</u>
Multiple level degenerative disc changes with mild bulges at L3/4, L4/5 and L5/S1 with minimal narrowing of the lateral recesses, potential site for nerve root irritation on the traversing nerve roots within their respective lateral recesses".

70. Dr. Musai explained that *"type II modic changes"* were chronic and that it was common in persons over 40 years of age. The *"disc desiccation"* is a type of fluid that provides nutrition and helps with shock absorption. It refers to dehydration of one's disc, therefore as one gets older, disc desiccation occurs leading to progression, usually taking place every decade after the age of 45 years. He agreed with counsel for the defendant that playing football on a regular basis or being physically active can lead to disc desiccation.

71. He went on to explain that the spinal cord was normal and the normal concavity relates to L1/2 and L2/3 levels. There was evidence of mild disc herniation at level L3/4 which showed bulging. The fluid would only leak if

the fibre was ruptured. Further, there was evidence of disc herniation at L4/5 with L4 being a potential site for nerve root compression.

72. He testified that the MRI scan would be able to *"show the degree of stenosis at the foramen and the spinal canal, or you can measure it and determine the degree of stenosis, narrowing of the canals"*. He agreed with counsel for the defendant that once there is narrowing, the claimant can potentially experience compression of the nerves. Overall, there was disc herniation at levels L3/4, L4/5 and L5/S1.

73. He disagreed with counsel for the claimant that an MRI scan would be able to detect whether there was an acute injury as it cannot be conclusive. He indicated that it was difficult to determine acute from chronic. He also testified that not having fluid present is not an indication of acute injury.

74. He testified that although he treated the claimant, his symptoms did not improve and referred him to Dr. Ramnarine for surgery, laminectomy and discectomy who reported back to him verbally. He agreed with counsel for the defendant that there was slight improvement between July and September 2013. Dr. Musai testified that he referred the claimant for physiotherapy for six months, noting that the general recommendation throughout the world is after three to six months of physiotherapy. There was no written report from Dr. Ramnarine.

75. Between 2015 and 2019, Dr. Musai saw the claimant intermittently but there are no written reports. He maintained that he examined the claimant during that period. He asserts that his 2019 report is accurate to his 2015 report save and except that in 2019 it was inaccurate that the claimant had twenty-five office visits.

76. He was unaware that the claimant retired in January 2015 when he prepared his October 2015 report.

77. He testified that some of the findings in his reports prepared on behalf of the claimant was consistent with age related changes. It was difficult to deduce and say conclusively that age related changes were on account of the fall from the incident. The findings from the MRI could not state whether the entries were acute or chronic. He agreed with counsel for the defendant that it was inconclusive whether the fall caused the findings in the x-ray report and MRI scan, or whether it was age-related changes.

THE CASE OF THE DEFENDANT

78. The defendant called two witnesses.

Dr. Martin Peters

79. Dr. Peters is a consultant radiologist with twenty years experience in radiology. He is an independent radiologist contracted by MRI of Trinidad and Tobago.

80. The claimant was referred to him by Dr. Musai.[11] He performed an MRI scan on the claimant on December 9, 2013 and prepared a report[12].

[11] See letter dated November 30, 2013 (erroneously recoded as 30/11/12) annexed as "M.P.3".
[12] See paragraph 71 herein.

Cross-examination

81. Dr. Peters testified that when he performed the MRI scan on the claimant, he concluded there were degenerative changes. Further, the referral letter dated November 30, 2013 would have stated the clinical details as complaints of lower back pain radiating to the legs with numbness and paraesthesia.

82. He testified that he was neither able to say whether the degenerative changes caused the claimant's back pain nor comment on the claimant's symptoms. He indicated that he only reports on the anatomy as presented.

Pedro Brito

83. Mr. Brito has been employed with the defendant for thirteen years and he is a senior instructor in the field of electrical installation.

84. On the date of the incident Mr. Brito was the acting coordinator of the instructors at the defendant's premises. He avers that the claimant was a senior instructor and they were relocated to these premises after a trainee was killed at the defendant's Macoya centre.

85. On the date of the incident he saw the claimant sitting on an office chair in a reclining position with his feet propped on the desk. The claimant would have seen him from where he stood in the doorway before leaving to go downstairs.

86. Later on that day, the claimant came to his office and informed him that he had fallen off the chair. During that conversation, he also indicated that he fell because of the defective chair, and not because he had placed his

feet on the table. The claimant did not at that time complain of back pain to him nor that he was injured as a result of the incident. Thereafter, in the claimant's presence, Mr. Brito looked at the chair which appeared to be in good order and demonstrated the features of the chair to the claimant. He further informed the claimant that the claimant did not know how to use the chair and he was not utilizing the chair properly.

87. Mr. Brito's evidence is that the defendant's premises were also outfitted with new chairs and that the staff members there were the first to use them. He also testified that it was "very likely" that he would have mentioned the incident to his superior, one Mr. Timothy. Further, he was not aware that the incident had to be reported and he does not recall whether the allegedly faulty chair was removed from by the claimant's desk.

88. Mr. Brito testified that when Mr. Timothy contacted him, he was asked whether he recalled the incident and if he could give a written account of it. Mr. Brito complied by providing a written statement of what occurred on May 23, 2013.

Cross-examination

89. Mr. Brito testified that he did not see the claimant fall from the chair.

90. He gave evidence that all the training instructors were transferred from Macoya centre to O'Meara in January 2013 and were provided with new chairs. Further, after the incident he demonstrated the features of the chair including the reclining lever on the right hand side and the controls for positioning it upright to the claimant only.

91. According to Mr. Brito, although he was the senior person on duty, he was unaware that the incident would have required the filing of a formal report. To the best of his knowledge, no other such incidents have ever occurred.

92. Mr. Brito testified that he knew Mr. Tinto who is a member of staff but he did not give him an oral statement or file a written report. However, on the afternoon of the incident, he gave a verbal statement to Mr. Timothy, the line manager at the time.

THE COURT'S APPROACH

93. A court must adopt a common sense approach to evidence and to the issue as to whether a litigant has deviated substantively from his pleaded case. It would defeat the goal of administering justice if parties were to be restricted to the narrow confines of facts which are themselves obscure. To do so can result in manifest injustice to the parties having regard to the overriding objective of the Civil Proceedings Rules.

94. The onus of proving negligence always rests upon the claimant. 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 defendant: ***Charlesworth & Percy on Negligence Thirteenth Edition, Chapter 1, paragraphs 1-19***. 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: ***Clerk & Lindsell on Torts Nineteenth Edition. Chapter 8, paragraph 8- 04***

95. At common law an employer owes to each of his employees a duty to take reasonable care to ensure their safety in all circumstances. The duty is often expressed as a duty to provide safe plant and premises, a safe system of work, safe and suitable equipment, and safe fellow-employees; but the duty is nonetheless one overall duty. Against this backdrop, any particular circumstances, that may be applicable to a particular employee, including his unique susceptibilities must be taken into consideration, including. Subject to the requirement of reasonableness, the duty extends to employees working away from the employer's premises, which may even include employees working abroad: ***See Halsbury's Laws of England, Volume 52 (2014), paragraph 376.***

96. An employer, is under a duty to prescribe a system of work, even where the operation is a single one, if it is necessary in the interests of safety[13].

97. In the case of ***Barcock v Brighton Corporation [1948] 1 K.B. 339*** at 343, the learned Justice Hilbery stated in his judgment that *"a system of work is not devised by telling a man to read the regulations and not to break them … It is no use for a master to say in court 'I discharged my common law duty because I put down on paper a safe system and put it into the hands of the man'*."

ISSUE 1- Did the defendant's negligence cause the incident

98. The obligations of an employer to provide a safe system of work was considered in **General Cleaning Contractors Ltd v. Christmas [1952] 2 All ER 1110 per Lord Tuker at 195**. The duty to provide a safe place of work is fulfilled by providing a place as safe as care and skill can make it, having

[13] ***Vernon v British Transport Commission [1963] 1 Lloyd's L.R. 55***

regard to the nature of the place. At common law there exists a duty for employers to provide their workmen with a safe place of work. That is, not merely to warn against unusual dangers known to them, but also to make the place of employment as safe as the exercise of reasonable skill and care would permit: ***Naismith v London Film Productions Ltd [1939] 1 All E.R. 794 at 798.***[14]

99. In deciding the extent of that duty the courts will take into account: (i) the size of the danger; (ii) the likelihood of an incident occurring; (iii) the possible consequences of the occurrence of an incident; and (iv) the steps needed to eliminate all risk and the cost of doing so: ***Edwards v National Coal Board [1949] 1 All ER 743***.

The submissions of the defendant

100. The defendant submitted that the onus of proving negligence rest upon the claimant. It relied on the case of ***Daron Williams v RBP Lifts & Nicholas Holdings Limited***[15] where this Honourable court set out the general legal issues for determining liability;

i. *"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.*
ii. *Did either the First or Second Defendants breach a duty of care and whether damage resulted*
iii. *If so, whether there was contributory negligence on the part of the Claimant.*

[14] See also ***Clifford v Charles*** per Lord Denning MR; *"The employers must take care of the men, but the men must also take care of themselves".*

[15] CV2014-01088 paragraph 5

iv. If there is a finding of negligence is the Second Defendant entitled to be indemnified by the First Defendant".

101. The defendant submits that the claimant testified that he was thrown backwards when he sat on the chair but in contrast to his written incident report, his version does not lend itself to the suggestion that he fell immediately upon sitting. Further, at the time of making the report the circumstances of the fall would have been fresh in his mind, the incident having just taken place. Accordingly, the statement in the written report is the more probable and more likely than not, the Claimant's fall was not immediate upon sitting. The defendant pointed to another inconsistency that, in Dr. Kumar's report the claimant reportedly told him that *"he fell off the chair <u>when the backrest suddenly gave away</u> causing him to fall backwards and on his buttocks",* and those facts that did not appear in the claimant's incident/incident report which he made prior to being examined by Dr Kumar, or in his pleadings or evidence in chief.

102. The defendant submitted that the claimant has not proved that the defendant was negligent or that the chair was defective or that the defendant's negligent act or omission caused the fall. The claimant's evidence was that he was familiar with rollable and reclining chairs as he used them at the Macoya Centre. Further, that the claimant had been using the said chair for five months prior and never had cause to adjust the back of the chair.

103. The defendant disputed the evidence that the claimant observed previous incidents where persons using the chair became off-balanced as there was nothing in his evidence or otherwise to suggest the claimant made a report or that prior to using the chair, that concerned him.

Moreover, the testimony of Baptise was "very careful" when he testified that the claimant was sitting in a normal manner with his feet on the floor and did not lean back or sit in any manner that could cause a regular chair to unbalance.

The submissions of the claimant

104. The claimant submitted that there were other persons present in the staff room when the claimant fell, but not Mr. Brito, the defendant's witness on this issue. Further, the claimant's version of events as contained in his Statement of Case - *"sat upon a chair… whereupon the chair fell backwards", his statement -"upon sitting on the chair… the chair toppled over…", and his oral testimony that "when he sat on the chair he was thrown backwards"* is particularly consistent in that the claimant fell, upon sitting on the chair.

105. Accordingly, the claimant submitted that there was no dispute that at the time of the fall the claimant was in fact sitting on the chair and there is no necessary or significant inconsistency between the different descriptions of the fall, all which could be simultaneously true despite the word "while" or "upon".

106. The evidence of Baptiste was not inconsistent as argued by the defendant. The claimant observed incidents with persons becoming *"off balanced"* between March 2013 to May 2013 while Baptise who is currently employed with the defendant, would have seen incidents post May 2013 of which he observed over the years.

107. The claimant relied on the doctrine of *res ipsa loquitor*, that in the absence of any other reason for the chair toppling over, it must have been caused by the defendant's negligence.

108. The claimant submitted that as a matter of common knowledge, a swivel chair, is designed so that the seat and backrest can be tilted backward, does not ordinarily fall in a backward motion to the floor when used in a normal, prudent manner. According to the claimant, the claimant cannot prove ***precisely*** what caused him to fall. Further, that on the evidence as it stood 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.

The defendant's submissions in response

109. The defendant submitted for the claimant to rely on the doctrine, the claimant must allege and prove the facts that allow the inference to be drawn. The defendant relied on the case of ***Scott and Bennett v Chemical Construction (GB) Ltd [1971] 3 All ER 822***, where the plaintiff was injured when a panel which was standing behind a panel which was being moved by the defendant's workmen, fell. There were some suggestions that the two panels had been tied together, but the judge held that it was not possible to determine precisely how the accident had happened and that it could not have occurred without negligence on the defendant's workmen's part. The defendant further submitted that, in ***Scott and Bennett (supra)***, the words *res ipsa loquitur* did not appear in the pleadings or in the judgment, however on appeal it was held that the case was a classic example of the maxim which was adequately covered in the

pleadings by the allegation of negligence. In establishing proof when relying on the maxim, while it is not necessary to show **how** the injury/accident occurred, the occurrence of the injury being of greater importance, a claimant is not absolved from establishing that there was negligence on the defendant's part. The circumstances must illustrate that the injury/accident cannot be explained by any other cause than that alleged by the claimant, i.e. the defendant's negligence.

110. It is the submission of the defendant that a claimant who wishes to rely on the doctrine should set it out in his pleadings. Further, that the claimant has not shown from the facts that the injury/accident occurred in the manner alleged or that they warrant an inference of negligence on the defendant's part. The defendant relied on the dicta of Earle CJ in **Scott v London and St Katherine's Docks [1861 – 73] All ER Rep 246** in his exposition of the doctrine was cited with approval in the recent judgment of the Court of Appeal in ***O'Connor v The Pennine Acute Hospitals NHS Trust***:[16]

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, 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 defendants, that the accident arose from want of care."

111. The defendant submitted the claimant's medical documents do not establish any evidence of the fall or that it aggravated/exacerbated the degenerative changes that were evident in them. The defendant

[16] [2015] EWCA Civ 1244 at paragraph 58

submitted that the testimony of Dr. Musai failed to make any conclusive finding to suggest what constituted an acute fall and whether, based on the symptoms exhibited by the claimant or the findings of the examinations conducted on him, he had in fact suffered such a fall. Further, there was no mention of the chair being defective in the claimant's incident report his letter to Ms. Badal. And the defendant's evidence infers that the claimant made improper use of the chair.

112. As such, the defendant submitted that in such circumstances, the Claimant has not satisfied the criteria for the finding of *res ipsa loquitur* to be made even should the court be so minded to consider the application of the doctrine in the absence of its having been pleaded.

Findings

Breach of the duty

113. As a matter of general principle, the fact that an employer in under a to devise a safe system of work is incontestable. The issue is more often than not a matter of degree as was the case in ***Ammah v Kuehne & Nagel Logistics Ltd [2009] EWCA Civ 11***, in which the English Court of Appeal reminded employers of the extent of their duty to devise a safe system of work, including warning against risks, even if those risks are obvious. All that is left for the court to determine therefore is the question of breach.

114. Both parties gave evidence that the defendant provided new chairs for members of staff a few months prior to the incident. It emerged in cross-examination that the claimant and Baptiste were never apprised of any untoward incident regarding any member of staff sitting on those chairs. However, the claimant and Baptiste accepted that despite their

observations, they did not report same to the Brito or Tinto. Having examined and considered all of the evidence it is the court's view that the chair upon which the claimant sat was not defective. Put another way, there is no evidence that it was in fact defective.

115. The defendant disputed the evidence of the claimant that during five months of sitting upon the chair, he never had cause to adjust any of the chairs. That may in fact be a logical conclusion to drawn having regard to the implausibility of the evidence. However this, cannot and does not derogate from the duty imposed on the defendant in law. In that regard there is a patent absence of evidence from the defendant that any guidelines or instructions on the use of the various levels on tension in the chairs were issued to the claimant or to the other members of staff. It does not matter that the risk may have been obvious. Nor does it matter that the claimant may have been adjusting the chair of his own volition as these adjustments (if they did in fact occur) may or may not have been in keeping with the recommended guidelines for adjusting the tension levels. The duty lay squarely on the defendant to issue such instructions and it has in the court's view clearly breahed its duty. The court is fortified in its view by the evidence of Brito who testified in cross-examination that after the incident he demonstrated the adjustments of the chair only to the claimant. If he or any other had done so before the incident it is reasonably to be expected that they quite simply would have said so.

Res ipsa loquitar

116. The court does not agree with the defendant's submission that for a party to avail himself of this principle it should be pleaded[17]. The law has

[17] ***Adriana Ralph Civil Appeal 98 of 2001, para 4 and Mona Lindsay Civil Appeal 33 of 2008***.

been abundantly clear on this issue for a long time. The only necessary pleading in that regard is that of the material facts which surround the plea.[18]

117. The court therefore finds that there was no explanation provided by the defendant for the collapse of the back of the chair and it does not accept for reasons set out hereinafter that any explanation had to do with the claimant placing his feet on a table. The defendant has failed therefore to provide an explanation particularly in light of the evidence that the defendant never instructed the workers in the proper use of the new chairs with three levels of resistance. This could have easily been accomplished by training or appropriately placed signage. The doctrine of res ipsa must therefore apply.

118. Where the claimant successfully alleges res ipsa loquitur its effect is to furnish evidence of negligence on which a court is free to find for the claimant. If the defendant shows how the accident happened, and that is consistent with absence of negligence on his part, he will displace the effect of the maxim and not be liable. Proof that there was no negligence by him or those for whom he is responsible will also absolve him from liability. However, it seems that the maxim does not reverse the burden of proof, so that where the defendant provides a plausible explanation without proving either of those matters, the court must still decide, in the light of the strength of the inference of negligence raised by the maxim in the particular case, whether the defendant has sufficiently rebutted that inference[19].

[18] ***Bennett v Chemical Construction (GB) Limited (1971) 3 All ER 822)***

[19] Halsbury's Laws of England/Negligence (Volume 78 (2018))/3. Proving Negligence/(2) Res Ipsa Loquitur/68. Effect of application of maxim res ipsa loquitur.

119. Therefore the court finds that the defendant breached its duty in that it failed to:

i. Provide or maintain for the claimant, a safe system of work and in particular, failed to train the claimant in the proper operation and use of the chair.

ii. Failed to take any or any adequate care for the safety of the claimant in the operation of the chair.

ISSUE 2- Whether there was contributory negligence on the part of the claimant

120. 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.[20]

121. ***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 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

[20] See Munkman: Employer's Liability at Common Law, 15th Edition, Chapter 6, paragraph 6.10

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…"

The submissions of the defendant

122. The defendant submitted that the claimant's negligence caused the accident on May 23, 2013 and that they should not to be held liable for the accident or the consequences which flowed from it. The defendant does not dispute that the claimant fell on the defendant's premises, but there is sufficient evidence to conclude that it was reasonably foreseeable that the claimant's own actions precipitated the accident. They relied on the case of ***Wesley Gabriel v Royal Bank of Trinidad and Tobago***[21] where the Honourable Justice Devindra Rampersad held that, *"the defence of 'volenti fit injuria' ('to a willing person no injury is done') may be raised if an injured person knowingly and willingly puts himself in danger. He cannot sue successfully for all of the damage arising – he is likely to be wholly or contributorily negligent. Lord Herschell in Smith v Baker & Sons (1891) AC 325 at 360 said;*

"The maxim is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as a wrong."

123. The defendant also cited the case of ***Mickey Ransome v Damus Limited***[22] [S-1305/2003], a claim for personal injuries and consequential

[21] CV2008-04072, paragraph 10
[22] S-1305 of 2003, page 10

loss arising out of the negligence of the defendant's servant in driving/operating the defendant's claim, the court cited *Parkinson v Lyle Shipping Company Ltd (1964) 2 Lloyd's List Law Reports 79* in which Hinchcliffe J observed;

"…merely because the Plaintiff has had an accident at work he is not entitled to recover damages from his employers; he can only recover damages if he can show that the accident was caused in whole or part by the negligence of the Defendants."

124. The defendant also relied on the evidence of Mr. Brito who testified that he would have seen the claimant reclining the chair with his feet propped up on his desk and what the claimant told him after the accident; that he did not fall because his feet was on the desk but that the chair was defective.

The submissions of the claimant

125. The claimant argues that the defendant did not proffer direct evidence of anyone observing the claimant use the chair in an improper manner at the time of the accident and the claimant's evidence with regard to how he was sitting was unchallenged by the defendant.

126. The claimant submitted that there were other persons present in the staff room when the claimant fell, but not Mr. Brito, the defendant's witness on this issue. Further, the claimant's version of events as contained in his Statement of Case - *"sat upon a chair… whereupon the chair fell backwards", his statement -"upon sitting on the chair… the chair toppled over…", and his oral testimony that "when he sat on the chair he was thrown backwards"* is particularly consistent in that the claimant fell, upon sitting on the chair.

127. The claimant submitted that for the defence of contributory negligence to succeed, there must be some act or omission of the claimant that was blameworthy and contributed to the damage caused.

128. The claimant argued that defendant's assertion that the claimant used the chair improperly is a purely factual dispute and the onus is on the defendant to prove the factual elements of both contributory negligence and *volenti* as it is they who have asserted the same[23].

129. The claimant also adopted the following from this court in the case of ***CV2010-05009 Betty James v The Attorney General*** at paragraph 59, *"Munkman: Employer's Liability at Common Law, Chapter 6, para 6.10 defines contributory negligence as follows: "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".*

130. Additionally, the maxim of *volenti non fit injuria*, being the defence of assumption of risk is available where a claimant is shown not only to have perceived the existence of danger but also to have appreciated it fully and voluntarily accepted the risk.

131. There was no report on who complained that the claimant had his feet on the desk on previous occasions or when and that Baptiste remained clear that the claimant's feet were not on the desk.

[23] Relying on Sheldon Neckles & anor v Monica Forrester et al. CV 2013-02152/CV 2013-02296

Findings

132. The defendant would have the court believe that the claimant's fall and subsequent injuries were as a result of his improper use of the chair by sitting and at the same time placing his feet on the desk. This evidence emanated from Brito. However, Brito was not present when the incident occurred. This is confirned by the evidence of both the claimant and Baptiste that that they did not see him in the staff lunch room at that time. Further, Baptiste testified that he was in the said lunchroom before the incident and saw when the claimant entered the room. However, Brito himself testified that he was informed of the incident by the claimant. As such, while Brito may be able to say that at some point the claimant may have propped his feet up on the desk while on the chair (which has been denied and which the court has not accepted as having occurred) he cannot in any event say that this was the case when the chair gave way. Neither is it a reasonable inference to be drawn having regard to the direct testimony of the claimant and his witness that his feet were on the ground. The court therefore finds that the claimant's feet were on the ground at the time the chair gave way.

133. It follows that in no way whatsoever did the claimant contribute by his own negligence. He did not use the chair in an improper manner nor was it reasonably foreseeable by him that the act of simply sitting on the chair would have resulted in a fall.

ISSUE 3- If the defendant was negligent, what is the extent of its liability for the injuries, loss and damage suffered by the claimant as a result of such negligence; and

The submissions of the defendant

134. The defendant submits that the claimant was unable to state how long he remained on the floor after the incident and he was able to get up without any assistance and walk down more than ten steps to make his report. The defendant argues that the claimant's account of the pain he allegedly suffered is exaggerated.

135. The defendant submitted that the claimant only took the referral letter from Dr. Musai to Human Resources a few days later. The defendant argued that Dr. Nesbit did not believe the Claimant was seriously ill/ unable to work as evidenced by the progressive decline in the number of sick days allotted to the claimant along with Dr. Nesbit's directives to the Claimant when taken as a whole. Further, Dr. Kumar's report found a permanent partial disability of 20%. The defendant also submitted that the report of Dr. Ottley expressed doubt with regards to the claimant's compliance with his home exercise plan which led her to discharge the claimant and refer him once again to Dr. Musai. Dr. Musai's evidence as regards the x-ray and MRI scans suggested that no conclusive medical evidence was advanced that the fall was the cause of the degenerative changes. In addition, the evidence of Dr. Peters was that the images seen on the MRI scans led him to conclude that claimant's lumbosacral spine exhibited degenerative changes. The ambit/nature of his report did not enable him to say whether these changes cause back pain or to deal with any symptoms.

136. As such, the defendant submits that the incident did not cause the injuries alleged, either in nature or degree and that the medical evidence suggests that the pain complained of is/was very likely/largely the result of age-related chronic and degenerative changes.

The submissions of the claimant

137. The claimant submitted that although the defendant relied on the report of Dr. Kumar as representing an inconsistency in that the doctor says the claimant reported *"he fell off the chair when the backrest suddenly gave away..."* a detail which is not included elsewhere. It is noted that this is the statement of Dr Kumar who was not called to give evidence. Further, neither the claimant nor defendant's case suggest that the backrest gave away so Mr. Kumar's view that same was reported is immaterial and unlikely to be accurate**.**

138. Further the claimant provides evidence as to the particulars of his pain and suffering and loss of amenities;

i. *"He suffered severe pain in the back, neck and shoulder on a daily basis.*
ii. *After the incident he was unable to bend, lift heavy objects or move about freely due to the severe pain experienced engaging in such activities.*
iii. *Despite treatment with analgesics and physiotherapy, the treatment did little to alleviate or control the pain (and only provided passing relief) and caused a deterioration in his quality of life due to the constant pain and inability to perform basic physical actions without unbearable pain.*
iv. *Dr. Musai advised the Claimant that his condition is chronic and that continuing to perform work requiring lifting and bending (as is required as an electrician) would likely worsen his pain condition and that a change of job to work of a lighter character would be required to avoid aggravation of the condition.*

v. *Since the incident up until present he is unable to move about freely, work or participate in physical activities such as football, going fishing, exercising and performing physical training (which he did before) due to the consistent pain.*

vi. *He can no longer sit for extended periods such as when driving.*

vii. *His unable to engage in sexual activities with his wife and this has caused severe embarrassment and serious problems within his marriage.*

viii. *He is continuously anxious, stressed and embarrassed"*.

139. The claimant submitted that evidence was provided by the vast majority of sick/ injury leave granted to the claimant from the date of the incident up until his retirement.

140. The claimant also submitted that the defendant's contention that the reports were largely similar is of no concern as there is no allegation that the material facts of Dr. Musai's conclusions or his treatment of the claimant changed significantly since the preparation of the earlier report. Further, when questioned by counsel for the defendant whether it was inconclusive whether the fall caused the injuries the expert (Dr. Musai) testified *"you cannot say a hundred percent conclusively"* indicates the expert's opinion that causation by the fall is probable though not absolutely certain. The claimant submitted that was incidentally, the best answer for an expert to give, as no honest expert can give a conclusion with "one hundred *percent"* certainty. Further, Dr. Musai, as an expert in line with his duty, gave the court impartial evidence disclosing two possible causes as to some of the claimant injuries, being either age related or an acute injury such as a fall. The witness did not give his opinion that the

cause was certainly one or the other but that both were possible. He, after all, was not present during the incident.

141. The claimant also submitted that it was probable that the claimant's injuries were as a result of his fall if the court was to look at the uncontested evidence that the claimant suffered from chronic pain after the incident and the fact that there is no evidence by either party suggesting that the Claimant was in fact suffering from the said injuries (barring the osteoarthritis) or chronic pain prior to the incident (Dr. Musai's report exhibited as "RM3" specifically notes the absence of any significant medical history).

142. The claimant argues that it would be a surprising coincidence that the claimant began experiencing such severe pain immediately after the incident and thereafter, if the fall was not the direct cause of same. The majority of the claimant's claim for pain, suffering and loss of amenities is based on the chronic pain which he has suffered due to the incident.

143. The claimant submitted that there is evidence that the claimant is in need for further medical treatment based on the recommendation of Dr. Musai in the form of laminectomy and/or decompression surgery.

144. The claimant submitted that the testimony of Dr. Peters was of little assistance to the court with respect to determining the issues. His report only stated the observations he made in reading the MRI scan images and was not able to say what caused the Claimant's pain or symptoms.

145. The defendant submitted that if negligence is proven and any award is to be made, the apportionment of liability against the claimant of 90% would be a good starting point.[24]

Findings

146. The court does not accept the defendant's argument that the claimant's injuries from the incident were as a result of degenerative changes nor were they age-related. There appears to be no evidence of pre-existing degenerative changes. What is clear on the medical evidence of Dr. Musai is that in persons of similar age such changes do in fact occur. To that end, Dr. Musai testified that some of his medical findings from the x-ray and MRI scan could be caused by age-related changes, but he remained inconclusive as to whether the injuries impacted by the fall as well. What is telling from this evidence is that the expert has been resolue that some of the changes may have been as a consequence of the aging process, meaning that logic would dictate that others were not. This is the inference to be drawn from his evidence and the court so finds.

147. It is equally clear that the defendant must take the claimant as he finds him even if some of the changes were due to age.

148. Further, the testimony of Dr. Peters was of little assistance to the court as he was unable to give evidence on what caused the claimant's pain.

[24] . Per Donaldson-Honeywell J in ***Keston Clarke v Darren Gonzales & anor CV2016-00913*** at paragraph 41

149. In those circumstances the court must accept the evidence of the claimant that the majority of his pain and suffering and loss of amenities is based on the pain that developed and persisted over time as a result of the incident.

ISSUE 4- Damages

General Damages

150. In assessing an award of damages for assault and battery, the court ought to be guided by the factors set out by Wooding C.J. in ***Cornilliac v St Louis (1965) 7 WIR 491***. The factors of relevance to this case are as follows;

i. the nature and extent of the injuries suffered;
ii. the nature and gravity of the resulting physical disability; and
iii. the pain and suffering endured.

The nature and extent of the injuries suffered

151. The claimant was born on January 10, 1955. He was 58 years at the time of the incident and is currently 63 years of age. As a result of the incident, the claimant has experienced and continues to experience the following injuries and effects;

i. Severe pain in the back, neck and shoulder on a daily basis.
ii. Deterioration in his quality of life due to the constant pain and inability to perform basic physical actions without unbearable pain.
iii. He is continuously anxious, stressed and embarrassed.
iv. 30% permanent disability.

The nature and gravity of the resulting physical disability

152. Since the incident, the claimant has been unable to bend, lift heavy objects or move about freely due to the severe pain experienced engaging in such activities. Apart from his past job with the defendant, the claimant operated a personal business as an electrician and he now unable to continue same. It was the testimony of the claimant that prior to the incident, he engaged in physical activities such as football, fishing, exercising and performing physical training. The claimant testified that he can no longer sit for extended periods such as when driving and further he is unable to engage in sexual activities with his wife causing severe embarrassment and serious problems within his marriage.

The pain and suffering endured

153. When the claimant fell, he testified that he experienced severe pain in his back, shoulder and neck. After the incident, he suffered pain in these areas on a daily basis. The claimant began to experience belly pains and discomfort in the groin area. He was administered painkillers and steroid injections to assist with his ongoing pain.

154. The claimant testified that he attended various types of therapy sessions to help alleviate his pain and despite the many referrals he continues to experience unbearable pain.

The submissions of the defendant

155. The defendant cited the following;

i. ***"Jamal Mohammed v The Port Authority of Trinidad and Tobago***[25] *traversed a number of cases on general damages and cited with approval the dicta of Kangaloo JA in Munroe Thomas v Malachi Ford, Civil Appeal 25/2007:*

The assessment of damages for a personal injuries claim should be a straightforward arithmetical exercise…but far too often sight is lost the 2 fundamental principles: first, the personal injuries claim must never be viewed as a road to riches and second, the claimant is entitled to fair, not perfect, compensation."

ii. *With regard to claims for medical expenses, the court in* ***Wesley Gabriel v Royal Bank of Trinidad and Tobago***[26] *referred to the criticism of Kangaloo J in Theophilus Persad & Capital Insurance Limited v Peter Seepersad, CA Civ 136/2000 in which he was critical of the 'unhelpfulness of the type of medical reports coming before the court'. In similar vein, Hamel-Smith J in Parahoo v S.M. Jaleel Company Limited, CA Civ 11/2001 stated that 'in respect of loss of pecuniary prospects, the claiming party had to show that the injury was of such a nature that it rendered the party incapable of performing the job he was previously performing, or, for that matter, any other form of work whatsoever….In discharging this onus, medical evidence as to the nature of the injury and the residual effect that the injury may have had on the claimant's ability to work is imperative'.*

iii. *In* ***Carolyn Fleming v The Attorney General of Trinidad and Tobago***[27] *the Claimant was sitting on a chair at her desk when it*

[25] CV2011-1833
[26] CV2008-04072
[27] CV2007-02766; HCA No 709 of 2005/S-387 of 2005

collapsed beneath her causing her to fall to the floor and to suffer injuries – analogous to those suffered by the Claimant in this case. Permanent partial disability was 25%. An award of general damages of $80,000 was made. That case did a traversal of a number of decisions in which awards of general damages were made for similar injuries, among them Andre Marchong v TTEC, CV2008-04045 in which an award of $60,000 was made; Monroe Thomas v Malachi Forde, Civ App 25 of 2005 in which an award of $100,000 was left undisturbed by the Court of Appeal. In that the injuries were slightly more severe than in the instant case".

156. The defendant also submitted that the claimant's testimony that he played a lot of football was unlikely as the Claimant's earlier evidence was that he spent his after-work hours and weekends pursuing private jobs, to the extent that he would earn twice his monthly salary. The defendant argues that it is unlikely that the claimant's football/exercise regime would have been as robust or frequent as alleged and is very likely exaggerated. In addition, the Claimant took no steps to seek counselling in relation to his complaint of a *decline* in his sex life. The defendant submitted that any award if made at all should be very modest.

157. The claimant submitted that the sum of $200,000.00 would be a reasonable compensation for the claimant's pain, suffering and loss of amenities. He cited the following cases in support of his claim for damages;

i. ***H.C.A. 1052 of 2006 - Edmund Taitt v Kenny Rampersad and Ors***

The plaintiff suffered cervical cord injury, C5/C6 disc herniation with nerve root involvement, a frozen shoulder,

severe neck pains, erectile dysfunction and found standing or walking for a long period problematic. There was evidence that the plaintiff experienced continuous pain throughout his body, his social activities were limited and he was unable to drive. On 6th April, 2009 Ventour J awarded $125,000.00 for pain and suffering and loss of amenities; when adjusted to February, 2018 said award amounts to $197, 213.71.

ii. H.C.A. S-923 of 1999 - Roger Rampersad v T&TEC

The plaintiff suffered cervical spondylosis greater at C3/4 and lumbar spondylosis at L4/5 less L5; disc degeneration; post traumatic syndrome and scalp neuralgia; low back and neck strain on spondylosis and erectile dysfunction. On 28th September, 2012 the Court awarded $155,000.00; when adjusted to February, 2018 said award amounts to $191,398.00.

iii. H.C.A 2316 of 2001 - Moonsammy v Rolly Ramdhanie & Capital Insurance

The plaintiff sustained an injury to the L4/5 and L5/S1, had pain in right hip and lower back and underwent surgery. The plaintiff was assessed as having recovered less than 50% of the L4 and L5 nerves. He was awarded on 18th April, 2005 $75,000.00; when adjusted to February, 2018 said award amounts to $167,631.65.

iv. H.C.A. 04045 of 2008 - Marchong v T&TEC

The plaintiff fell from a chair and suffered 10% PPD, soft tissue injury and lumbar spasm, narrowing at L4-L5 with possible impingement of L5 nerve root and degradation at the L5/S1 level, resulting in back pain. On 21st May, 2010

the Court awarded $60,000.00; when adjusted to February, 2018 said award amounts to $86,559.60.

v. ***H.C.A. 810 of 1972 - McKenzie Valdez v Cecil Samlal***

A 25 year old plaintiff suffered disc herniation at the L4/L5 and L5/S1 intervertebral spaces and two discs were surgically removed, and the injuries adversely affected his sex life. On 23rd November, 1976 the plaintiff was awarded the sum of $8,000.00; when adjusted to February, 2018 said award amounts to $173,276.68.

vi. ***H.C.A. 513 of 1978 Elisha Sohan v Henry Hackett***

The plaintiff suffered wedge compression fracture of the 1st Lumbar vertebra, injury to knee, ankle and left hip. On 30th July, 1984 the Court awarded $20,000.00; when adjusted to February, 2018 said award amounts to $161,108.65.

vii. ***CV2009/1066 – Vialva v Ryan (dated 8th January 2013)****:-*

An adjusted award of $328,721.95 accurate to March, 2018 where the Claimant suffered post concussion syndrome; mild disc bulge at L3/4 level; diffuse disc bulge at L4/5; mild disc bulge at L5/S1. Surgery was recommended because of pains and neurological deficits. Permanent Partial Disability assessed at 40%. The Claimant was not fit to continue in his pre-incident employment.

viii. ***Civ. App. 56 of 2009 Wayne Wills v Unilever Caribbean Limited (dated 18th December, 2013)***

An adjusted award of $232,600.00 (adjusted from an original award of $200,000) accurate to March, 2018 where back injuries caused the Claimant to suffer lower back pain running down his legs and limited the Claimant to light physical work, unable to bend below waist level, lift objects

of more than 50 pounds, climb ladders, run or jog with a permanent partial disability of 25%. The Court of Appeal noted that the range of general damages for similar injuries is between $90,000.00 to $200,000.00, which, when adjusted for inflation to March, 2018, is now between $105,000.00 to $233,000.00".

Findings

158. Despite the treatments and pain killers administered to the claimant over time, he has benefited from very little relief and therefore obtained a referral to Dr. Ramnarine, a nuerosurgen. Based on Dr. Ramnarine's recommendation, the claimant is in need of further medical treatment. The evidence clearly demonstrates the tremendous difficulty he experiences with most mundane physical everyday tasks and the court accepts that evidence.

159. In relation to the decline in his sex life, there was no medical evidence or otherwise that addressed that aspect of the claim so that it will not be considered for the purpose of the award.

160. Judicial Trends

i. In ***Racquel Burroughs v Guardian Life of the Caribbean Limited***[28] a claimant, who fell off a chair at work, suffered tenderness and stiffness to the neck; cervical tenderness C4 to C7; mild L2/L3 and L5/S1 disc bulge. The main continuing effect was patella pain, but her neck and back pains, which also persisted, resulted in restrictions in ambulation and social

[28] CV2011-04315 delivered on May 17, 2017

activities. She was ascribed a 50% permanent partial disability for this pain. For the tenderness along her whole spine and neck, along with restriction of neck movement, she was given a 25% permanent partial disability. By ten months post injury, she was still experiencing pain, approaching maximum medical improvement, and was now in a chronic state. Master Alexander awarded her $78,000.00 for general damages.

ii. ***Kurlene Pierre v Miles Almandoz and Company & Trinidad and Tobago Insurance Limited***[29]; In this case the claimant suffered a loss of curvature of her cervical spine, disc degeneration of her cervical spine, restricted movement of her shoulder and neck, moderate to severe pain in her shoulder, neck and back, and such pain affected her ability to swim, dance and socialize. Further, the claimant could no longer perform simple household chores, her back pain was unbearable during her menstrual cycle, and experienced pain during sexual relations. An award of $110,000.00 was made for pain and suffering.

iii. ***Choon v Industrial Plant Services Ltd***[30]**,** the court awarded the sum of $90,000 (adjusted to $102,841 in December 2010) for pain and suffering and loss of amenities. The main injury sustained was an injury to the claimant's spine in the area of L5 S1. The claimant suffered acute pain for several days after her injury and was not relieved completely until the claimant had surgery in April, 2005. As a result of the injury, the claimant had an operation to remove the disc L5 S1 (a laminectomy and discectomy).

[29] Civil Appeal No. 2 of 2012 delivered on March 10, 2015 per Rajnauth-Lee J.A
[30] CV2006-00574 per Smith J

iv. In ***Darryl Abraham v The Attorney General of Trinidad and Tobago***[31] the claimant's injuries were nerve root irritation, nerve root compression, lumbosacral spasm with decreased range of movement, absent hamstring jerk, decreased ankle reflex, diminished sensation bilateral L5 dermatome, weakness of right ankle dorsiflexion, moderate spondylotic changes, osteophtic lipping L4-5, mild diffuse annular disk bulge at L3-4, mild left neural foramina stenosis, nerve roots irritation L3-4 and L4-5, diffuse annular disk bulge with focal disc protrusions at L4-5. The court considered that the claimant had injuries to more than one disc and that there were additional injuries to the ankle resulting in a wider gamete of injury. This court awarded $137,536.98 to the claimant for general damages. This sum adjusted to present is $156,086.47.

161. The court finds that the injuries referred to in the cases submitted by the claimant **(Edmind Taitt; Roger Rampersad; Moonsammy; McKenzie Valdez; Vialva; and Wayne Wills)** were of a far more serious nature than the present case so that they are of limited assistance to this assessment. Having regard to the evidence before the court and the judicial trends, the court finds that a just award for general damages is the sum of $160,000.00.

Special Damages

162. The claimant has sought the sum of $5,020.00 for medical expenses post his retirement.

163. The defendant submitted that although receipts for medical attention were tendered in evidence, the doctors to whom these monies

[31] CV2011-03101 delievred on September 26, 2013

were allegedly paid were not ascertained. Further, that no award should be given to the claimant as the claim for special damages was not specifically pleaded.

Findings

164. It is settled law that special damages must be specifically pleaded and proven[32]. The court finds contrary to the defendant's submissions, special damges were in fact pleaded at paragraph 15 of the statement of case and that pursuant to that pleading, the defendat agreed to the admission of the relevant documents that form the basis of the claim for special damages by way of the filing of the bundle of agreed documents.

165. As part of pain managing after retirement, the claimant continued to access medical care in an orthopaedic clinic and in a chiropractic rehabilitation clinic. He also sought decompression treatment (See paragraphs 40, 42, 43 of the claimant's witness statement). The claimant has annexed receipts totaling $5,020.00 for those medical expenses. Thus, the court will allow the sum.

Loss of future earnings

166. In the case of ***Dayal Moonsammy v Rolly Ramdhanie and Capital Insurance Limited***[33] Kangaloo JA set out the evidential burden on an injured party when claiming loss of earning capacity. Kangaloo JA referred to the locus classicus decision on this area of ***Moeliker v Reyrolle & Co. Ltd*** where Browne LJ stated:

[32] ***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
[33] CA 62 of 2003

"But what has somehow to be quantified in assessing damages under this head is the present value of the risk that a plaintiff will, at some future time, suffer financial damage because of his disadvantage in the labour market. As Orr LJ said in Clarke v Rotax Aircraft Equipment Ltd ([1975] 3 All ER 794 at 798, [1975] 1 WLR 1570 at 1576):

'It is true, as stated by Scarman LJ in Smith v Manchester Corpn, that the loss of earning capacity has arisen at the time of and in consequence of the incident, but its financial consequences may or may not arise at all or may arise at any future time.'

Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? I think the question is whether this is a 'substantial' risk or is it a 'speculative' or 'fanciful' risk (see Davies v Taylor, per Lord Reid ([1972] 3 All ER 836 at 838, [1974] AC 207 at 212) and Lord Simon of Glaisdale ([1972] 3 All ER 836 at 844, [1974] AC 207 at 220)). Scarman LJ in Smith v Manchester Corp. referred to a 'real' risk, which I think is the same test. In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with the facts of particular cases. For example, the nature and prospects of the employers' business; the plaintiff's age and qualifications; his length of service; his remaining length of working life; the nature of his disabilities; and any undertaking or statement of intention by his employers as to his future employment. If the court comes to the conclusion that there is no 'substantial' or 'real' risk of the plaintiff's losing his present job in the rest of his working life, no damages will be recoverable under this head".

167. The claimant submitted that as a result of the claimant's injuries, he has been assessed with a permanent disability of 30%. Dr. Renwick

Musai stated that a change of position of work would be beneficial to avoid future exacerbations of his condition. Further, the claimant testified that due to the injuries and pain he continues to experience, he has been unable to return to his previous work as an electrician which has severely diminished his earning capacity on the open market.

168. The claimant accepted that there was no reliable evidence in support of the claimant's claim for loss of earnings from his personal business. The claimant submitted that due the claimant's age, the multiplier/multiplicand approach would not be appropriate and puts forward the lump-sum approach[34].

169. The claimant further submitted that the claimant is now able to perform light duties and it is not unreasonable to assume that he may be able to obtain part-time employment. There is also no evidence that the claimant has any other notable skills or academic qualifications, allowing him to work in any other fields. He did, however, earn $7,053.50 monthly with the defendant. There is no evidence to suggest that the claimant would not have been able to work several more years past his retirement age at a high level.

170. The claimant submitted that a ***Blamire*** award is largely guesswork and suggest that the Honourable Court make an award in accordance with the ***Smith v Manchester[35]*** principle in making an informed guess. The convention is that such awards typically range from six months to two years' earnings: ***See Billett v. Ministry of Defence [2015] EWCA Civ 773***.

[34] ***Blamire v South Cumbria Health Authority (1993)*****P.I.Q.R.Q1,C.A**
[35] (1974) 17 KIR 1

171. As such the claimant submitted that the sum of $80,000.00 (representing one year earning at his monthly wage with defendant) is appropriate compensation for loss of future earning capacity, at the very least the Claimant should be entitled to $30,000.00 (representing one year of earnings at minimum wage).

172. The defendant opposed the claimant's claim for loss of future earnings as it was not substantiated on the evidence of the claimant's testimony. Further, there was not a scintilla of evidence in support or in the pleadings to suggest that there was any likelihood of guaranteed employment (or any at all) from the defendant after his retirement. At trial the claimant admitted that not only did the defendant not rehire him after his retirement, but that he did not ask to be considered for post-retirement employment. As such, the defendant submitted that this head of claim should fail.

Findings

173. The court accepts that the claimant carried on a personal business as an electrician for the past thirty-five years. There is also no dispute that the claimant was a career electrician since 1980. Further, the defendant's submissions that the claimant exercised and played football at least twice per week and would not have time to undertake jobs after work hours is mere speculation.

174. It is accepted by the court that the claimant cannot resume his job as an electrician due to the injuries. Further his ability to engage in strenuous physical activity, especially involving lifting objects, climbing ladders or standing for extended periods is gravely affected. The court is

therefore satisfied that the claimant has established a partial loss of earning capacity on the labour market.

175. The court is tasked with projecting a sum without documentary evidence. As a result of the evidential uncertainties, the claimant's claim for a ***Blamire (supra)*** type of award is appropriate. As such, the court awards the sum of $72,000.00 being $6000.00 per month for a period of one year.

Workmen's Compensation

176. Based on the learning of the Court of Appeal decision in ***PTSC V Nerahoo Sookhoo Civ App No 21 of 1993*****,** the claimant having been paid workmen's compensation in the sum of $55,243.27, said sum should be deducted from the award for future loss of earnings.

DISPOSITION

177. The court will therefore make the following order;

a. Judgment for the claimant against the defendant for negligence as follows;

i. The defendant shall pay to the claimant, general damages in the sum of One Hundred and Sixty Thousand dollars ($160,000.00) together with interest at the rate of 2.5% per annum from May 23, 2017 to the date of judgment;

ii. The defendant shall pay to the claimant, special damages of:

a. The sum of Five Thousand and Twenty dollars ($5,020.00) and

b. Loss of earnings in the sum of Sixteen Thousand Seven Hundred and Fifty-Six dollars and Twenty-Seven cents ($16,756.27).

iii. The defendant shall pay to the claimant the prescribed costs of the claim.

Ricky Rahim

Judge