THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.CV 2015-01345

Between

SHERIFFA ALI

Claimant

And

MASSY DISTRIBUTION (a Firm)
(formerly known as Marketing and Distribution)

First Defendant

$ VALUE SUPERMARKET (a Firm)

Second Defendant

Appearances:

Claimant: Earl John

1st Defendant: Kirk Bengochea instructed by Ramnarine Mungroo

2nd Defendant: Richard Arjoon Jagai instructed by Sham Sahadeo

Before The Honourable Mr. Justice Devindra Rampersad

Dated 22 November 2017

JUDGMENT

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Introduction

1. The claimant was at all material times an employee of the first defendant carrying out duties on the premises of the second defendant when she was injured on 6 May 2011. The claimant has sought damages for negligence and/or breach of the occupier's duty of care. There was no disputing that the claimant was injured but the defendants averred instead that her injuries were the result of the claimant's own negligence in that she failed to adhere to the defendants' safety protocols.

2. The court considered the evidence of the parties and found that the defendants may have had written safety protocols to prevent the type of injury sustained by the claimant. However, the evidence suggested that these protocols were not reflected in the established operational practice at the second defendant's premises. The claimant regularly operated outside of those set regulations in complicity with and with the concurrence of the second defendant's employees and with the knowledge of the first defendant. In the circumstances, the court found that the claimant was entitled to be compensated by the defendants for the injuries and damages sustained. The court however found the claimant contributorily negligent and allocated liability 80% to the defendants and 20% to the claimant.

Background

3. The claimant was at all material times a Merchandiser employed with the first defendant. Merchandisers manage that part of the supermarket's real estate occupied by a particular product supplied by the first defendant.

4. At the second defendant's premises, goods were stored on the second/upper floor and merchandise was offered for sale on the first/ground floor. There was in place, at the material time, a specially designed mechanized goods lift controlled by an electrical hand held switch to lower goods from the second floor to the ground floor. According to the defendants, warehouse attendants are responsible for placing goods in the lift as well as lowering the lift.

5. On 6 May 2011, the claimant, in the course of performing her duties, was retrieving a box of the first defendant's products from the second defendant's warehouse.

While in the process of standing outside, bending and placing the box in the lift, she was struck in the head by the bar of the lift. It was the claimant's pleaded case that the lift became loose and crashed down to the ground floor.

6. The claimant averred that because of the aforementioned incident she sustained numerous injuries and a permanent partial disability of twenty five percent (25%). In this regard, the claimant relied upon the medical report of Dr. S. Mc Benedict dated 19 July 2011 and the medical reports of Dr. Rasheed U. Adam dated 3 June 2013 and 22 April 2015.[1]

Issues Arising

On the first defendant's defence

7. The first defendant was unable to state how the accident happened but the following issues were identified by its pleadings, having also taken into consideration the claimant's reply:

   7.1. Whether it took all reasonable precautions to provide for the safety of the claimant. More particularly, whether the first defendant, prior to merchandisers being sent there, conducted an inspection of the second defendant's premises;

   7.2. Whether the claimant disregarded general safety rules and regulations. Also in issue was whether an alleged written document - the "General Safety Rules and Regulations for Merchandisers" - relied upon by the first defendant was in existence at the time of the accident or prior thereto;

   7.3. Whether the claimant was only required to place goods close to the lift for the second defendant's employees to place the goods on the lift. The claimant said in her reply that the merchandisers had to pack their own goods and that the policy requiring goods to be placed close to the lift was only implemented after she became injured;

   7.4. Whether the claimant was wholly or partially negligent for her injuries; and

   7.5. Whether the claimant' s permanent partial disability was 20% as stated in report of 3 June 2013 or 25% as stated in the particulars of personal injuries.

[1] Annexed in a bundle and marked as "A" in the Claimant's Statement of Case

On the second defendant's defence

8. The following issues were identified based on this party's pleadings and having considered the claimant's reply :

8.1. Whether there was a stock retrieval policy in place whereby requests had to be made to warehouse attendants who would then place same in the lift and be responsible for lowering the lift to the ground floor;

8.2. Whether the claimant reduced that alleged policy into signage warning the claimant to keep away from the lift. The claimant said that there were no signs attached to the gateway of the lift at the time of the accident and that any such signs were placed after she got injured as a direct response to her injury;

8.3. Whether the merchandisers were allowed access to the storeroom;

8.4. Whether the claimant entered the storeroom without consent. In her reply, the claimant said that she relied upon the general practice that the merchandisers had to retrieve goods for themselves;

8.5. Whether the claimant was therefore in breach of the internal stock retrieval policy;

8.6. If the former issues are answered in the positive, whether the claimant then became a trespasser;

8.7. Whether the goods lift became loose or crashed to the ground. The second defendant accepted at paragraph 10 that the claimant struck her head on the bar of the lift that was partly lowered at the time but denied that it crashed to the ground;

8.8. Whether the risk was reasonably foreseeable in the circumstances where there were trained and experienced warehouse attendants;

8.9. Whether the claimant was wholly or partially liable i.e. contributory negligence at the very least;

8.10. Whether a plea of *volenti no fit injuria* can be sustained as it was alleged that the claimant willingly accepted the risks of such damage; and

8.11. Whether the plea of *res ipsa loquitor* arises?

Kamla Emrith

9. Ms. Heeraman, formerly Ms. Emrith, came across as a compelling witness who came to tell the truth. She was not afraid to admit that the loading of the lift was not part of the duties of the merchandisers. She did not seem to come to defend the indefensible. Instead, her evidence supported what the claimant had to say as to the practice which had developed and which was allowed to develop over the years i.e. that the merchandisers would load the lift. That practice seemed to be part of an accepted manner in which the warehousing department operated rather than a one-off occurrence.

10. It was suggested to this witness, and the claimant, that their witness statements were very similar as if to suggest some sort of collusion. Both of them, however, denied having read each other's witness statements or having been together in the room with the attorney when their statements were taken. Having seen and heard both of them give evidence the court believes them and puts the similarity down to the unfortunate practice of attorneys not following the rules.

11. There was however an obvious disconnect between her simple viva voce evidence in cross examination and the more complicated written evidence set out in her witness statement. As in so many, too many, other matters[2], the similarities seem to have arisen because of the cut-and-paste approach adopted by attorneys. To my mind, this approach is one of the greatest diseases to inflict the post CPR witness statement situation and, despite the obvious statement of the rule in Part 29[3], expediency is too often favoured over the risk of loss of credibility. Again, this court reiterates its concern for the pressure put on witnesses by their own attorneys upon whom they rely for legal advice but who, instead, adopt this cut-and-paste approach. This forces witnesses to think that they must stand by their witness statements even in the face of obvious copying. The purist may argue that a witness ought to admit truthfully, when asked, that they did not prepare their witness statement and that their attorney really prepared it. However, the practical experience has been that, more often than not, witnesses seem to feel that they ought not to accept that anyone other than they prepared the witness statement. It

[2] See this court's discussion in CV 2013 – 04946 ***Mukesh Rampersad & Or v Ramkarran Ramparas & Or*** at paras 125 et seq

[3] Part 29.5 (1) provides that: *"A witness statement must – (d) so far as reasonably practicable, be in the intended witness's own words;"*

is unfair for their legal representatives to place them in this position since the former ought to know better.

The Claimant

12. The claimant was a very responsive and alert witness who tried her best to pay attention to the questions and impressed the court that she was doing her best to answer them truthfully, even when the answers seemed contrary to the case that she had put forward. She did not come across as a person who had deliberately tried to mislead the court on her written witness statement. Instead, again, it seems that there was a disconnect between her actual viva voce evidence in cross examination and the evidence set out in the witness statement filed on her behalf and as expressed in language which quite obviously was not hers and which was really the language of her attorney at law. This was evident from the fact that during her cross examination counsel's language had to be broken down on more than one occasion to enable her to understand the question.

13. This witness readily accepted that she was doing something that she knew was not part of her job description and which was designated to be done by warehouse attendants, that was, loading the lift. Her evidence as to the attitude of the warehouse attendants nonetheless remained uncontroverted as it was never suggested to her that what she had said about the warehouse attendants was untrue. She described the attendants as usually being busy with other duties, having no time for merchandisers, and indicated that they would never help to retrieve goods once they felt the goods were not heavy.

14. Even if there was to be a challenge to her evidence, there was no evidence from persons on the scene to refute it. The second defendant's attorney questioned the credibility of the evidence as the claimant herself gave evidence that on the morning of the incident those very attendants brought down cases of the product for her upon her request. At the time of the incident, however, the claimant was dealing with one box. She readily admitted that the one box that she went to collect was an extra one that was needed following the warehouse attendant obtaining a previous set of boxes of the same product. This was consistent with her evidence that the attendants would assist when the goods were heavy.

15. Therefore, the court accepts that even though the second defendant had set down a policy in terms of the loading of the lift, in reality, a different practice had been mutually adopted by the claimant, as a merchandiser, and the warehouse attendants. This practice, as described by the claimant's witness as well, seemed

to be one that was not restricted to the claimant but was a generally accepted one. The court accepts the claimant's adamant response that a complaint was made to the second defendant's supervisor but that did not produce any results. It was suggested to her that she did not make any complaint to the first defendnt but, having seen the claimant in the box, she came across as being a placid and compromising person who was not one to challenge authority or to "rock the boat". It was therefore quite understandable that her complaints were primarily directed to those who could have actively done something about the situation, namely the second defendant's supervisor rather than her employer. However, the court does accept that she made complaints to her employer as well.

The Evidence for the Defendants

Domini Harewood

16. Ms. Harewood was the Human Resource Director. Her duties and responsibilities were stated by her as being to ensure the proper and efficient operation of the first defendant's company in conformity with the first defendant's set policies and guidelines which included, but was not limited to, promoting and implementing human resource values by planning and managing human resource programs and directing staff. She indicated that she had custody of all the documents in relation to the claimant's employment. Her list of managerial duties, understandably, did not include safety issues and concerns and the documents in relation to the claimant's employment did not include any safety reports whatsoever. In fact, she readily accepted in cross examination that, even though she said that she was familiar with issues of merchandisers' safety at work, she had never been to the second defendant's supermarket and no Health and Safety Officers were brought as witnesses. Further, she provided no Health and Safety Reports in relation to the supermarket or in any way relating to the claimant's employment. Therefore, the court has absolutely no hesitation in coming to the finding that she was not familiar with the second defendant's supermarket, the safety issues arising or the procedure which was or was not adopted at the second defendant's supermarket.

17. The main thrust of her evidence, therefore, was to establish that training was done by the claimant. However, despite her statement that she had attached true copies of the various records of the first defendant that demonstrate that the claimant had attended various training courses, a perusal of the alleged copies attached as

"D.H.1" did not support this contention. Instead, all that was attached was a flowchart of sorts headed "Merchandising Procedure". There is nothing on the document to indicate that the flowchart or any of the items identified thereon were pointed out to the claimant or that she attended any training course whatsoever in relation to the same. Therefore, with the greatest respect, the court finds the document unhelpful and irrelevant. The court will place no weight on the document as, respectfully, it does not show anything in relation to the claimant or her knowledge of the matters set out therein or her actual training in relation to the same.

18. The other factor that this witness was obviously brought to give evidence about was what she called "the Golden Rules" – the "General Safety Rules and Regulations for Merchandisers" attached at exhibit "D.H.2". However that exhibit is undated, does not relate to the claimant on the face of it and the statement of acknowledgment of these responsibilities set out in this document does not refer to the claimant. When one looks at paragraph 9 of her witness statement, to which this document is attached, there is no mention that she was ever present when these rules were discussed with the merchandisers, including specifically the claimant. Neither did she indicate at paragraph 6 of her witness statement that she was present when the complete overview on safety for merchandisers as well as first-aid training in 2010 and job hazard analysis training in 2011 was conducted and therefore is not able to state if the claimant was present for these sessions. Certainly, she ought to have had records of the attendance of the claimant at these sessions but none were produced. Therefore, once again, this evidence is of no value. This witness therefore did not establish that these rules were ever brought to the claimant's attention or that she was ever given a copy of the same or that she ever attended any of the training sessions referred to above. When the court contrasts this evidence to that of the claimant, which was that she was only given a copy and asked to sign it ***after*** the incident occurred – an allegation which was corroborated by the fact that the only document with her signature on it carried a date after the incident – the court finds that the document was not in fact presented to the claimant ***prior*** to the incident.

19. To my mind, this was an attempt to mislead this court into finding that this document was given to and accepted by the claimant before the accident.

20. When it was put to her that Health and Safety Officers only visited the premises after the incident as alleged by the claimant in her pleadings, she confidently answered that that was not so. This bald statement was said notwithstanding the

fact that she had produced absolutely no records, logs, reports or any other contemporaneous documents to confirm or corroborate this allegation. Further she did not impress this court that she had any apparent personal knowledge as to whether this was in fact so. It must have been obvious to the first defendant from the pleadings that the claimant had made such an allegation yet it made no attempt to refute this in any corroborated or cogent manner. Consequently, when faced with the two versions, the court accepts the claimant's version that as far as she was aware, the first defendant did not conduct any such visits prior to the incident. Certainly, none were cogently alluded to by the first defendant or, for that matter, by the second defendant's witness.

21. At the end of the day, although she was a confident person in the witness box, as one would expect having regard to her position and job description, Ms. Harewood did not assist this court in establishing the vital factors of the first defendant's system of work in so far as they related to the claimant's knowledge of the same. She spoke generally about an ideal process, possibly, but failed to pin it down to the specifics of the claimant's situation.

Clara Ramdansingh

22. Ms. Ramdansingh was the merchandising supervisor for the first defendant and was a merchandising supervisor for approximately 8 years. She gave cogent evidence about visiting the stores at which the merchandisers operated and she was convincing when she said that she was familiar with the lift at the second defendant's supermarket.

23. This witness contradicted herself on two issues.

24. Firstly, she stated at paragraph 16 of her witness statement that for the duration of time that the claimant was assigned to the supermarket, she did not inform her of any complaints or difficulties that she had encountered at the supermarket. However, at paragraph 22 (b) of the same witness statement she said that the claimant ***often*** complained about the length of time it took the supermarket employees to pack goods on the lift. In cross-examination, when this disparity was drawn to her attention, she said that her statement at paragraph 16 was true and that it is only when an issue was raised that the claimant came and complained. Clearly, this still contradicts paragraph 16 but, also very importantly, it indicates that the first defendant was aware of a problem similar in nature to what the claimant was alleging but did nothing about it. At least, there is no evidence of

either herself or anyone on behalf of the first defendant doing anything about it or addressing it at all. When one looks at what is said at paragraph 22 (b), it is easy to see the similarity between what the claimant said was the problem and what this witness admitted that she complained of. That similarity was the failure of the warehouse attendants to attend to their work in a timely manner. Obviously, this would have impacted upon the claimant's ability to complete the work and the possible consequences of this failure on the part of the supermarket employees could quite reasonably and conceivably have led to exactly what the claimant has complained of in these proceedings.

25. The other contradiction arises out of paragraph 20 of her witness statement where she indicated that she was informed and verily believed that the claimant was now managing a store in Valsayn for her son. Even though that sentence was objected to by the claimant, the court had allowed it into evidence as it went to the issue of quantum. However, in cross-examination, she admitted that she did not know if the claimant was working in such a manner nor did she bring any witness to say that the claimant was working in such a manner. This allegation in her witness statement indicated an element of *mala fides* in her evidence. Why would she say this about the claimant if she had no evidence and did not know it for a fact? Obviously, it was done to colour the court's mind negatively against the claimant. This evidence, to my mind, caused this court to be extra vigilant about the evidence of this witness.

26. On the other hand, this witness' evidence lent support to the claimant's case as she failed to mention that she had ever seen any warning signs placed in the vicinity of the lift .This is especially pertinent in light of the fact that she was there every week during the course of the claimant's employment. The issue was placed in contention on the pleadings and was not refuted by anyone for the first defendant. If it was not apparent to her, then it may not have been apparent at all and it lends credibility to what the claimant said in relation to such signs i.e. that they were not put up until after the incident.

27. Ms. Ramdansingh indicated certain training courses which the claimant had participated in on 23 December 2010:

    27.1. Customer Service and Professionalism I

    27.2. Customer Service and Professionalism II

    27.3. Welcome to Online Training

    27.4. Welcome to IGA.

The document annexed to her witness statement setting out this information indicated that the claimant was ***enrolled*** to do these courses but there was nothing confirming that she did in fact participate in them.

28. She also indicated the following other courses done by the claimant:

    28.1. HSE - date attended 11 March 2006;

    28.2. Ladder Safety – date attended 3rd and 4th of March 2009;

    28.3. National Financial Literacy – date attended 12 May 2009;

    28.4. First Aid – date attended 13 August 2010;

    28.5. Personal Financial Management – date attended 2 October 2010.

29. The court notes that this witness did not provide course descriptions for any of these courses and training sessions and therefore while it does establish that the claimant may, or may not in respect of the first set of sessions, have attended these courses, their relevance to the case for determination by this court was not established.

30. The witness mentioned at paragraph 7 of her witness statement that the claimant and other merchandisers received a complete overview on safety once a year and the claimant attended monthly meetings for all merchandisers in 2011 conducted by the merchandising manager. She said that at each meeting, the "General Safety Meeting rules" were discussed and the merchandisers were informed that they were to comply with the said rules and that they were to place all goods outside the lift and ask employees in the supermarket for assistance in loading the lift. She did not immediately clarify what the "General Safety Meeting rules" were or how they related to the so-called Golden Rules – the "General Safety Rules and Regulations for Merchandisers" attached at exhibit "D.H.2" of the witness statement of Ms. Harewood. However, she did say at paragraph 22 (a) of her witness statement that the "General Safety Rules and Conditions for Merchandisers" existed before the incident in May 2011 and was discussed in the merchandisers meetings which happened monthly. Particularly, however, she did not mention that she was aware that a copy of the same was ever given to the claimant.

31. The witness indicated that a health and safety briefing was also conducted at the monthly merchandising meetings and at the said briefing, the merchandisers were instructed by the Health and Safety Coordinator not to enter the lift or place any items on the lift but to place the goods close to the lift since it was the duty of the

warehouse employees in the supermarket to place the goods on the lift for the merchandisers. It is interesting that both Ms. Ramdansingh and Ms. Harewood referred to matters which could easily have been dealt with first hand by a member of the Health and Safety department who could have spoken to the inspection of the premises, the assessment of risks arising out of the inspection of the premises and any reports, the instructions given and the reasons for giving these instructions, etc. Yet, no member of that department attended to give evidence and to establish whether any risk assessment in respect of the second defendant's supermarket was ever done.

32. As referred to above in relation to the claimant's evidence, it is clear that the claimant was aware that she was not supposed to have loaded the lift so it is more probable than not that this information arose as a result of the meetings which this witness alluded to. However, the court returns to the issue raised at paragraph 22 (b) of Ms. Ramdansingh's evidence and the failure to act on the complaint raised, which she described as an "often" complaint.

Sintra Persad-Manurath

33. Ms. Manurath was the sole witness for the second defendant. She described herself as the second defendant's store manager and had been with them since 2001, having also being employed by the previous owner of the supermarket that occupied that same location. She was obviously quite familiar with the layout of the property and spoke about the interactions with the merchandisers who would visit the store on a regular basis, one of whom was the claimant. She described in detail the lift in question and indicated that the lift was not designed to convey persons but only to convey goods between floors. She provided photographs and a video recording of the lift in operation in evidence. She recognized that the nature, size and weight of the lift could pose a threat if misused since it had limitations in terms of the weight carrying capacity and the manner in which goods were loaded which was the reason why warehouse attendants were provided and appropriately trained in the correct use of the lift.

34. She confirmed that the warehouse attendants were given instructions on the safe use of the lift and informed of how to safely operate the lift as well as safe offloading and loading procedures. She also confirmed the store's policy that requests had to be made by a merchandiser to the warehouse attendants when the merchandisers required goods and that this was done orally or in writing. No example of any such written request was provided. She confirmed that merchandisers were not allowed to retrieve goods from the warehouse shelves

and she gave reasons for this policy although she never said that this information was made plain to merchandisers by way of any written or oral instruction.

35. The witness did say that one of the procedures adopted by the second defendant was to ensure that all new merchandisers coming to the store for the first time were informed of the stock retrieval system and the conduct expected of them while in the supermarket. However, the court was left to infer that this restriction on the retrieval of goods was indicated to this particular claimant in some manner. The court notes, however, that the claimant showed familiarity with this policy so that such an inference seems well placed. She also confirmed that merchandisers were strictly prohibited from loading goods onto the lift and or operating the lift, again without indicating when and how this prohibition was communicated to the claimant and by whom.

36. Importantly, she confirmed from the second defendant's records that the lift did not become loose or crash to the ground floor on the day in question.

37. In her supplemental witness statement, she indicated that it was part of her routine duty to speak to, amongst other persons, merchandisers and she had no recollection, when she did this witness statement on 11 March 2016, of any complaint from the claimant or the claimant's witness regarding warehouse attendants refusing to assist. She went on to say that any worker not carrying out their work functions in a proper manner would result in disciplinary action but she never had cause to commence any proceedings against any warehouse worker.

38. She did agree that from time to time, there may be a waiting period from request for goods to retrieval and merchandisers were advised to use their waiting time in other constructive managers without identifying who gave such advice.

Analysis and discussion

39. To the court's mind, it would have been necessary for this witness to have addressed the obvious concern that a court would have in relation to what transpired on the day. Obviously, she was not there and she brought no one to give evidence as to what happened. Strikingly, she made no mention whatsoever in her witness statement of the identities of the warehouse attendants who were on duty at that point in time although, in cross-examination, she said that they were no longer working with the second defendant. In giving this evidence, she failed to identify what steps she took to have them attend to give evidence in this matter. The fact that they were no longer working with the second defendant did not mean necessarily that they were not available to give evidence. She did not

give evidence of not having contact information for them and one would expect that the second defendant would keep records of the names, addresses and contact numbers for its employees, especially in circumstances where, according to her, this was the first time that any such incident had occurred. It is strange that no statements were obtained or presented by the defendant in relation this incident.

40. Without any explanation for this failure to have them give evidence, other than to say that they were no longer employed, the court is free to make an inference that their evidence may well have proven to have been adverse to the second defendant's assertion of its stated policy in these proceedings. It may very well be that no effort was made to bring them before this court since their evidence was no longer shaped by their employment with the second defendant. The court does not know the truth of the reason for this default but must express its concern at this failure to produce them. Obviously, these persons were in the best position to indicate what happened on a daily basis behind the scenes in the warehouse at the time. They could have refuted the claimant's allegation as to the practice that had developed so that their absence is even more glaring. It is all good and handy to describe the utopian principles of proper practice and procedure but it is often a different proposition when it comes to implementation. Nowhere in her evidence, or in any evidence for the second defendant, was the actual practice of what transpired behind the scenes in the warehouse put before the court. Instead, the court had evidence of generalizations - of procedures and policies formulated, quite obviously, managerially in board rooms or offices - but without evidence of the actual practice.

Findings on Liability

41. Did the lift crash or did the bar fall?

42. The court finds that there is no evidence of the lift crashing. In any event, despite the plea at paragraph 7 of the statement of case, the claimant gave no evidence of the lift crashing. The manner in which the claimant indicated that the accident occurred is more consistent with the bar falling.

43. The court has no doubt that even though there was a policy in place, which the claimant was aware of, that the lift was to have been operated by the warehouse attendants, a contrary practice had developed in circumstances such as this.

44. The court accepts the claimant's unchallenged evidence[4] that one of the warehouse attendants showed her how to operate the lift and after that she received little assistance from them[5]. This is a telling piece of unchallenged evidence since it serves to substantiate the expectations and operation of the practical reality. In fact, the claimant's explanation that the warehouse attendants would not have wanted to be troubled by having to retrieve one box at a time is quite an understandable and reasonable one, especially in light of the society in which we live. The court therefore accepts that even though the established policy was that warehouse attendants would retrieve the goods from the warehouse, again, in reality, the attendants would only help if the goods were very heavy and, otherwise, the merchandisers had to retrieve the goods themselves.

45. The court notes the explanation given by the second defendant for the failure of the warehouse attendants who were employed at the time to give evidence in this matter on the ground that they no longer worked with the second defendant. However, the second defendant's witness did not identify what attempts were made to locate them and surely the second defendant would have had their contact information including phone numbers and addresses. Therefore, on its own, the fact that they no longer worked with the second defendant did not mean that they were not or would not have been available to give evidence in this matter as to what transpired on the day. Further, no warehouse attendant gave evidence on behalf of the second defendant to refute the suggestion that the practice as described by the claimant had developed.

46. Therefore, in the light of this unshaken evidence, the court accepts that the claimant acted according to the established practice, as opposed to the stated protocol, as a result of which she suffered the injury.

47. The court further accepts that the claimant complained of this situation to the first defendant's representative, who accepted that complaints were made that the attendants were taking too long to pack goods on the lift. As a result, notwithstanding the stated policy, the court finds that the same was not enforced, whether by the first and/or the second defendants. In respect of the second defendant, the court notes that the second defendant's witness did not give evidence that the policy which was described was ever monitored or enforced –

[4] See H.C.A. No. 11 of 2002 H.C.A. No. 66 of 2002 ***Debbie Mohammed v Archibald Bellamy & Ors*** at para 4 et seq

[5] Paragraph 11 of her witness statement.

only that no other incident like this had occurred. That may have been a matter of luck rather than of compliance.

48. As a result, the court finds that, in the case of both defendants, they failed to properly address the practical issue for this court's determination in their evidence, especially in respect of the second defendant who failed to call the 2 warehouse attendants who were present on the day and who could have refuted the claimant's allegations of the practice which had developed. At the same time, however, the court accepts that the claimant was aware that she was doing something which she was not authorized to do and therefore subjected herself to the possibility of harm thereby contributing to her own circumstances.

49. In the circumstances, the court will find for the claimant against both defendants but also finds that she contributed to her own injury. The court therefore finds the defendants 80% liable for the claimant's injuries and the claimant contributorily negligent for the remaining 20%.

The Quantum of Damages

General Damages

50. The statement of case pleaded the claimant's injuries as follows:

    50.1. Laceration to scalp with bleeding;

    50.2. Laceration to back of head secondary to trauma;

    50.3. Tenderness in the laceration site;

    50.4. Restrictions in neck movement and neck pain;

    50.5. Headaches and lightheadness;

    50.6. Dizziness plus forgetfulness;

    50.7. Blurred vision;

    50.8. Post traumatic syndrome;

    50.9. Neck Strain;

    50.10. Permanent partial disability of twenty five percent (25%).

51. It went on to state that the claimant received treatment on the day of the accident at the Emergency Department, San Fernando General Hospital and follow up

treatment from private medical practitioners. She was admitted to the General Hospital with a laceration to the scalp and bleeding. There was no loss of consciousness or swelling and she was discharged from the hospital after a few hours and initially placed on 10 days' sick leave.

52. The first defendant recommended that the court have regard to the following authorities when assessing quantum, some of which the second defendant also referred to:

52.1. ***Damian Moreno v Anthony Brusco et al*** HCA No. 3130 of 2004 - a decision delivered 7 October, 2009 by this court. The claimant was awarded $35,000 as general damages for personal injuries which included post concussion syndrome and thoracic spine strain as well as a 2 cm laceration to the right cheek and multiple abrasions to the left cheek. The court was not satisfied with the quality of the medical evidence given nor with the plaintiff's evidence as it was found that the plaintiff was prone to the exaggeration of his claim and of his symptoms having regard to the manner in which he gave his evidence at trial. The court thus did not accept the intensity of the continuing disability alleged by the plaintiff and seriously doubted the findings made by the plaintiff's doctor that were based upon whatever subjective symptoms related to him by the plaintiff. The court was also unable to come to any finding as to the effect that the accident had on his quality of life.

According to the first defendant, the award updated to April 2015 using the Retail Price Index is valued at $50.657.32. The second defendant submitted that this award updated stands at $43,850.00 but it failed to state how that figure was calculated.

This matter was however the subject of an appeal. The Court of Appeal was unable to disagree with this court's finding in relation to the claimant's propensity to exaggerate the claim but nonetheless found the award for general damages to be unjustifiably or inordinately low. It was found that while it was not accepted that the claimant suffered extreme pain, the possibility of pain or that the claimant would suffer pain in the future was not exclude at the trial. There was no finding made at first instance in that regard and the award for general damages was thus increased to $75,000 on 12 December 2014 by the Court of Appeal.

52.2. ***Jane Craig v L.J. Williams Limited*** CV2009-01023 - a decision delivered 30 July 2012. The plaintiff was awarded $25,000.00 in general damages. She was a customer at the defendant's place of business when an iron object fell on her head. She was taken to the hospital for treatment and discharged the same day. The court accepted that she continued to have headaches and dizziness over a period of time but the court found that there was no evidence of the continuing frequency of headaches. The court also found that the claimant's pecuniary prospects were not affected.

According to the first defendant, the award updated to April 2015 using the Retail Price Index is valued at $28.950.65 whereas the second defendant indicated that the updated value as at July 2015 is $28,623.00.

52.3. ***Wilson v Super Mix Feeds*** HCA No. 3809 of 1983 - the plaintiff suffered lacerations, bruising, tenderness of the head, chest, legs and spine. An award of $2,750.00 was made by the court in 1983.

This figure adjusted in July, 2015 using the Retail Price Index is valued at $39,958.81 according to the first defendant.

52.4. ***Kent Hector v Indranie Bhagoutie and Re-insurance Company*** HCA 1115 of 2000 – delivered on 14 June 2006. The plaintiff was involved in a motor vehicle accident and suffered soft tissue injury to his chest, neck and right shoulder as a result of the defendant's negligence. The court found that an award of $19,000.00 was reasonable in the circumstances as there was no evidence that his disability seriously affected his work and at 2001 his permanent partial disability was 10 per cent; lingering disabilities were relatively minor pain and discomfort; and there was no need for surgeries, no medical diagnosis of whiplash injury, no bone injury or neurological deficit.

According to the first defendant, this award updated to December 2014, using the Retail Price Index is now valued at $36,330.87.

52.5. ***Newton Elliot & Ors v Roderick Joefield & Anor*** HC T90/1988 - delivered 14 February 2012. This matter concerned a claim by the 'Elliot' family as a result of injuries sustained as a result of a collision. The father sustained injuries which included a big haematoma 4" x 5" with abrasion on the right temple; 4" x 3" haematoma forehead left side; abrasion right cheek; linear abrasion right shoulder and tenderness in the right upper anterior chest wall; multiple linear abrasion on right forearm; 3" x 3" deep abrasion upper

portion of the right thigh; 1" laceration right mid finger; and subsequent hospitalization for five (5) days. Nonetheless an award of $20,000 was made as the court found that the injuries sustained by the plaintiff/father were neither extensive nor debilitating. The plaintiff daughter was awarded $40,000. The daughter suffered a severe concussion along with a 3" by 3" haematoma in my mid-forehead; a punctured wound on the bridge of my nose; abrasion to my left and right knee and anterior aspect of my left elbow. She was hospitalized for several days following the accident for further management.

The first defendant provided an updated figure for the father's award only to $23,584.81.

53. The first defendant submitted that the award to the claimant ought to be in the range of $35,000 - $45,000 but in any event $40,000 is appropriate. The second defendant submitted that the award of $30,000 is sufficient to meet the justice of the case, despite having previously indicated that the award ought to be in the range of $75,000 - $95,000, and relied on the additional cases of:

53.1. ***Keith Gittens v Minerva Hutson*** HC 290/1990 – delivered 29 March 1993. The plaintiff sustained trauma to his head and right chest; loss of consciousness for an undetermined period of time; 5 c.m. laceration behind right ear; 2 c.m wound on his right forehead; and his right chest was tender as a result of a vehicular accident. An award of $5,000 was made for general damages.

According to the second defendant, that figure updated to June 2014 is valued at $18,192.00.

53.2. ***Clifton Richardson & Ors v Kiss Baking Company Limited*** HC 696/1996 – delivered 21 January 2000. The injuries of the second plaintiff are more severe than that being considered as it involved a penetrating eye injury. As relates the first plaintiff, he was a self employed electrician who suffered head injury, permanent partial disability assessment -two percent; soft tissue injury to back, permanent partial disability assessment -five percent; and flexion extension injury [cervical vertebrae] permanent partial disability assessment -five percent as a result of a vehicular accident. He was awarded $35,000 and the unchallenged medical evidence did not in any way suggest that this plaintiff was unfit or unable to work as an electrician or even that he was partially unfit or unable to do so.

According to the second defendant, this figure updated to July 2015 stands at $92,935.18.

54. The second defendant suggested that the claimant had not proven any long term and debilitating effects to support anything but an award for minor injuries.

55. The claimant instead asked the court to place reliance on the cases of:

55.1. ***George Cadogan v Godwyn James*** HCA No. 1915 of 1997 - delivered 19 January 2005. In that case the plaintiff was diagnosed in 1996 as suffering from scalp neuralgia, post concussion syndrome and neck strain as a result of a vehicular accident. The plaintiff also suffered a broken right leg. Permanent partial disability was assessed at 30 percent. Before the accident the plaintiff was a rifle soldier but was placed in the stores when he returned to work because of his condition. He was awarded $80,000 in general damages.

According to the claimant, this figure updated to 10 March 2016 stands at $154,704.06 and when a deduction of 40% is made for the injury to his leg, that amounts to an award of $92,822.44.

55.2. ***Anna M.H. Peters v Andre Ramjohn and Anor*** CV2007-01972 – delivered 29 September 2010. The claimant suffered injuries as a result of a collision which included a narrowing of C5 and C6 of the cervical spine which led to spondylosis; her neck movements were restricted and she was also diagnosed as suffering from Post Concussion Syndrome. At the time of the accident she was employed as a Security Guard and was 51 years old. The court found that general damages should lie within the range of $75,000 to $123,757 but considered an award of $90,000.00 as general damages as just and reasonable. No interest was awarded. The court accepted the principle endorsed by the Court of Appeal in ***Bernard v Quashie***, C.A.CIV.159/1992, which warned against merely using updated figures in assessing damages and recommended that cases which are more recent are better as a guide for courts in assessing damages.

According to the claimant, this figure updated to 2015 stands at $99,769.74 but the award of $70,000 would be applicable given the difference in the injuries.

56. The claimant's attorney's suggested quantum was thus $100,000.00.

57. Wooding CJ in ***Cornilliac v. St. Louis*** (1965) 7 W.I.R. 491 outlined the approach that should be adopted when assessing general damages in cases of this nature. The sub-heads of damage to be considered are:

57.1. the nature and extent of the injuries sustained;

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

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

57.4. the loss of amenities suffered; and

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

58. The claimant gave evidence that, as at the date of giving her witness statement,[6] she was still experiencing negative effects as a result of the injury. According to the claimant she had been prevented from conducting her usual household chores such as cooking and cleaning as she is required to rest to cope with the pain and dizziness. She also indicated that she was prone to headaches and as a result was unable to watch television shows as she used to. The claimant also indicated that when traveling long distances she would get headaches and pain to the back of her neck and that she was prevented from dyeing her hair because of a fear that it may worsen her symptoms.

59. The report of Dr. Rasheed U. Adam dated 22 April 2015 indicated that the claimant was unable to work as a merchandiser but could work in a less demanding capacity as an assistant and assessed her disability at 25%. At trial, Dr. Adam also indicated that the claimant may only be capable of working half day. Both defendants attempted to undermine Dr. Adam's evidence by pointing out that his findings were based on subjective symptoms related to him by the claimant without any real independent/objective tests being conducted similar to the situation in ***Moreno v Brusco.*** Unlike the claimant in that case however, the claimant in this matter was generally found to be a reliable witness and the court has no reason to undermine the findings of the doctor that were based on the claimant's subjective responses.

60. Despite the claimant's medical condition, there was no evidence of a need for future surgery nor was there any evidence of any remedial therapy taken.

[6] 16 February 2016

61. In the circumstances, the court will award the claimant the sum of $80,000.00 as general damages.

Special Damages

62. A claim was also made for special damages for:

62.1.	Cost of visits to Dr R. Narine	$ 1,000.00
62.2.	Cost of visits and medical reports from Dr. Rasheed Adam	900.00
62.3.	Cost of CT Scan-Surgi-Med Clinic	1,200.00
62.4.	Cost of EEG-Dr Rasheed Adam	600.00
62.5.	Cost of medication from May 2011 and continuing per month	150.00
62.6.	Cost of transportation to and from doctors and continuing	1,000.00
62.7.	Loss of earnings at $3,000.00 per month from 1st September 2011 and continuing.	

63. Receipts for the doctor visits, the CT scan and EEG were provided and the court accepts them as evidence of the special damages the claimant suffered in the amount of **$3,700.00**.

64. In relation to transportation, not only was there a lack of documentary evidence in support of the claim but the claimant gave no evidence of having to pay for transport. The court has a discretion to allow a claim for special damages despite a lack of documentary evidence where a reasonable claim is made and supported by viva voce evidence.[7] No such viva voce evidence was submitted in this instance and so the court has no idea of how much it would have cost for the claimant to travel to and from the various medical appointments. Therefore, it would be wrong for this court to just guess a figure without any basis and therefore the court will not make any award for travelling.

65. In relation to the claim for medication, two receipts were provided for the purchase of medication on 13 and 17 May 2011. The former was for the purchase

[7] See ***Ramanrine Singh & Anor v The Great Northern Insurance Company Limited & Anor*** Civ. App. No. 169 & 121 of 2008

of 10 pills, namely 5 Nexium 40g and 5 Mobic 15mg, together with an ointment all costing $142.25. The second receipt reflected the purchase of 17 Stemetil tablets at the cost of $17.00. Stemil was prescribed by Dr. Narine but there is no indication as to the length of time the supply of these three drugs were to last the claimant.

66. Quite interestingly, Dr. Adam's report of 22 April 2015 states that the claimant is on medication – Cataflam and Syndol – at an approximate cost of $100.00. A reduction in the cost of medication would however be consistent with the claimant's evidence that there was a reduction in the pain she experienced.[8] In addition to this discrepancy the first defendant submitted that having regard to the strict requirement of proving and pleading special damages[9] the claimant ought to only be allowed a claim for the purchase of Stemil, the only prescribed drug. Both defendants submitted that under this head, an award of $17.00 should be made as that was the only expense proven and for which there is proof of it arising as a result of the injuries. The court is however of the opinion that the further sum of $142.25 should be added, it having been accepted that the claimant was in pain, totalling the sum of **$159.25**.

67. With respect to loss of earnings the first defendant took issue with the fact that the claimant resigned and was not fired. In any event the accepted evidence before the court was that she is unable to work as a Merchandiser so that whether she was forced to resign or resigned on her own is irrelevant especially as there was no evidence of her being offered an alternative post with lighter duties. Evidence from the claimant suggested that she has been unable to find gainful employment since 1 September 2011. However, she was not deemed unfit to work. The evidence was that she was unfit to work as a Merchandiser but could have worked as an assistant. In that way it was submitted that there was a failure for the claimant to mitigate her loss and that the parties ought not to be held liable for this head of damage in its entirety or at all. The court agrees in part. There would nonetheless have been a loss in earnings even if the claimant sought employment due to her being required to work in a lower capacity. The court would thus assess the loss as follow:

    67.1. Past – As an assistant the claimant would have been entitled to minimum wage at the very least of $12.50 an hour. Dr. Adam's evidence as the court understands it was that she would have been able to work half day as a

[8] See para 22

[9] See ***Mario Pizzeria Ltd v Hardeo Ramjit*** CV App No 146 of 2003 and ***Anand Rampersad v Willies Ice Cream*** CA Civ No 20 of 2002

Merchandiser. There is no evidence for how long she would be able to work in the capacity of assistant and without any evidence to indicate such the court infers that she would have been able to work in the lower capacity of assistant for a full 8 hour day. That would have resulted in an annual salary of $26000 versus the annual salary of $36000 the claimant would have expected previously – a loss of $10,000 per year. Thus her loss to the date of trial, from 1 September 2011 to 22 September 2016, 5 years and 22 days, works out to a pre-trial loss of **$50,602.74**.

67.2. Future – The claimant was 54 years of age as at the date of the trial, 6 years shy of the age of retirement. In the circumstances a multiplicand of 5.51 as suggested by the claimant's attorney does not adequately take into consideration the vicissitudes of life. The second defendant has indicated that a multiplicand of 4.5 would be reasonable and the court is minded to agree in light of the lack of evidence to suggest that she is unable to work. (10,000 x 4.5=$**45,000**).

68. Consequently, the court will award the claimant the following for special damages:

68.1.	Medical expenses	$ 3,859.25[10]
68.2.	Loss of Earnings	$50,602.74
	Total	**$54,461.99**
68.3.	Future Loss of Earnings	$45,000.00

Order

69. There would therefore be judgment for the claimant against the defendants for 80% of her claim.

70. The defendants would pay to the claimant 80% of the following damages:

70.1. General damages in the sum of $80,000.00 amounting to $64,000.00 together with interest thereon at the rate of 3% per annum from 28 April 2015.

[10] $3,700 (para 61) + 159.25 (para 64)

70.2. Special damages in the sum of $54,461.99 amounting to $43,569.59 with interest thereon at the rate of 3% per annum from 6 May 2011.

70.3. Damages for future loss of earnings in the sum of $45,000.00 amounting to $36,000.00.

71. The defendants shall also pay to the claimant 80% of the prescribed costs of the claim quantified by the court on the award for damages and interest[11] in the sum of $38,449.37 amounting to $30,759.50.

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Devindra Rampersad
Judge

Assisted by Charlene Williams
Attorney at Law
Judicial Research Counsel

[11] ***Leriche v Maurice*** [2008] UKPC 8